

November 11, 2015

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

WESTINGHOUSE ELECTRIC COMPANY’S SUPPLEMENTAL RESPONSE REGARDING  
WESTINGHOUSE’S APPEARANCE AND PROPRIETARY DOCUMENTS

In accordance with the Licensing Board’s direction during the pre-hearing conference call on November 5, 2015,<sup>1</sup> Westinghouse Electric Company LLC (“Westinghouse”) herein addresses two related issues: (1) New York State’s opposition<sup>2</sup> to Westinghouse’s limited participation in this proceeding related to proprietary information; and (2) the implications of the Commission’s decision of November 9, 2015,<sup>3</sup> in this matter for the State’s pending motion<sup>4</sup> to withdraw Westinghouse’s proprietary designation on ten additional documents. In addition, attached to this filing is a Non-Disclosure Agreement in accordance with the Protective Order in

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<sup>1</sup> Tr. 4723-24, 4752 (with the due date/time subsequently modified from 48 hours to 72 hours after the Commission decision anticipated for November 9, 2015).

<sup>2</sup> “State of New York Answer Opposing Westinghouse Electric Company’s Motion for Leave to Appear Specially Regarding Additional Proprietary Documents,” dated November 6, 2015 (“Opposition”).

<sup>3</sup> CLI-15-24, dated November 9, 2015.

<sup>4</sup> “State of New York Motion for Public Disclosure of Various Westinghouse Documents,” dated October 19, 2015 (“Motion”).

this matter, executed by Mr. Richard J. Coldren, Westinghouse Senior Counsel Intellectual property, who will attend the hearings later this month.

1. Westinghouse's Participation

Westinghouse first sought leave from the Licensing Board to appear specially to protect its proprietary information in this proceeding in May in response to the State's motion to withdraw the proprietary designations by Westinghouse for five documents.<sup>5</sup> The Licensing Board allowed Westinghouse to participate in an oral argument on May 14, 2015, and allowed Entergy Nuclear Operations, Inc. ("Entergy") and Westinghouse to file a joint brief on the issue of Westinghouse's proprietary designations for the documents and the legal standards for public release of such documents.

When the State filed its Motion to withdraw the proprietary designations for ten additional documents (or portions thereof), Westinghouse again sought leave to appear specially, on the assumption that the Licensing Board's prior allowance may not extend to the new State Motion.<sup>6</sup> As before, the documents now at issue were disclosed to the State by Entergy and were provided to the State under a protective order. Westinghouse has asserted that the documents are entitled to be protected as confidential commercial information under 10 C.F.R. § 2.390(a)(4). Westinghouse's Motion to Appear explains the basis for and limited scope of Westinghouse's appearance and participation in this matter. The Licensing Board has granted the motion by

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<sup>5</sup> "Motion of Westinghouse Electric Company LLC to Appear Specially in Connection with State of New York Motion to Strike Proprietary Designations of Westinghouse and PWROG Proprietary Documents," dated May 5, 2015.

<sup>6</sup> Westinghouse Electric Company's Motion for Leave to Appear Specially Regarding Additional Proprietary Documents," dated October 29, 2015 ("Motion to Appear"). Without any presumption, Westinghouse stated (at page 2) that it "is seeking to participate in the present case in an appropriate manner to protect its interests and preserve its rights."

Order dated November 3, 2015.<sup>7</sup> Nonetheless, the State sought permission to file its Opposition, which amounts to a request for reconsideration of the Licensing Board's decision.

The Opposition does not provide any reason for the Board to reconsider Westinghouse's limited participation to protect Westinghouse commercial information.

First, the basis for Westinghouse's participation is 10 C.F.R. § 2.315(a), as well as the Licensing Board's discretionary authority to manage a proceeding<sup>8</sup> and Commission precedent previously cited. The State alleges that Westinghouse is seeking to "shoulder its way into the proceeding" to participate in some open-ended fashion, subject only to "self-imposed limitations."<sup>9</sup> But that characterization does not comport with reality. Westinghouse has never sought to intervene as a party, nor does it intend to appear or otherwise participate on any issue other than the State's own motions to release Westinghouse proprietary information to the detriment of Westinghouse. When it filed its Motion to Appear, Westinghouse had no way of knowing what further proceedings would be allowed by the Licensing Board in connection with the State's Motion. But Westinghouse only sought to participate to protect its commercial interests and understands that it can and will appear only as allowed by the Licensing Board in whatever process is established by the Licensing Board for addressing the State's Motion. The scope of and limitations on Westinghouse's role are hardly "self-imposed."

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<sup>7</sup> Order (Granting Westinghouse Electric Company's Motion for Leave to Appear Specially Regarding Additional Proprietary Documents (October 29, 2015)," dated November 3, 2015; Tr. 4721.

<sup>8</sup> *See, e.g.*, 10 C.F.R. §§ 2.319(g) and (s).

<sup>9</sup> Opposition at 6.

Second, the State suggests other approaches by which Westinghouse could have participated (*e.g.*, by submitting a “statement” or joining in Entergy’s response to the motion).<sup>10</sup> The State does not explain how Westinghouse could have done this without first filing a motion to appear. But, regardless, Westinghouse is free to choose how it wants to protect its interests in its proprietary documents, and it has chosen to do so in the same limited way as previously allowed in this very proceeding. Accordingly, Westinghouse filed a timely motion to do so.<sup>11</sup> Westinghouse was not “attempting to assure that it gets another bite at the apple,” nor was it seeking or advocating “multiple rounds of briefing” as the State asserts.<sup>12</sup> Westinghouse simply sought to appear in any relevant process, yet to be determined by the Licensing Board, to preserve its rights going forward.

Third, the State seeks “discovery and depositions” of Westinghouse employees to address perceived “asymmetry” in the process and to assure “procedural fairness.”<sup>13</sup> However, there is no legal basis for this novel request. Westinghouse is not a party and does not itself offer evidence on the substantive contentions in the proceeding. NRC regulations do not provide for depositions in Subpart L hearings, and they do not provide for disclosures directly from non-parties in any proceeding. *See generally* 10 C.F.R. §2.336.<sup>14</sup> Disclosures from the applicant

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<sup>10</sup> Opposition at 6.

<sup>11</sup> Had Westinghouse moved to submit a statement as the State suggests, it is unclear why the State would not have objected to that as well, for the same reasons as offered in the Opposition.

<sup>12</sup> Opposition at 6-7.

<sup>13</sup> *Id.* at 7.

<sup>14</sup> Section 2.336(g) further provides that the disclosure procedures in Section 2.336 are the “sole discovery permitted” unless allowed by another subsection for a particular type of hearing or as specifically allowed by the Commission. Neither of those exceptions applies here.

already encompass Westinghouse documents in the possession of Entergy that the applicant determines to be potentially relevant to the contentions, as evidenced by the fact that we are now addressing Westinghouse documents. But there is no basis in the regulations for discovery into the “factual representations” in the declarations of Westinghouse employees related to the proprietary nature of Westinghouse documents, as proposed by the State.

Finally, the State quibbles with Westinghouse counsel’s compliance with the consultation requirement in 10 C.F.R. § 2.323(b) with respect to Westinghouse’s Motion to Appear. Westinghouse counsel contacted the State three days in advance of its Motion to Appear and informed the State of its intended motion. The State’s counsel replied that “at this point . . . the State cannot respond to Westinghouse’s proposal.” The email went on to give a number of reasons, all making clear that the State continued to object to Westinghouse’s special appearance (as the State has consistently objected, before both the Licensing Board and the Commission). Westinghouse counsel stated accurately the State’s position that it could not at the time respond to the motion. Westinghouse had no obligation to further engage or recite the various bases for the State’s position. The Commission’s regulations provide a process for the State to respond to a motion.

2. Commission Decision, CLI-15-24

As anticipated, on November 9, 2015 the Commission issued CLI-15-24, ruling on the State’s petition for interlocutory review of the Licensing Board’s Order of July 20, 2015, denying the State’s first motion to withdraw Westinghouse’s proprietary designation for five documents. The State’s petition for interlocutory review also addressed the Licensing Board’s implicit decision to allow Westinghouse to appear in connection with the first motion. The Commission in CLI-15-24 denied the petition for review, because the State did not demonstrate

that its petition meets the standards for interlocutory review in 10 C.F.R. § 2.341(f)(2). This applied to the State's arguments on the merits of its motion as well as its arguments related to Westinghouse's participation.<sup>15</sup>

The Commission's decision is, of course, without prejudice to the State's ability to renew the appeal following a partial or final initial decision by the Licensing Board. Presently, Westinghouse's view is that the decision does not change the situation as it existed previously with respect to the State's pending Motion or the dispute over Westinghouse's ongoing role. The Licensing Board's prior decisions, including its most recent decision of November 3 allowing Westinghouse to participate, remain controlling in this case. The Commission's decision provides no basis for reconsideration.

3. Non-Disclosure Agreement

As discussed during the pre-hearing conference call,<sup>16</sup> Mr. Coldren, Westinghouse's in-house intellectual property senior counsel, will be present at the upcoming hearings, including in any closed proceedings. He is authorized to have access to Westinghouse's confidential commercial information by virtue of his role with the company. Nonetheless, given that proprietary information of other entities may be involved, attached to this filing is a Non-Disclosure Agreement in accordance with the Protective Order in this matter, executed by Mr. Coldren.<sup>17</sup>

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<sup>15</sup> CLI-15-24, slip op. at 7-9.

<sup>16</sup> Tr. 4750-52.

<sup>17</sup> Mr. Repka, Westinghouse's outside counsel on this matter, previously executed and submitted a Non-Disclosure Agreement.

Respectfully submitted,

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*Counsel for Westinghouse Electric Company LLC*

Dated at Washington, DC  
this 11th day of November 2015

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the “WESTINGHOUSE ELECTRIC COMPANY’S SUPPLEMENTAL RESPONSE REGARDING WESTINGHOUSE’S PROPRIETARY DOCUMENTS AND APPEARANCE” and the Non-Disclosure Agreement of Richard J. Coldren in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 11th day of November 2015, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by  
Victoria L. Hsia  
Winston & Strawn LLP  
1700 K Street, NW  
Washington, DC 20006-3817

*Counsel for Westinghouse Electric Company LLC*

ATTACHMENT A

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence G. McDade, Chairman  
Dr. Kaye D. Lathrop  
Dr. Richard E. Wardwell

In the Matter of

ENERGY NUCLEAR OPERATIONS, INC.

(Indian Point Nuclear Generating Units 2 and 3)

Docket Nos. 50-0247-LR and  
50-286-LR

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

**NONDISCLOSURE AGREEMENT AND ACKNOWLEDGMENT**

Under penalty of perjury, I hereby agree and acknowledge that (i) access to "proprietary documents," as that term is defined in the Atomic Safety and Licensing Board's Protective Order dated September 4, 2009, issued in Docket Nos. 50-247-LR and 50-286-LR ("Protective Order"), may be provided to me pursuant to the terms and restrictions of the Protective Order; (ii) I have been given a copy and have read the Protective Order; and (iii) I agree to be bound by the terms of the Protective Order. I understand and agree that proprietary documents, their contents, or any notes or other memoranda summarizing or otherwise describing their contents, or any form of information that derives from the proprietary documents and copies or discloses the contents of the proprietary documents, shall be held in strict confidence and shall not be disclosed to anyone except in accordance with that Protective Order, and shall be used only for purposes of this proceeding. I acknowledge that a violation of this Nondisclosure Agreement and Acknowledgment or the Protective Order, which incorporates the terms of this Nondisclosure Agreement and Acknowledgment, constitutes a violation of an order of the U.S. Nuclear Regulatory Commission and may result in the imposition of such sanctions as the

Atomic Safety and Licensing Board or the U.S. Nuclear Regulatory Commission may deem to be appropriate. I also acknowledge that a violation of this Nondisclosure Agreement and Acknowledgment or the Protective Order shall entitle the Initial Holder or owner of the proprietary document(s) or proprietary information contained therein to seek immediate injunctive relief prohibiting such violation.

WHEREFORE, I do solemnly agree to protect such proprietary documents, and their contents, as may be disclosed to me in this proceeding, in accordance with the terms of the attached Protective Order and this Nondisclosure Agreement and Acknowledgment.

Name (printed): Richard J. Coldren  
Title: Senior Counsel Intellectual Property  
Employed by or Representing: Westinghouse Electric Company  
Signature: Richard J. Coldren  
Executed on (date): Nov. 9, 2015