



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

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DIVISION OF SOCIAL JUSTICE  
ENVIRONMENTAL PROTECTION BUREAU

November 6, 2015

Lawrence G. McDade, Chair  
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Michael F. Kennedy  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
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Re: Indian Point Nuclear Generating Station, Unit 2 and Unit 3  
Docket Nos. 50-247-LR/50-286-LR; ASLBP No. 07-858-03-LR-BD01

Dear Administrative Judges:

In accordance with the Board's authorization during the November 5, 2015 pre-hearing conference, the State of New York respectfully submits an Answer to Westinghouse's Motion for Leave to Appear Specially Regarding Additional Proprietary Documents dated October 29, 2015.

Also, enclosed is a certificate of service.

Respectfully submitted,

*Signed (electronically) by*

John J. Sipos  
Assistant Attorney General

cc: All individuals, parties, or NRC offices on the Service List

**UNITED STATES  
NUCLEAR REGULATORY COMMISSION**

**ATOMIC SAFETY AND LICENSING BOARD**

-----X  
In re:

Docket Nos. 50-247-LR; 50-286-LR

License Renewal Application Submitted by

ASLBP No. 07-858-03-LR-BD01

Entergy Nuclear Indian Point 2, LLC,  
Entergy Nuclear Indian Point 3, LLC, and  
Entergy Nuclear Operations, Inc.

November 6, 2015

-----X

**STATE OF NEW YORK  
ANSWER OPPOSING  
WESTINGHOUSE ELECTRIC COMPANY'S  
MOTION FOR LEAVE TO APPEAR SPECIALLY  
REGARDING ADDITIONAL PROPRIETARY DOCUMENTS**

Office of the Attorney General  
for the State of New York  
The Capitol  
Albany, New York 12224

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Pursuant to 10 C.F.R. § 2.323(c) and in accordance with the Atomic Safety and Licensing Board's (Board's) July 1, 2010 Scheduling Order,<sup>1</sup> the State of New York (the State) submits this Answer Opposing the "Westinghouse Electric Company's Motion for Leave to Appear Specially Regarding Additional Proprietary Documents" (Westinghouse Motion), filed on October 29, 2015 (ML15302A291). The Westinghouse Motion was filed in response to the State's "Motion for Public Disclosure" (the State's Motion) of ten calculation notes (the calculation notes) disclosed by Entergy Nuclear Operations, Inc. (Entergy) pursuant to its mandatory disclosure obligations in this relicensing proceeding. Despite having the opportunity to answer the State's motion along the well-defined schedule prescribed in NRC regulations for answering motions, Westinghouse instead seeks broad, open-ended permission to "appear specially" in unidentified "further proceedings" to defend the confidential designation of the calculation notes. Westinghouse fails to indicate when this participation would occur or what it will consist of. In the past, Westinghouse and its employees have presented arguments and factual representations to the Board after motions were fully briefed, outside the framework of the Protective Order and without any opportunity for the State of New York to test those statements. The Board should not permit Westinghouse to interject itself, for a second time, into this proceeding without any meaningful limitation.

### **BACKGROUND**

This proceeding concerns two 40-year-old nuclear power reactors located 24 miles north of New York City in the midst of more than 17 million people. The reactors were designed by Westinghouse in the late 1960s. Entergy, the current owner of the reactors, hired Westinghouse

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<sup>1</sup> See *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), Scheduling Order (July 1, 2010) (unpublished).

to analyze the metal fatigue of structures and components within the reactors and thereby help Entergy obtain 20-year operating licenses that are the subject of these proceedings.

This is the second time that Westinghouse has sought to “appear specially” in connection with a dispute between the State and Entergy over the proprietary designation of documents. Earlier this year, Westinghouse moved to appear specially in connection with the State’s April 9, 2015 motion for public disclosure of five documents that had been designated by Entergy as proprietary. *See* Motion of Westinghouse Electric Company LLC to Appear Specially (May 5, 2015) (ML15132A518); NYS Motion to Withdraw Proprietary Designation (April 9, 2015) (ML15099A785) (Public, Redacted Version). The State objected to the first Westinghouse Motion to appear specially, noting that Westinghouse had not identified any statutory or regulatory authority permitting its special appearance, and that the State’s April 9 Motion had already been fully briefed by the parties. The State also argued that Westinghouse had long been aware of the dispute and had even permitted Entergy to submit affidavits from its employees in its briefing in support of the proprietary designation. *See* NYS Answer Opposing Motion of Westinghouse Electric Co. LLC to Appear Specially (May 6, 2015) (ML15126A578). Nonetheless, during oral arguments on the State’s April 9 motion the Board, without addressing the State’s objections, permitted Westinghouse to make additional presentations and to submit a joint brief with Entergy, resulting in another round of briefing. The Board ultimately denied the State’s April 9 Motion. *Entergy Nuclear Operations, Inc.* (Indian Point Generating Units 2 and 3) Order (Denying New York Motion to Withdraw Proprietary Designation) (July 20, 2015) (unpublished) (ML15201A488).

During those earlier proceedings, the Board did not appear to clarify its basis for permitting Westinghouse to participate in the proceeding, and did not impose any restrictions or

boundaries on Westinghouse's participation. The State petitioned the NRC Commissioners for interlocutory review of the Board's Order, specifically raising the question of whether Westinghouse had properly been permitted to participate in the proceeding. NYS Petition Pursuant to 10 C.F.R. § 2.341 for Commission Interlocutory Review of July 20, 2015 Board Order (Aug. 14, 2015) (ML15226A564) (Public, Redacted Version).

The instant dispute arose in September, when – in accordance with the dispute resolution procedures set out in Paragraph D of the Protective Order – the State served the parties with notice of its objections to the proprietary designation of various documents disclosed by Entergy. *See* NYS Motion, Attachment 13. During the course of consultations, counsel for Entergy stated that “it is Westinghouse's and Entergy's position that [the documents] are proprietary and should remain subject to the terms of the Protective Order.” NYS Motion, Attachment 17. The State filed its motion on October 19, 2015,<sup>2</sup> which counsel for Westinghouse received via the NRC's EIE.<sup>3</sup> On October 26, 2015, counsel for Westinghouse notified the State that Westinghouse would file a motion “to again appear specially in the Indian Point proceeding[.]” *See* E-Mail from David A. Repka to John J. Sipos, et al. (October 26, 2015) (Attachment 1). Westinghouse did not identify the basis for its planned motion. Westinghouse stated that it did “not plan to file a separate response” to the State's Motion but wanted to “request to appear in any additional proceedings on the motion, as it did with respect to the previous documents.” *Id.* Westinghouse asked whether it could represent that the state had “no objection to the motion.” *Id.*

In response, in an October 27, 2015 email, the State told Westinghouse that it could not respond to Westinghouse's proposal and identified several specific concerns with Westinghouse's request. *See* E-Mail from John J. Sipos to David A. Repka, et al. (October 27,

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<sup>2</sup> Various documents relating to the State's motion were filed early on October 20.

<sup>3</sup> Westinghouse's representatives have been placed on the Electronic Information Exchange service list and thereby have received all filings in this proceeding since the Spring of 2015.

2015) (Attachment 2). The State noted that Westinghouse had not provided any regulatory basis for its proposed motion, essentially asking the State “to consent to Westinghouse’s participation, without knowing the basis for that participation or what that participation will entail.” *Id.* Noting the issues that arose in connection with Westinghouse’s prior appearance in the proceeding, the State noted that it would be “helpful to know whether Westinghouse proposes to proceed here under 10 C.F.R. § 2.315(a) or another provision.” *Id.* The State also observed that Westinghouse, “by not now responding to the State’s motion,” appeared “to be asking the State to allow Westinghouse to supplement the record after the matter is briefed.” *Id.* The State expressed its preference “to avoid the multiple rounds of submissions that occurred on the previous motion.” *Id.*

Westinghouse did not respond to the State’s email. Instead, it filed its Motion to Appear Specially on October 29, 2015. For the first time, Westinghouse identified 10 C.F.R. § 2.315(a) as the authority under which it sought to appear. Westinghouse Motion, at 1. In its motion, Westinghouse represented that the State had said it “[could not] respond to Westinghouse’s motion at this time[.]” without referring to any of the specific concerns that the State had raised. *Id.* at 4. When it came to its 10 C.F.R. § 2.323(b) consultation certification, Westinghouse merely stated that it “contacted counsel for the parties in this proceeding to seek consent to the motion.” *Id.* at 3. In a separate filing submitted on the same day as Westinghouse’s motion, Entergy opposed the State’s Motion and submitted an affidavit from Mark Gray, a Westinghouse employee. *See Entergy’s Answer Opposing State of New York Motion for Public Disclosure of Various Westinghouse Documents (October 29, 2015) (Nonpublic).*

On Tuesday, November 3, before the expiration of the State’s opportunity to respond, the Board issued an order granting Westinghouse’s motion. *Entergy Nuclear Operations, Inc.*

(Indian Point, Units 2 and 3), Order (Granting Westinghouse Electric Company's Motion for Leave to Appeal Specially Regarding Additional Proprietary Documents) (Nov. 3, 2015).

During the November 5 pre-hearing conference, the State informed the Board that the State had been in the process of preparing a response to the Westinghouse motion when the Board issued its order. Transcript of November 5, 2015 Pre-hearing Conference, at 4722-4724. The State requested an opportunity to submit a written response to the Westinghouse motion, and the Board authorized the State to do so. *Id.*<sup>4</sup>

### **LEGAL STANDARDS**

Parties to a relicensing proceeding must satisfy, among other things, the “strict by design” standards for contention admissibility set forth in 10 C.F.R. § 2.309. *See Entergy Nuclear Operations, Inc.* (Indian Point Generating Units 2 and 3), LBP-08-13, 68 N.R.C. 43, 61 (July 31, 2008). Under 10 C.F.R. § 2.315(a), “[a] person who is not a party . . . may, in the discretion of the presiding officer, be permitted to make a limited appearance by making an oral or written statement of his or her position on the issues at any session of the hearing or any prehearing conferring within the limits and on the conditions fixed by the presiding officer.” However, “that person may not otherwise participate in the proceeding” and “[s]uch statement shall not be considered evidence in the proceeding.” 10 C.F.R. 2.315(a).

### **ARGUMENT**

The Westinghouse Motion should be denied because the participation sought by Westinghouse is not authorized by statute or regulation. Westinghouse purports to rely on 10 C.F.R. § 2.315(a) in its Motion to Appear Specially, but then broadly seeks permission “to

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<sup>4</sup> The State opposes any reply by Westinghouse to this submission which is a timely filing to Westinghouse's motion. Under 10 C.F.R. § 2.323(c), Westinghouse has no right to reply, and can only obtain leave to do so based on compelling circumstances. *See Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), Scheduling Order at 6-7 (July 1, 2010).



appear and participate in any further proceedings on the [State's] Motion." Westinghouse Motion, at 1, 3. Westinghouse is not asking to submit a statement responding to the State's Motion at this time, but rather is seeking permission to participate in unidentified "further proceedings." In short, Westinghouse seeks to once again shoulder its way into the proceeding subject only to its own self-imposed limitations. Such open-ended participation is not authorized by section 2.315(a), which permits only the submission of "an oral or written statement" that does not have evidentiary value.

In response to the State's Motion, Westinghouse could have moved pursuant to 10 C.F.R. § 2.315(a) for permission to submit a statement describing its interests in the challenged documents and defending their proprietary designation and filing any such statement in conformity with the schedule for motion practice followed by parties in this proceeding. Instead, Westinghouse relies on Entergy's response to the State's Motion – even providing a factual declaration from a Westinghouse employee to assist Entergy – but seeks to preserve its option to submit additional briefing at some later point.<sup>5</sup> Essentially, Westinghouse is attempting to assure that it gets another bite at the apple should Entergy's defense of the documents not meet with its approval. Westinghouse missed its opportunity to respond to the State's Motion by bringing its motion at this late date, and by failing to seek to join in Entergy's Answer to the State's Motion, or by seeking to submit its own Answer. Indeed, as Westinghouse itself recognizes in its motion, "Westinghouse clearly has a much greater interest than Entergy in the proprietary designation and protection for Westinghouse's confidential commercial information." Westinghouse Motion at 3. This being the case, it is puzzling why Westinghouse is seeking to insert itself into

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<sup>5</sup> In so doing Westinghouse has used an employee who has been designated as an expert witness to support Entergy license application and position concerning metal fatigue analysis at Indian Point to now also provide *factual representations* to support Westinghouse's position that the public should not know the numerical results of those fatigue analyses. Although § 2.315(a) "statements of position shall not be considered evidence in the proceeding," Westinghouse seeks just the opposite.

argument on the State's Motion at this late time. The Board should not condone the multiple rounds of briefing sought by Westinghouse.

The State is also concerned about another open-ended aspect of Westinghouse's presence in this proceeding – Westinghouse's ability to unilaterally make representations to the Board about factual issues without a meaningful opportunity for the State to test or contest such statements by Westinghouse's witness(es). Westinghouse's proposal provides it with some of the benefits of being a party<sup>6</sup> without the attendant responsibilities that such participation entails. For example, given open-ended nature of the proposal, it is not clear that the Part 2 disclosure obligations apply to Westinghouse, including the obligation to produce relevant information including information that does not support its position. *See, e.g.*, 10 C.F.R. § 2.336(a). To mitigate this asymmetry and to ensure procedural fairness, the State should be permitted to conduct discovery and depositions of Westinghouse employees and witnesses who make factual representations to the Board in connection with Westinghouse's efforts to prevent the public from learning the numerical results of fatigue calculations for critical components.

Additionally, the Westinghouse Motion should be denied because Westinghouse failed to make a "sincere effort" to "resolve the issue(s) raised in the motion" as required by 10 C.F.R. § 2.323(b). Westinghouse itself appears to concede this point, stating only that it "has contacted counsel for the parties in this proceeding to ask consent to the motion." Westinghouse glosses over the fact that, after it notified the State of its planned motion, the State raised specific issues regarding the open-ended nature of Westinghouse's request. Rather than respond to the State's concerns, Westinghouse moved forward with its motion and told the Board that the State could not respond. Westinghouse Motion, at 4. The Westinghouse Motion does indirectly respond to

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<sup>6</sup> Such benefits include receiving notice of filings via the NRC's Electronic Information Exchange and having its representatives participate in conferences and the upcoming adjudicatory hearing.

one of the State's concerns by finally clarifying that the motion is being brought pursuant to 10 C.F.R. § 2.315(a). *Id.* at 1. However, Westinghouse failed to make any attempt to respond to the State's other concerns regarding the open-ended nature of Westinghouse's proposed participation. Had the State known Westinghouse intended to move forward with its motion pursuant to these terms, the State would have opposed Westinghouse's Motion.

### **CONCLUSION**

For the reasons set forth above, the State opposes the Westinghouse Motion. Westinghouse should not be permitted once again to define its own role in this proceeding, contrary to statutory and regulatory requirements. Accordingly, the Board should deny the Westinghouse Motion.

Respectfully submitted,

***Signed (electronically) by***

---

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Dated: November 6, 2015

### **10 C.F.R. § 2.323 Certification**

In accordance with the Board’s Scheduling Order of July 1, 2010 (at 8-9) and 10 C.F.R. § 2.323(b), the undersigned counsel hereby certifies that counsel for the State of New York has participated in discussions between Westinghouse Electric Company LLC (“Westinghouse”), the movant, Entergy Nuclear Operations, Inc. (“Entergy”), and NRC Staff, concerning “Westinghouse Electric Company’s Motion for Leave to Appear Specially Regarding Additional Proprietary Documents” filed on October 29, 2015, in this matter, and has made a sincere effort to make themselves available to listen and respond to the movant, Entergy and NRC Staff, and to resolve the factual and legal issues raised in the motions. The State of New York’s efforts to resolve the issue of whether Westinghouse should be permitted to “appear specially” were unsuccessful.

***Signed (electronically) by***

---

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The Capitol  
Albany, New York 12224  
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November 6, 2015

# ATTACHMENT 1

**From:** [Repka, David A.](#)  
**To:** [Sherwin Turk](#); [Bessette, Paul M.](#); [Kuyler, Raphael Philip](#); [John J. Sipos](#); [Lisa S. Kwong](#); [Mihir Desai](#)  
**Cc:** [Coldren, Richard J \(coldrerj@westinghouse.com\)](mailto:coldrerj@westinghouse.com)  
**Subject:** Consultation Under 10 CFR 2.323(b) -- Westinghouse  
**Date:** Monday, October 26, 2015 11:56:13 AM

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Counsel-

Westinghouse Electric Company will be filing a motion later this week to again appear specially in the Indian Point proceeding, this time with respect to the State's motion to withdraw the Westinghouse proprietary designation from 10 additional documents. We understand that Entergy will be responding to the motion. At this time Westinghouse does not plan to file a separate response. However, in the motion Westinghouse will request to appear in any additional proceedings on the motion, as it did with respect to the previous documents. May I represent that each of you has no objection to the motion?

Thanks,  
David

**David A. Repka**

**Partner**

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# ATTACHMENT 2

**From:** [John J. Sipos](#)  
**To:** [Repka, David A.](#)  
**Cc:** [Coldren, Richard J. \(coldrerj@westinghouse.com\)](#); [Sutton, Kathryn M.](#); [Glew Jr, William](#); ["Bessette, Paul M."](#); [Sherwin Turk](#); [Kuyler, Raphael Philip](#); [Harris, Brian](#); [Roth\(OGC\), David \(David.Roth@nrc.gov\)](#); [Lisa S. Kwong](#); [Mihir Desai](#); [Brian Lusignan](#)  
**Subject:** RE: Consultation Under 10 CFR 2.323(b) -- Westinghouse  
**Date:** Tuesday, October 27, 2015 5:55:52 PM

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Good afternoon David:

Thank you for consulting with the State of New York on behalf of Westinghouse and its stated intention to file a motion to “appear specially” in the Indian Point adjudicatory proceeding in connection with the State’s October 2015 motion requesting the withdrawal of the proprietary designations for 10 Westinghouse documents related to metal fatigue calculations of various components at the Westinghouse-designed Indian Point Unit 2 and Indian Point Unit 3 facilities.

In yesterday’s consultation request, Westinghouse stated that Entergy will file a response to the State’s motion. Westinghouse also stated that it does not anticipate filing a separate response to the State’s motion. Westinghouse further stated that it seeks to appear in “any additional proceedings on the [State’s] motion.” Oct. 26, 2015 Westinghouse consultation.

The State does not dispute that Westinghouse may have some interest in the documents that it provided to Entergy to support Entergy’s application to receive NRC operating licenses for Indian Point Unit 2 and Indian Point Unit 3. Based on the consultation, it appears that Entergy’s response will cover Westinghouse’s interests. At this point, however, the State cannot respond to Westinghouse’s proposal. Westinghouse has not provided the regulatory basis of its proposed motion, and thus the proposal is open-ended in scope. The State is being asked to consent to Westinghouse’s participation, without knowing the basis for that participation or what that participation will entail. In light of the issues that arose in connection with the State’s previous motion under the Protective Order, it would be helpful to know whether Westinghouse proposes to proceed here under 10 C.F.R. § 2.315(a) or another provision. Another open-ended aspect of the proposal is that by not now responding to the State’s motion, Westinghouse appears to be asking the State to allow Westinghouse to supplement the record after the matter is briefed. The State would prefer to avoid the multiple rounds of submissions that occurred on the previous motion.

Best regards,

John

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**From:** Bessette, Paul M. [<mailto:pbessette@morganlewis.com>]  
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**Subject:** RE: Consultation Under 10 CFR 2.323(b) -- Westinghouse

Entergy has no objection.

**Paul M. Bessette**

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**Subject:** Consultation Under 10 CFR 2.323(b) -- Westinghouse

Counsel-

Westinghouse Electric Company will be filing a motion later this week to again appear specially in the Indian Point proceeding, this time with respect to the State's motion to withdraw the Westinghouse proprietary designation from 10 additional documents. We understand that Entergy will be responding to the motion. At this time Westinghouse does not plan to file a separate response. However, in the motion Westinghouse will request to appear in any additional proceedings on the motion, as it did with respect to the previous documents. May I represent that each of you has no objection to the motion?

Thanks,  
David

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**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**ATOMIC SAFETY AND LICENSING BOARD**

-----x  
In re: Docket Nos. 50-247-LR and 50-286-LR  
  
License Renewal Application Submitted by ASLBP No. 07-858-03-LR-BD01  
  
Entergy Nuclear Indian Point 2, LLC, DPR-26, DPR-64  
Entergy Nuclear Indian Point 3, LLC, and  
Entergy Nuclear Operations, Inc. November 6, 2015  
-----x

**CERTIFICATE OF SERVICE**

I hereby certify that on November 6, 2015 copies of the State of New York's Answer to Westinghouse's Motion for Leave to Appear Specially Regarding Additional Proprietary Documents were served electronically via the public portal of the NRC's Electronic Information Exchange on the following recipients:

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