

October 29, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
ENERGY NUCLEAR OPERATIONS, INC.) Docket Nos. 50-247-LR/286-LR
)
(Indian Point Nuclear Generating)
Units 2 and 3))

NRC STAFF'S ANSWER IN OPPOSITION TO
"STATE OF NEW YORK MOTION FOR PUBLIC
DISCLOSURE OF VARIOUS WESTINGHOUSE DOCUMENTS"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the NRC Staff ("Staff") hereby responds to "State of New York Motion for Public Disclosure of Various Westinghouse Documents" ("Motion"), filed by the State of New York ("New York") on October 20, 2015. In its Motion, New York seeks to compel the public disclosure of "10 calculation notes authored by Westinghouse" Electric Company, LLC ("Westinghouse"),¹ related to the license renewal application for Indian Point Units 2 and 3 submitted by Entergy Nuclear Operations, Inc. ("Entergy"). New York states that it "seeks, at a minimum, the disclosure of redacted versions of these documents so as to provide the public with the results, summaries, and goals of Westinghouse's fatigue evaluations for the Indian Point facilities."² For the reasons set forth below, the Staff respectfully submits that New York's Motion should be denied.

¹ Motion at 1.

² *Id.*

DISCUSSION

I. New York Has Not Complied with the Requirements of 10 C.F.R. § 2.323(b).

Pursuant to 10 C.F.R. § 2.323(b), “[a] motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant’s efforts to resolve the issue(s) have been unsuccessful.”³ Here, New York describes the discussions it has held with Counsel for Entergy,⁴ and Counsel for New York Lisa S. Kwong filed a certification (“10 C.F.R. § 2.323(b) Certification”) in which she states, “I have made a sincere effort to contact counsel for Entergy . . . to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful.”⁵ Nowhere, however, does New York describe any communications it has had with Staff Counsel, nor does Ms. Kwong certify that she has contacted Counsel for the Staff in an effort to resolve the issues raised by her Motion.

In fact, as stated in the Certification of Counsel attached hereto, New York did not consult with the Staff in an effort to resolve the issues raised by its Motion⁶ -- nor did New York ever inform the Staff that it intended to file a motion to compel public disclosure of these

³ See, e.g., *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-11-34, 74 NRC 685, 695 (2011);

75 NRC 393 (2012). ; *Union Elec. Co.*, 74 NRC 141 (2011).

⁴ *Id.* at 6-7.

⁵ *Id.* at 25.

⁶ See “Certification of Counsel” attached hereto. Out of an abundance of caution, prior to filing this Answer Staff Counsel asked Counsel for New York to identify any communications it had held with the Staff regarding its Motion; in response, Counsel for New York identified only the E-mail communications with Entergy that were attached to its Motion, and a message thread between Counsel for New York and Counsel for Entergy regarding their availability for further discussions. See Attachments 1-4 hereto.

10 documents. While New York asserts that “NRC Staff took no position” on its Motion,⁷ that statement is simply not correct. In fact, as New York’s Motion and Attachments make clear, New York copied Counsel for the Staff on some of its communications with Entergy,⁸ but it never stated that it intended to file a motion and it never solicited the Staff’s position on the filing of such a motion.⁹ Further, while New York filed a formal “Objection” to the proprietary designation of these documents, it did not state that it would file a motion to compel public disclosure of the documents if its “Objection” was not satisfied.¹⁰ Inasmuch as New York never stated its intention to file a motion and never consulted with the Staff on its filing of a motion, its statement that the Staff “took no position” on a motion it did not know about constitutes an inaccurate representation of the facts.¹¹

Indeed, if New York had contacted Staff Counsel to inform the Staff of its intent to file its Motion, the Staff would have told New York that it opposes the filing of such a motion – on the grounds that (1) the Atomic Safety and Licensing Board (“Board”) has already held that four other Westinghouse Calculation Notes “contain confidential commercial information, which is entitled to protection [from public disclosure] under 10 C.F.R. § 2.390(a)(4)”;¹² (2) inasmuch as these 10 documents are very similar in nature to the Calculation Notes that were addressed by the Board, the Board’s ruling should apply to these documents as well; and (3) New York’s filing

⁷ Motion at 2; emphasis added.

⁸ See, e.g., Motion at 6; E-mail from John J. Sipos to Paul M. Bessette and Raphael Philip Kuyler (Aug. 31, 2015) (Motion, Attachment 14).

⁹ See Motion at 6-7, and Attachments 13-17 thereto.

¹⁰ “State of New York’s Objection to Proprietary and/or Confidential Designations for Certain Documents Relating to Contentions NYS-25, NYS-26B/RK-TC-1B and NYS-38/RKTC5” (Sept. 17, 2015) (“Objection”) (Motion, Attachment 13).

¹¹ See 10 C.F.R. § 2.323(d) (“Accuracy in filing”).

¹² “Order (Denying New York Motion to Withdraw Proprietary Designation)” (July 20, 2015), slip op. at 6; *petition for Commission review pending*.

of its Motion just three weeks prior to the date that evidentiary hearings are scheduled to commence, when the documents have been in New York's possession for at least two months (or longer), is untimely and unfairly diverts the Board's and other parties' attention from their ongoing preparations for hearing.

Finally, although the Staff is not the originator or owner of the documents in question, New York had reason to know that the Staff might have opposed the Motion if it had been informed of the Motion prior to its filing. Thus, the Staff had opposed New York's previous motion to disclose similar Westinghouse Calculation Notes on the grounds that the documents contained "confidential or privileged commercial . . . information" that was entitled to be withheld from public disclosure under 10 C.F.R. § 2.390(b),¹³ and New York had reason to know that the Staff might oppose the instant Motion, seeking disclosure of similar documents, for the same reasons. New York therefore should have consulted with the Staff prior to filing its Motion, as required by 10 C.F.R. § 2.323(b).

II. New York's Motion Is Untimely, Lacks Good Cause, and Unfairly Diverts the Parties' Attention from their Preparation for Hearing.

New York states that Entergy and Westinghouse disclosed some of the 10 documents "this summer,"¹⁴ but it does not state when it first learned that each of the 10 Westinghouse Calculation Notes was withheld from public disclosure as proprietary information. Nonetheless, based on the information contained in its Motion, New York appears to have had possession of all 10 documents at least two months prior to filing its Motion.¹⁵ In accordance with 10 C.F.R. § 2.323(b) and the Board's Scheduling Order of July 1, 2010, New York was required to file its

¹³ See "NRC Staff's Response to Joint Brief of Entergy and Westinghouse Regarding Proprietary Documents" (June 25, 2015), at 1, 7 and 8-9. The Staff had initially taken no position on New York's motion, but stated its views of the documents' proprietary nature in its Response after being offered an opportunity to do so by the Board. See *id.* at 6; Tr. at 4711.

¹⁴ Motion at 2.

¹⁵ See Motion at 6.

Motion 10 days after receiving the disclosure log in which the document(s) were described as proprietary, or at least “sufficiently in advance to provide enough time for the possible resolution of the matter . . .”¹⁶ New York does not explain why it could not have filed its Motion within 10 days after its discovery of the documents’ proprietary designation, as required by 10 C.F.R. § 2.323(a)(2) and the Board’s Scheduling Order, rather than waiting to file its Motion just weeks before the start of scheduled hearings on its “Track 2” contentions. Accordingly, New York’s Motion should be denied as having been untimely filed without a proper showing of good cause.

Moreover, each of the 10 documents addressed in New York’s Motion are in New York’s possession and are available for New York to utilize in litigating its contentions – and, indeed, each of those documents has already been submitted as an evidentiary exhibit in this proceeding by Entergy or New York.¹⁷ New York thus will not be prejudiced by the continued withholding of these documents from public disclosure. Moreover, the parties’ testimony, statements of position and numerous pre-filed exhibits for the upcoming hearings also contain proprietary information, so that public disclosure of these 10 documents would have no appreciable effect on the evidentiary hearings or New York’s ability to participate therein.

¹⁶ In its Scheduling Order, the Board directed as follows:

Although in general the movant has only ten (10) days within which to file its motion under 10 C.F.R. § 2.323(a), the Board believes that, in order to be sincere, the effort should be timely, i.e., not initiated at the last minute, but instead commenced sufficiently in advance to provide enough time for the possible resolution of the matter or issues in question. *Cf. Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-05, 63 NRC 116, 128-31 (2006). If the initial consultation is initiated at a reasonable time and the parties believe that all or part of the matter may be resolved amicably if additional time for filing the motion were provided, the parties are encouraged to file a joint motion requesting an extension of time.

Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), “Scheduling Order (July 1, 2010), (unpublished), slip op. at 8 n.23.

¹⁷ See Motion, Attachment 1 to NYS Declaration, “List of Documents Subject to NYS Motion for Public Disclosure.”

In addition, the public interest will not be harmed by the continued withholding of these documents from public disclosure. New York acknowledges that the Board has ruled that four other Westinghouse Calculation Notes should be withheld from disclosure,¹⁸ and it fails to explain why the rationale and ruling set out in the Board's Order should not apply to these 10 documents as well. Indeed, these 10 Calculation Notes appear to be similar in nature to the four Calculation Notes addressed by the Board in its July 20 Order, and these documents should be withheld from public disclosure for the reasons stated in the Board's Order. New York's Motion appears to constitute little more than an ill-timed request for the Board revisit its previous decision denying New York's previous motion for public disclosure. The Staff submits that the Motion should be denied, for the reasons set forth in the Board's Order of July 20, 2015.

Further, although New York asserts that redacted versions of these 10 documents should be made available, it does not explain how such a redaction could be made to these highly technical documents in a way that could provide the public with a meaningful understanding of the documents, nor does it explain why the parties' redacted pre-filed testimony and statements of position – including its own and Entergy's redacted testimony and statements of position, which Entergy filed at New York's request¹⁹ – fail to afford sufficient and meaningful information to the public. New York does not explain why the parties' attention

¹⁸ Motion at 2, 5-6.

¹⁹ In this regard, New York states:

On August 31, 2015, the State expressed its initial concern over Entergy's filing of proprietary versions of its Statements of Position and Prefiled Testimony of August 10, 2015, and asked Entergy to file redacted, public versions of these documents. (Kwong Decl., Att. 14). . . . [O]n September 18, Entergy filed redacted filings for the Track 2 Contentions. (Kwong Decl., Att. 16). Based on these redacted filings, the State informed Entergy during consultations that it would agree to withdraw its initial objection with respect to Entergy's initially filed SOPs and PFTs on the Track 2 Contentions.

Motion at 6 n.19.

should be diverted from their preparations for hearing at this late date, just a few weeks before hearings are scheduled to commence, to focus on a word-by-word and line-by-line redaction of these lengthy and highly technical documents. New York's Motion should therefore be denied for these reasons, as well.

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that New York's Motion should be denied.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, MD
this 29th day of October 2015

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CERTIFICATION OF COUNSEL

In accordance with the Atomic Safety and Licensing Board's "Scheduling Order" of July 1, 2010 (at 8), I hereby certify that I am unaware of any attempt by the State of New York ("New York") to contact the NRC Staff to consult on the "State of New York Motion for Public Disclosure of Various Westinghouse Documents," filed on October 19 and 20, 2015, at any time prior to New York's filing thereof.

Executed this 29th day of October 2015.

/Signed (electronically) by/

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER IN OPPOSITION TO 'STATE OF NEW YORK MOTION FOR PUBLIC DISCLOSURE OF VARIOUS WESTINGHOUSE DOCUMENTS,'" dated October 29, 2015, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above captioned proceeding, this 29th day of October 2015.

/Signed (electronically) by/

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