

**UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

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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 12, 2015

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**STATE OF NEW YORK
SUPPLEMENTAL BRIEF
ON THE STATE OF NEW YORK MOTION
FOR PUBLIC DISCLOSURE OF VARIOUS
WESTINGHOUSE DOCUMENTS**

Office of the Attorney General
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In accordance with the Atomic Safety and Licensing Board's instruction in its pre-hearing conference of November 5, 2015, the State of New York submits this Supplemental Brief to its previously-filed Motion for Public Disclosure of Various Westinghouse Documents. The State's Motion asks the Board to compel the public disclosure of ten calculation notes (the Westinghouse Documents) created by Westinghouse Electric Co., LLC, and disclosed by Entergy Nuclear Operations, Inc., pursuant to its mandatory disclosure obligations in this relicensing proceeding. This Supplemental Brief considers the effect of the NRC Commission's Memorandum and Order of November 9, 2015 (Commission's Order),¹ which, among other things, denied the State's request for interlocutory review of a Board Order concerning a different set of four Westinghouse calculation notes.

The Commission's Order did not reach the merits of the State's petition. The Order does not address whether the Board was correct in holding that the four Westinghouse calculation notes contain confidential commercial information, and as such, has limited impact on that same question in the current dispute involving this different set of ten Westinghouse calculation notes. The Commission's Order, however, does weigh heavily on the current dispute. The Commission expressly endorses the use of redaction as a part of the "ordinary administrative burden" of litigation, which, in the current dispute, provides a reasonable means for balancing the public interest in disclosure against any commercial interest Westinghouse may have in protecting information from its competitors and the public. The Board should grant the State's motion to compel Entergy to produce the whole contents of the ten Westinghouse Documents to the public, or in the alternative, should follow the Commission's endorsement of redaction and order Entergy to produce public, redacted versions of the ten Westinghouse Documents.

¹ See *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), Memorandum and Order, CLI-15-24, -- N.R.C. -- (Nov. 9, 2015).

BACKGROUND

This proceeding concerns two 40-year-old nuclear power reactors, Indian Point Units 2 and 3, which are located 24 miles north of New York City. More than 17 million people live within 50 miles of the Indian Point facilities. In support of its application for 20-year operating licenses, Entergy, the current owner of the reactors, hired Westinghouse, the original designer, to conduct environmental fatigue evaluations for critical structures and components within the Indian Point reactors. Entergy, in turn, made Westinghouse's fatigue evaluations available to NRC as part of its application. The State has sought the public disclosure of these fatigue evaluations because Entergy relies on them in its effort to show that the Indian Point facilities can operate safely during the proposed 20-year period of extended operation. In this proceeding, Westinghouse and Entergy have opposed any disclosure of these fatigue evaluations to the public, to any extent.

This is the second motion brought by the State to challenge the proprietary designation of Westinghouse documents disclosed in this proceeding. Early in 2015, the State initiated discussions in an effort to make five documents, including four Westinghouse calculation notes, available to the public. Westinghouse and Entergy refused, and in April 2015, the State brought a motion to compel the public production of these documents.² The State argued that the information contained in the four Westinghouse documents did not constitute confidential commercial information under the meaning of NRC regulations or the Freedom of Information Act, and that the Board should order Entergy to remove the proprietary designation of these documents. The State also argued that Entergy should produce public, redacted versions of these four documents in the event that certain portions of the documents are found to be confidential

² See State of New York Motion to Withdraw the Proprietary Designation of Various Pressurized Water Reactor Owners' Group and Westinghouse Documents (Apr. 9, 2015) (ML15099A785) (Public, Redacted Version).

commercial information. In July, the Board issued an Order denying the State's challenge to these documents, and did not appear to consider the State's request for redactions.³

Consequently, in August, the State petitioned the NRC Commission for interlocutory review of the Board's Order.⁴ This procedural history has been previously briefed in detail by the State.⁵

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 ten new Westinghouse calculation notes disclosed by Entergy.⁶ Though these ten Westinghouse documents are similar to, and in some cases, revisions of the four Westinghouse documents at the subject of the State's earlier challenge, the State argued that the ten new documents do not contain proprietary information that should deny the public access to the documents. The State's motion underscored that Entergy and Westinghouse – and not the State – bear the burden of non-disclosure.

On Thursday, November 5, the Board, in its pre-hearing conference, advised the parties that the NRC Commission would soon hold an affirmation session to address the State's petition for interlocutory review. The Board instructed the parties to submit supplemental briefing to consider any issues raised by the Commission which bear on the instant dispute.⁷ On Monday, November 8, the Commission issued its Memorandum and Order, in which it denied the State's request for interlocutory review of the Board's Order. Three days later, on November 11, with

³ *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).

⁴ State of New York 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).

⁵ See State of New York Petition Pursuant to 10 C.F.R. § 2.341 for Commission Interlocutory Review of the July 20, 2015 Atomic Safety and Licensing Board Order Denying New York Motion to Withdrawn Proprietary Designations (Aug. 14, 2015).

⁶ See State of New York Motion for Public Disclosure of Various Westinghouse Documents, Kwong Decl., Attachment 13 (Oct. 19, 2015) (“NYS October Motion for Disclosure”).

⁷ See Transcript of November 5, 2015 Pre-hearing Conference, at 4722-4723.

the State's motion on the ten Westinghouse Documents still unresolved, Entergy filed a motion for leave to file six new Westinghouse calculation notes as new exhibits.⁸

ARGUMENT

The Board should grant the State's motion for public disclosure of the ten Westinghouse Documents. Though it specifically prescribes the use of redaction, the Commission's Order does not otherwise consider the merits of the State's previous motion for public disclosure, and therefore, does not alter the conclusion that Entergy should be compelled to disclose the ten Westinghouse Documents to the public.

The Commission's Order makes a clear endorsement of the use of redaction as a means for protecting information that is truly privileged or confidential – and to ensure that relevant and non-proprietary information is made public. The Commission instructs that “[f]iling non-public versions and redacted, public version of certain documents is part of the ordinary administrative burden involved in participating in litigation”⁹ At minimum, Entergy and Westinghouse should be ordered to produce public, redacted versions of the ten Westinghouse Documents identified in the State's motion for disclosure.

The bare numerical results of Westinghouse's metal fatigue evaluations, i.e., CUF_{en} results, along with the associated transient cycle limits, background, summary and conclusion statements contained in the ten Westinghouse documents, are not proprietary. None of this information, and in particular the CUF_{en} results themselves, reveal anything to Westinghouse's

⁸ See Entergy Unopposed Motion for Leave to File New and Revised Hearing Exhibits, Nov. 11, 2015. On November 4, Entergy disclosed eight new Westinghouse calculation notes in its proprietary log. After obtaining copies of these documents, the State, on November 12, served its Notice of Objection to the proprietary designation of six documents submitted by Entergy as exhibits, and sought to engage the parties in consultations pursuant to 10 C.F.R. § 2.323(b). As of the date of filing of this Supplemental Brief, the parties have been unable to resolve the dispute concerning these six newly produced Westinghouse calculation notes, and the State anticipates raising this issue with the Board on the same grounds as raised in the current dispute concerning the ten Westinghouse Documents.

⁹ Commission Memorandum and Order CLI-15-24, at 8 (Nov. 9, 2015).

potential competitors about the methods and assumptions Westinghouse used to arrive at these results. All of this information, additionally, is highly-specific to the Indian Point facilities, as stated expressly in the Westinghouse Documents. Moreover, Entergy has already disclosed the components and locations associated with these CUF_{en} results to the public, not to mention that Westinghouse itself has publicly disclosed the very methods and procedures it uses to generate these CUF_{en} values.¹⁰ For convenience, the following table identifies the specific disclosures in Entergy's license renewal application (LRA) – a public document – which correspond to the same structures and components that Westinghouse evaluated for cumulative fatigue in the ten calculation notes identified in the State's motion:

¹⁰ See Kupper, C. and M. Gray, "License Renewal Environmental Fatigue Screening Application," PVP2014-29093, ASME Pressure Vessels and Piping Conference in Anaheim, California (2014) (NYS000513) (NYS October Motion for Disclosure, Kwong Decl., Att. 19); "WESTEMS™ Integrated Diagnostics and Monitoring Systems," Westinghouse Electric Co. (March 2015) (Kwong Decl., Att. 20); "EAF Screening: Process and Technical Basis for Identifying EAF Limiting Locations," EPRI Report 1024995 (August 2012) (Kwong Decl., Att. 21); and Safety Evaluation Report, "Topical Report on ASME Section III Piping and Component Fatigue Analysis Utilizing the WESTEMS™ Computer Code" (WCAP-17577, Revision 2) (ENT000687).

		Location of evaluated structures and components		
		NUREG/CR-6260 locations (Commitment 33)	Potentially more limiting locations (Commitment 43)	Reactor Vessel Internals (Commitment 49)
Disclosures	Entergy LRA ¹¹ (public)	Table 4.3-13 (IP-2) Table 4.3-14 (IP-3)	Tables 4.3-3, 4.3-7, 4.3-11 (IP-2) Tables 4.3-4, 4.3-8, 4.3-12 (IP-3)	Table 4.3-5 (IP-2) Table 4.3-6 (IP-3)
	The Westinghouse Documents	[REDACTED]	[REDACTED]	[REDACTED]
	(claimed as CBI)	[REDACTED]	[REDACTED]	[REDACTED]

The identity of the specific structures and components analyzed by Westinghouse for the Indian Point facilities has already been disclosed publicly by Entergy. Any competitor of Westinghouse who is interested in locating this information need look no further than Entergy’s LRA itself.

The LRA identifies the same structures and components for which Westinghouse performed later fatigue evaluations in the ten Westinghouse Documents, and provides a starting point for showing how Westinghouse has iteratively removed conservatisms in its fatigue evaluations to achieve CUF_{en} results of less than 1.0 for the structures and components at the Indian Point facilities. These results show whether and how rapidly certain critical structures and components at the Indian Point facilities are likely to develop cracks due to aging and fatigue, and are being used to fulfill three key commitments adopted by Entergy to obtain NRC’s approval of Entergy’s

¹¹ See Entergy License Renewal Application for Indian Point Energy Center (ENT00015B).

¹² WCAP-17199-P, Rev. 1, “Environmental Fatigue Evaluation for Indian Point Unit 2.” (ENT000681), and including WCAP-17199, Rev. 2 (ENTR00681), disclosed by Entergy on Nov. 11, 2015.

¹³ WCAP-17200-P, Rev. 1, “Environmental Fatigue Evaluation for Indian Point Unit 3,” (ENT000682), and including WCAP-17200, Rev. 2 (ENTR00682), disclosed by Entergy on Nov. 11, 2015.

¹⁴ CN-PAFM-13-32, Rev. 3, “Indian Point Unit 2 (IP2) and Unit 3 (IP3) Refined EAF Analyses and EAF Screening Evaluations,” (ENT000683), and including CN-PAFM-13-32, Rev. 4 (ENTR00683), disclosed by Entergy on Nov. 11, 2015.

license renewal application. The disclosure of this information is of real interest to the public, and on the other hand, could not possibly cause substantial competitive harm to Westinghouse.

It is telling that alleged competitors of Westinghouse in the market for providing environmentally-adjusted fatigue evaluations in support of license renewal, such as Structural Integrity Associates, Inc. and Iepson Consulting Enterprises, Inc., employ individuals who are providing testimony on behalf of Entergy in this proceeding.¹⁵ These individuals have full and complete access to the same calculation notes that Westinghouse professes concern with disclosing to its competitors. Westinghouse's claim that it would be harmed by the public disclosure of its calculation notes and the CUF_{en} results contained therein is unconvincing.

The Board should compel the public disclosure of the ten Westinghouse Documents in their entirety. However, to the extent that the Board finds that certain portions of these documents contain information that is proprietary, it should not now excuse Entergy from its "ordinary administrative burden" to file public, redacted versions of the ten Westinghouse Documents. Indeed, the burden on Entergy to produce redacted versions of the calculation notes is hardly any burden at all. Over the course of the Indian Point proceedings on the State's Track 1 and Track 2 contentions, Entergy has disclosed almost 800 documents non-publicly and subject to the Protective Order as part of its mandatory disclosures.¹⁶ While this number of documents is certainly less for the Track 2 contentions alone, the State has sought redacted, public versions of only a small fraction of the total number of documents disclosed non-publicly by Entergy in the Track 2 proceeding. It is hardly a great administrative burden on Entergy to produce

¹⁵ These individuals include, for Structural Integrity Associates, Inc., Mr. Timothy J. Griesbach, Senior Associate, and Mr. Barry M. Gordon, Senior Consultant/Associate, and for Iepson Consulting Enterprises, Inc., Alan B. Cox, Consultant.

¹⁶ See Entergy-Indian Point License Renewal Proceeding, Eighty-second Supplemental Proprietary Disclosure Log (Nov. 11, 2015).

redacted, public versions of a small number of the documents – the Westinghouse calculation notes – that it has disclosed non-publicly in this proceeding. Public, redacted versions of these documents can provide the public with information that is critical to understanding the likelihood that the Indian Point facilities will continue to operate safely for an additional 20 years. In contrast to Entergy, the State has shouldered its burden of submitting such redacted, public versions of all of its filings in this proceeding as part of its obligations of participating in litigation. The Board should compel Entergy and Westinghouse to do the same.

CONCLUSION

For the reasons set forth above, the Board should grant the State’s motion to remove the proprietary designation of the ten Westinghouse Documents, whether in whole or in part. The use of redaction to protect truly privileged or confidential information in this proceeding has been expressly endorsed by the Commission in its recent Order, and is specifically provided for in the Protective Order negotiated by the parties.

Respectfully submitted,

Signed (electronically) by

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