

December 22, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
ENTERGY 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
THE STATE OF NEW YORK'S THIRD MOTION TO COMPEL PUBLIC
DISCLOSURE OF CONFIDENTIAL 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 Six Revised Westinghouse Documents" ("Motion"), filed by the State of New York ("New York" or "State") on December 14, 2015. In its Motion, New York seeks to compel the public disclosure of "six revised calculation note documents" authored by Westinghouse Electric Company, LLC ("Westinghouse")¹ related to Entergy Nuclear Operations, Inc.'s ("Entergy") license renewal application for Indian Point Units 2 and 3. New York identifies these six documents as "revisions of Westinghouse calculation notes previously disclosed by Entergy in this proceeding, and which the State has sought to make available to the public."² In addition, New York attached to its Motion versions of the documents showing the State's proposed redactions, identifying "the specific portions of these documents that the State

¹ Motion at 1.

² *Id.*

believes, at [a] minimum, should be publicly disclosed.”³ For the reasons set forth below, the Staff respectfully submits that New York’s Motion should be denied.

DISCUSSION

I. The Motion Lacks Substantial Basis.

As New York acknowledges, this is the third time the State has sought public disclosure of Westinghouse’s Calculation Notes.⁴ This Board has previously held that documents of this nature are entitled to protection from public disclosure, due to the confidential, proprietary nature of the information contained therein. In this regard, the Board ruled as follows:

The Board finds that the [Westinghouse] Calculation Notes contain confidential commercial information, which is entitled to protection under 10 C.F.R. § 2.390(a)(4). The Calculation Notes documents are of a type that is maintained in confidence by the company and contain information which, if released, likely would lead to substantial competitive harm to Westinghouse. Specifically, Westinghouse has established that they have a substantial commercial interest in the market for engineering services for nuclear plants, including ASME Code fatigue screening evaluations, and that the Calculation Notes contain data developed by Westinghouse in conducting ASME Code Section III evaluations. The Board finds that the information in the Calculation Notes, if taken piece-by-piece or together, would enable a competitor to undercut Westinghouse’s market position. . . .

Thus, the Board holds that the documents in question contain confidential and trade secret information within the purview of 10 C.F.R. § 2.390(a)(4), and therefore should remain non-public subject to the Protective Order.⁵

New York offers little in support of its latest motion to compel the public disclosure of Westinghouse’s Calculation Notes that was not considered previously by the Board. While the

³ *Id.*

⁴ *Id.* at 3-4.

⁵ *Entergy Nuclear Operations, Inc.*, “Order (Denying New York Motion to Withdraw Proprietary Designation)” (July 20, 2015), slip op. at 6-7, *petition for interlocutory review denied*, CLI-15-24, 82 NRC ____ (Nov. 9, 2015) (slip op.). See also, Transcript (“Tr.”) at 4,772 (Nov. 16, 2015) (denying New York’s second motion to compel public disclosure of Westinghouse documents).

State has now proposed certain redactions of the documents, it does not explain how its proposed redactions would provide the public with any better understanding of the issues in this proceeding, or of the documents, beyond the information that was already provided in the parties' redacted pre-filed testimony and statements of position and testimony presented in the public evidentiary hearings held in November 2015.

Moreover, each of the documents addressed in New York's Motion are in New York's possession and have been available for New York to utilize in litigating its contentions – and, indeed, each of the documents was submitted as an evidentiary exhibit in this proceeding.⁶ New York thus will not be prejudiced by the continued withholding of these documents from public disclosure. Further, hearings on the matters addressed in these documents have concluded, so that public disclosure of these documents would have no effect on the public's ability to peruse the documents during the evidentiary hearings.

Finally, the public interest will not be harmed by the continued withholding of these documents from public disclosure. Indeed, these Calculation Notes are similar in nature to the Calculation Notes addressed by the Board in its July 20, 2015 Order. New York acknowledges that the Board has ruled that other Westinghouse Calculation Notes should be withheld from disclosure,⁷ and it fails to explain why the rationale and ruling set out in the Board's Order should not apply to these documents as well. Nor does New York provide any satisfactory explanation as to why it believes members of the public need to examine redacted versions of the documents.

In sum, New York's Motion fails to show good cause to compel the public disclosure of these six revised Calculation Notes. Its Motion should therefore be denied.

⁶ See NYS Notice of Objection (Nov. 12, 2015) (Attachment 1 to NYS Declaration).

⁷ Motion at 2, 5-6.

II. New York Failed to Engage in Meaningful Consultations Prior to Filing Its Motion.

Pursuant to 10 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.”⁸ Here, Counsel for New York certified that she has “made a sincere effort to contact counsel in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues,” and “that [her] efforts have been unsuccessful.”⁹ Notwithstanding these statements, she fails to note that Counsel for Entergy was unable to open the CD containing the State’s proposed redactions and to forward it to Westinghouse until the day the motion was filed, and that Staff Counsel did not receive its copy of the CD until the day after the motion was filed.¹⁰ Thus, New York’s consultations have been inchoate, and the parties have not had any meaningful opportunity to consult upon New York’s proposed redactions prior to New York’s filing of its Motion.

The Board has previously required the parties to engage in “sincere” consultations to resolve disputes, requiring them to engage in consultations “sufficiently in advance to provide

⁸ See, e.g., *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-11-34, 74 NRC 685, 695 (2011), *aff’d in part and rev’d in part on other grounds*, CLI-12-8, 75 NRC 393 (2012).

⁹ *Id.* at 25.

¹⁰ Due to problems encountered in opening New York’s CD containing the proposed redactions, Entergy was first able to access the documents and to forward them to Westinghouse on December 14, 2015 – the same day that New York filed its Motion. Further, due to New York’s use of an incorrect mailing address in sending the CD by express mail to the Staff, the Staff did not receive the CD until December 15, 2015, one day after the Motion was filed. See (1) E-mail messages from Raphael Kuyler, Esq., to Lisa Kwong, Esq. (Dec. 14 and Dec. 11, 2015) (Motion, Attachment 11), at 1 and 4; (2) E-mail message from Sherwin Turk, Esq., to Lisa Kwong, Esq. (Dec. 14, 2015) (Motion, Attachment 12), at 1; (3) E-mail message from Sherwin Turk, Esq., to Lisa Kwong, Esq. (Dec. 15 and 17, 2015) (Attachment 1 hereto), at 1 and 2; and (4) copies of the mailing labels used by New York to send the CD to the Staff (Attachment 2 hereto).

enough time for the possible resolution of the matter . . .”¹¹ Here, New York did not allow sufficient time for the parties to review its proposed redactions and to engage in meaningful consultations on those redactions prior to filing its Motion. The State’s efforts to consult with the other parties on its Motion were ill-timed and incomplete, and it has therefore failed to satisfy the requirements imposed by 10 C.F.R. § 2.323(b) and the Board’s Scheduling Order. The Motion should be denied for these reasons, as well.

III. The Motion Should Be Denied as Untimely.

New York appears to have filed its Motion three weeks late, with no showing of good cause for its delay in doing so. On November 12, 2015, Counsel for New York sent an E-mail message to Counsel for Entergy and the Staff, entitled “IP – 2015 11 12 NYS Notice of Objection to Proprietary Designation” (“Notice”), in which New York objected to the proprietary designation of these documents. As stated in that Notice, Entergy had disclosed these documents to New York on November 4, 2015, and New York received the documents on November 6, 2015. Thirty-two days later, on December 14, 2015 (25 days after evidentiary hearings had concluded), New York filed the instant Motion, seeking to compel public disclosure of the documents.

New York’s delay in filing the instant Motion warrants that the Motion be denied as untimely. In accordance with 10 C.F.R. § 2.323(b) and the Board’s Scheduling Order of July 1,

¹¹ In its Scheduling Order of July 1, 2010 (at 8 n.23), 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.

2010, New York was required to file its Motion 10 days after receiving notice that the document(s) had been identified as proprietary, or at least “sufficiently in advance to provide enough time for the possible resolution of the matter . . .” 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 32 days after it received the documents and 25 days after evidentiary hearings in this proceeding had concluded. Accordingly, New York’s Motion should be denied as untimely filed without a proper showing of good cause.

CONCLUSION

New York’s Motion appears to constitute an ill-timed request for the Board revisit its previous decision denying New York’s earlier motion for public disclosure. Its proposed redactions were transmitted to the parties without sufficient time to be considered during consultations. For these and other 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 22nd day of December 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 have made a sincere effort to make myself available to listen and respond to the State of New York, and to resolve the factual and legal issues raised in the "State of New York Motion for Public Disclosure of Six Revised Westinghouse Documents," and that my efforts to resolve the issues have been unsuccessful.

Executed this 22nd day of December 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 THE STATE OF NEW YORK'S THIRD MOTION TO COMPEL PUBLIC DISCLOSURE OF CONFIDENTIAL WESTINGHOUSE DOCUMENTS," dated December 22, 2015, together with ATTACHMENTS 1 and 2 thereto, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above captioned proceeding, this 22nd day of December 2015.

/Signed (electronically) by/

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