

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket Nos. 50-247-LR and
)	50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.)	
)	
(Indian Point Nuclear Generating Units 2 and 3))	December 23, 2015
)	

**ENTERGY'S ANSWER OPPOSING STATE OF NEW YORK MOTION FOR PUBLIC
DISCLOSURE OF SIX REVISED WESTINGHOUSE DOCUMENTS**

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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”) Protective Order,¹ Entergy Nuclear Operations, Inc. (“Entergy”) submits this Answer opposing New York State’s (“New York” or “the State”) third Motion to compel the public disclosure of certain Westinghouse documents (collectively, “the Documents”).² As in the other two motions, New York is again challenging the proprietary designation of environmentally-assisted fatigue (“EAF”) reports and Calculation Notes³ prepared by Westinghouse Electric Company LLC (“Westinghouse”) in support of the License Renewal Application (“LRA”) for Indian Point Energy Center (“IPEC” or “Indian Point”). New York requests that the Board issue an order compelling the production of public versions of the documents either in redacted form or

¹ Licensing Board Protective Order (Sept. 4, 2009) (unpublished) (“Protective Order”).

² State of New York Motion for Public Disclosure of Six Revised Westinghouse Documents Dec. 14, 2015 (“Motion”), *available at* ADAMS Accession No. ML15348A429. The “First Motion” is State of New York Motion to Withdraw the Proprietary Designation of Various Pressurized Water Reactor Owners’ Group and Westinghouse Documents (Apr. 9, 2015), *available at* ADAMS Accession Nos. ML15099A785 (public) and ML15099A784 (non-public). The “Second Motion” is State of New York Motion for Public Disclosure of Various Westinghouse Documents (Oct. 19, 2015), *available at* ADAMS Accession Nos. ML15293A592 (non-public) and ML15293A575 (public).

³ The Documents are listed on page 8 of the Motion, and in the Declaration of Lisa S. Kwong (Dec. 14, 2015), filed with the Motion.

in their entirety.⁴ New York requests such an order notwithstanding New York’s acknowledgment that “the Board has considered the appropriateness of Entergy’s designation of earlier versions of these documents, and the NRC Commission [sic] did not take up the State’s interlocutory appeal on this issue”⁵

As demonstrated below, the Board should deny this third Motion on multiple independent grounds. As a threshold matter, the Motion must be rejected because the consultation process was inadequate. As shown in Section I.B, below, on Friday, December 4, the final working day of the 30-day consultation period, New York transmitted proposed redactions of twenty voluminous documents, including the six Documents that became the subject of the Motion, to Entergy and Westinghouse, such that they were afforded just a few working hours to review New York’s proposals. New York was or should have been aware that Entergy and Westinghouse could not sufficiently review the proposed redactions in that timeframe, *i.e.*, prior to New York’s planned submission of its Motion on Monday, December 7. Despite this, New York characterizes the status of consultation for the Board as follows: “Although Entergy and Westinghouse have not reconsidered their position *after reviewing the State’s proposed redactions*, the State hopes that the proposed redactions will aid the Board”⁶ This characterization is not correct. Simply put, New York did not engage in sincere consultation, and the Board must reject the Motion on these grounds.

Moreover, the Board (twice) and the Commission (once) have rejected New York’s arguments on the topic of Westinghouse proprietary documents. While this third Motion includes proposed redactions, it is fundamentally another attempt to seek reconsideration of resolved

⁴ Motion at 13.

⁵ *Id.* at 1.

⁶ *Id.* (emphasis added).

issues—as, New York readily admits.⁷ Thus, the Board should reject this third Motion on the same grounds as the first two, and for failure to address or meet the procedural and substantive standards for reconsideration.

Finally, the six new Documents are no different from the documents at issue in New York’s two prior motions, in that they all contain valuable confidential commercial information belonging to Westinghouse regarding its processes for preparing fatigue evaluations and related transient history analyses and stress calculations, and are entitled to protection from public disclosure under 10 C.F.R. § 2.390(a)(4).⁸ Indeed, all six Documents are revised versions of documents at issue in New York’s rejected Second Motion filed on October 19.⁹ As Entergy and Westinghouse have repeatedly shown on prior occasions, the Documents, “if taken piece-by-piece or together, would enable a competitor to undercut Westinghouse’s market position,” and such interests far outweigh any public interest in disclosure, particularly given that nothing in the Documents reveals the bases for or the effects of a proposed action by the NRC.¹⁰ New York’s newly proposed redactions do not remedy any of these deficiencies.

For all of these reasons, the Board should summarily deny the Motion.¹¹

⁷ *See id.* (“the Board has considered the appropriateness of Entergy’s designation of earlier versions of these documents, and the NRC Commission [sic] did not take up the State’s interlocutory appeal on this issue”).

⁸ *See* Licensing Board Order (Denying New York Motion to Withdraw Proprietary Designation) at 6-7 (July 20, 2015) (unpublished) (“July 20 Order”).

⁹ *See* Motion at 8 (indicating that previous versions of five of the six Documents were addressed in New York’s September 17, 2015 notice of objection). In fact, previous versions of all six of the documents were addressed in the September 17 notice of objection and New York’s Second Motion, including CN-PAFM-09-21 (ENT000727), a previous version of which was NYS000364. *See* Second Motion at 19.

¹⁰ *See* July 20 Order at 7.

¹¹ Under 10 C.F.R. § 2.323(c), and contrary to New York’s claims, *see* Motion at 7 n.28 & 13, New York has no right to reply to this answer, and can only obtain leave to do so based on compelling circumstances. *See* Scheduling Order at 6-7. Given the extensive record on the First Motion and the Second Motion and the consultations between the parties, New York cannot argue that there are compelling circumstances that could justify seeking or obtaining leave to reply. During consultations, Entergy fully explained its position—to the extent possible given the schedule New York created. Moreover, the Rules of Practice provide no basis for New York’s reservation of its purported “right to depose Westinghouse’s employees.”

I. PROCEDURAL HISTORY

A. The Board Rejected New York's First Two Motions

Considering the repetitive nature of the Motion, and the fact that New York purports to incorporate its prior arguments by reference into its new Motion, the procedural history of New York's first two motions is not repeated here.¹² Entergy summarized the procedural history of the first two motions in its October 29 answer to the Second Motion.¹³

Since the completion of briefings on New York's Second Motion, there have been two significant developments. First, on November 9, 2015, the Commission denied New York's petition for interlocutory review of the Board's July 20 Order denying the First Motion.¹⁴ The Commission held that the Board's decision did not affect New York's ability to pursue its case and that New York's concerns regarding the release of information to the public did not warrant interlocutory review.¹⁵ And second, at the evidentiary hearing on November 16, 2015, the Board denied New York's Second Motion.¹⁶ Thereafter, in response to a comment from New York regarding redactions following the denial of the Second Motion, Chairman McDade advised New York that if it wished the Board to consider redactions of Westinghouse proprietary documents, then New York should "submit a document with proposed redactions."¹⁷ Chairman McDade, however, was clear in his directions on this issue, specifying that New York should "submit those

¹² See Motion at 2.

¹³ See Entergy's Answer Opposing State of New York Motion for Public Disclosure of Various Westinghouse Documents at 3-6 (Oct. 29, 2015) ("Entergy Answer to Second Motion"), available at ADAMS Accession No. ML15302A534.

¹⁴ See *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-15-24, 82 NRC ___, slip op. (Nov. 9, 2015).

¹⁵ See *id.* at 9.

¹⁶ Official Transcript of Proceedings, *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3) at 4772 (Nov. 16, 2015) ("Tr.").

¹⁷ *Id.* at 4999.

proposed redactions initially to Entergy and Westinghouse. And if there isn't an agreement, then to the Board.”¹⁸

B. New York's Third Notice of Objection, Consultation, and Motion

On November 12, 2015, a few days prior to the evidentiary hearing, counsel for New York sent a third “Notice of Objection” to counsel for Entergy, the NRC Staff, and Riverkeeper.¹⁹ The third Notice identified six additional documents that, the State asserted, “appear to primarily contain information that is not exempt from public inspection pursuant to 10 C.F.R. § 2.390.”²⁰ The Notice again demanded that Entergy (or Westinghouse) identify the portions of the documents it deemed proprietary by page and line or column number, the basis for such claims, and the harm that would result from public disclosure.²¹

After consulting with Westinghouse, and given that the six new documents were revised versions of documents at issue in the Second Motion, Entergy responded to New York that the November 12 Notice had effectively been rendered moot by the Board's denial of the Second Motion at the hearing.²² Nevertheless, Entergy reiterated that the six documents were Westinghouse fatigue calculations or reports that should remain subject to the Protective Order for all of the reasons explained in Entergy's and Westinghouse's prior filings on this topic.²³

Counsel for New York did not respond to Entergy's e-mail for over a week, and then only to inform the other parties that New York was “developing a proposed set of redacted documents

¹⁸ *Id.* at 5000.

¹⁹ *See* Motion, Attach. 1 (“Notice”).

²⁰ *Id.* at 1. The six documents were recent updates to previously submitted Westinghouse calculations and reports. Entergy moved to submit these documents as new and revised exhibits on November 11, 2015. *See* Entergy's Unopposed Motion for Leave to File New and Revised Hearing Exhibits (Nov. 11, 2015). The Board granted this unopposed motion during the “Track 2” evidentiary hearing. Tr. at 4769.

²¹ Notice at 1.

²² *See* E-mail from R. Kuyler to L. Kwong and D. Brancato (Nov. 24, 2015), included in Motion, Attach. 2.

²³ *See id.*

and expect[ed] to be able to forward it to you shortly.”²⁴ Eight days after that, and two working days before the deadline for filing any motion regarding the Notice, on Thursday, December 10, 2015, New York sent via overnight mail a compact disc to counsel for the other parties with proposed redactions of twenty Westinghouse documents—all fourteen of the documents at issue in the First and Second Motions, plus the six new Documents.²⁵ Entergy’s counsel received the disc on Friday, December 11.²⁶

The redacted documents on the disc were encrypted, and due to technical difficulties, Entergy was unable to access the documents on Friday, December 11.²⁷ Ultimately, after receiving further guidance from New York on Monday, December 14, Entergy was able to access the redacted documents and forward them to Westinghouse for review.²⁸ Counsel for New York and Entergy discussed the proposed redactions that day. During those discussions, counsel for New York acknowledged that Entergy and Westinghouse would need more than a portion of one day to review the documents, and stated that New York would inform the Board that *the parties were in the process of reviewing the proposed redactions*.²⁹ During that call, counsel for New York indicated that New York was planning to file a motion that same day, but failed to

²⁴ See Motion, Attach. 2, E-mail from L. Kwong to R. Kuyler (Dec. 2, 2015).

²⁵ See Letter from L. Kwong to P. Bessette and S. Turk (Dec. 10, 2015) (sent electronically on Dec. 11, 2015), included in Motion, Attach. 3. This letter suggested, but did not clearly state, that New York’s planned motion would cover only the six new documents and not the fourteen other documents with proposed redactions.

²⁶ Apparently the package sent to counsel for the NRC Staff was incorrectly addressed and arrived on Tuesday, December 15. The package sent to Riverkeeper did not arrive and apparently may have been lost by UPS. See Letter from L. Kwong to Administrative Judges et al. (Dec. 18, 2015).

²⁷ Immediately after receiving the disc, counsel for Entergy attempted to contact counsel for New York to work through the technical problems, but counsel for New York and Entergy were unable to confer until Monday morning, December 14.

²⁸ See Motion, Attach. 11.

²⁹ See E-mail from L. Kwong to R. Kuyler (Dec. 14, 2015, 2:37 p.m.), included in Motion, Attach. 11 (“The State appreciates your concern about the need for additional time to evaluate the State’s proposal. We will be filing our motion later today in order to preserve the State’s right to challenge Westinghouse’s proprietary designations pending Entergy/Westinghouse’s review of the proposed redactions, with the understanding and hope that the parties may reach a mutual resolution of this issue without further Board intervention.”) (emphasis added).

communicate certain significant aspects of New York’s plans, including that the Motion would be supported by a new Declaration from Riverkeeper’s witness, Dr. Joram Hopenfeld. Late in the day on December 14, New York filed the Motion and its supporting attachments.

The Motion again acknowledges that “the Board has considered the appropriateness of Entergy’s designation of earlier versions of these documents”³⁰ Nevertheless, the new Motion purports to “continue to urge the Board to order the use of redaction as a reasonable means for resolving this dispute”

II. THE CONSULTATION ON NEW YORK’S THIRD MOTION WAS INADEQUATE

As is clear from the forgoing discussion, New York has not undertaken a sincere effort to resolve the factual and legal issues raised.³¹ Accordingly, the Motion must be rejected.

New York’s transmittal of twenty redacted documents to the other parties one working day before the specified deadline for a motion—after a 30-day consultation period—falls far short of the required sincere consultation.³² It also contravenes Chairman McDade’s specific direction to submit proposed redactions to the Board only if there was no agreement among the parties.³³ In this case, the parties had no time to agree, or not, on the proposed redactions. Also contrary to the Board’s direction, New York did not suggest or seek an extension of time to allow the other parties to review the proposed redactions.³⁴

³⁰ Motion at 1.

³¹ See 10 C.F.R. § 2.323(b); see also Licensing Board Scheduling Order at 8-9 (July 1, 2010) (unpublished) (“Scheduling Order”).

³² See *U.S. Dep’t of Energy* (High Level Waste Repository: Pre-Application Matters), CLI-08-22, 68 NRC 355, 359 (2008) (denying a motion in part because the movant failed to consult); Licensing Board Order (Denying New York State’s Motion to Supplement) (June 7, 2012) (unpublished) (denying a motion because New York did not initiate consultation in time for Entergy to contact appropriate individuals and effectively engage in consultation with New York); Licensing Board Memorandum and Order (Summarizing Pre-Hearing Conference) at 3 (Feb. 4, 2009) (unpublished).

³³ Tr. at 5000.

³⁴ See Scheduling Order at 8 n.23.

New York's communications to the parties, moreover, explicitly recognized Entergy's and Westinghouse's need for additional time to review the proposed redactions.³⁵ Even putting aside the deficiencies in this "cart-before-the-horse" concept of consultation, New York incorrectly represented in its Motion that "Entergy and Westinghouse have not reconsidered their position *after reviewing the State's proposed redactions . . .*"³⁶

Under these circumstances, the Board must reject the Motion under 10 C.F.R. § 2.323(b).

III. THE SIX NEW DOCUMENTS ARE PROTECTED FROM PUBLIC DISCLOSURE AS CONFIDENTIAL COMMERCIAL INFORMATION

A. Legal Standards Governing the Disclosure of Proprietary Information

Entergy has provided extensive briefing on the legal and regulatory standards associated with the protection of confidential commercial or financial information from public disclosure under 10 C.F.R. § 2.390, and the Board's Protective Order in this proceeding, most recently in response to New York's Second Motion.³⁷ That discussion of legal standards is not repeated here.

B. The Board Has on Two Prior Occasions Rejected the Arguments in New York's Third Motion

New York's third Motion is wasteful, repetitive, and a belated attempt to seek reconsideration of the denials of its two earlier motions.³⁸ Far from "reliev[ing] the Board from a

³⁵ See E-mail from L. Kwong to R. Kuyler (Dec. 14, 2015, 2:37 p.m.), included in Motion, Attach. 11.

³⁶ Motion at 1 (emphasis added). As noted previously, New York failed to mention that the Motion would be accompanied by a declaration from Riverkeeper's witness, Dr. Hopenfeld. In the past New York and Riverkeeper have criticized Entergy for raising particular issues in a motion that allegedly "never came up" during the consultation. State of New York and Riverkeeper, Inc. Answer to January 7, 2013 Motions in Limine Filed by Entergy and NRC Staff to Strike Various Intervenors' Pre-Filed Submissions in Support of Contention NYS-38/RK-TC-5 at 11 (Jan 17, 2013), *available at* ADAMS Accession No. ML13017A562. Given Intervenors' own prior statement, New York certainly should have been more forthcoming about the content of and arguments in its own Motion.

³⁷ See generally Entergy Answer to Second Motion.

³⁸ A motion for reconsideration must be filed within ten days of the action for which reconsideration is requested, and requires a showing of compelling circumstance, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid. Such motions are limited to ten pages. See 10 C.F.R. § 2.323(e). New York's third Motion does not meet the procedural requirements for reconsideration, nor has it even attempted to address the substantive requirements.

lengthy and repetitive motion,” that is precisely what New York has presented.³⁹ New York does not explain what makes these Documents different from earlier documents or why the Board’s two earlier decisions do not apply to this new Motion. As in the past, New York’s arguments are general and do not suggest that Westinghouse’s prior sworn statements were inaccurate.⁴⁰ On the question of whether there is confidential commercial information, the six new Documents are similar in nature to the fourteen documents at issue in the First and Second Motions, and are confidential commercial information for the same reasons. Indeed, all six Documents are merely revised and updated versions of previously reviewed documents.⁴¹ Thus, the Board should apply the same analysis again and summarily reject the Motion.

C. New York’s Proposed Redactions Should Not Be Considered

Entergy is aware of no precedent in NRC proceedings for the Board to adopt unilateral redactions performed by adverse parties without pertinent expertise, and without input from—and over the objections of—the owner of the confidential business information at issue. New York cites no precedent for such a radical new process. On the contrary, in prior NRC proceedings, when the Commission and Board have found redactions to be appropriate, the NRC tribunal will typically either direct the parties to develop a joint proposal or direct the owners of such proprietary information to identify in the first instance the confidential material to be redacted.⁴²

³⁹ Motion at 2.

⁴⁰ See July 20 Order at 7.

⁴¹ See *supra* note 9.

⁴² See, e.g., *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-05-01, 61 NRC 160, 161, 184 (2005) (directing the applicant to prepare redacted versions of Commission decisions, consistent with the Commission’s direction); *La. Energy Servs., L.P.* (Nat’l Enrichment Facility), LBP-05-13, 61 NRC 385, 446 (2005) (directing the parties to confer to develop joint proposed redactions to a Board decision). Notably, both of these cases involved the need for redactions of Commission or Board decisions after a determination that redaction was appropriate—in both respects very different from the current situation.

Westinghouse has filed an answer and supporting affidavit addressing the Documents and refuting the points made in the Hopenfeld Declaration.⁴³ But aside from the substantive problems with his declaration,⁴⁴ New York does not certify that Dr. Hopenfeld had any input in the preparation of the redactions.⁴⁵ Thus, it appears that the proposed redactions were prepared by or at the direction of counsel for New York with no input from anyone with expertise in the business of fatigue analysis or in the business of providing engineering services to nuclear power plants.⁴⁶ Put another way, the proposed redactions appear to represent the unilateral opinion of New York about what information it desires to see publicized. There is no basis to conclude that the proposals have any relationship to what is or is not confidential commercial information.

Instead, redactions of the Westinghouse proprietary documents would be impractical and would not serve the purposes of the Freedom of Information Act. As Entergy and Westinghouse previously explained in connection with the First and Second Motions, it is well-established that any non-exempt portions of a document need not be disclosed if they are “inextricably intertwined with exempt portions.”⁴⁷

Moreover, as Entergy and Westinghouse have previously shown, even small pieces of seemingly-unimportant information could provide the “pieces of the puzzle” to a competitor.⁴⁸ Overall, the time and expense that would be involved in a redaction effort would not be justified,

⁴³ See Declaration of Dr. Joram Hopenfeld in Support of State of New York Motion to Withdraw Proprietary Designations of Westinghouse Documents (Dec. 14, 2005) (“Hopenfeld Declaration”).

⁴⁴ For example, Dr. Hopenfeld’s claim that “[e]nd fatigue results cannot be ‘reverse engineered’” has previously been refuted by Westinghouse’s expert, Mark Gray. See Declaration of Mark Gray ¶ 23.ii (Oct. 28, 2015) (“Gray Declaration III”) (attached to Entergy Answer to Second Motion).

⁴⁵ Indeed, Dr. Hopenfeld apparently had none, as he merely states that he understands New York has proposed redactions. See Hopenfeld Declaration ¶ 9.

⁴⁶ Dr. Hopenfeld does not assert that he has any expertise in the engineering services business.

⁴⁷ *Trans–Pacific Policing Agreement v. U.S. Customs Serv.*, 177 F.3d 1022, 1027 (D.C. Cir. 1999) (quoting *Mead Data Cent., Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977)).

⁴⁸ See Entergy Answer to Second Motion at 13-22.

and any redacted version appropriately protecting confidential information would be of little or no value to the public due to the likely extent of such redactions.⁴⁹

IV. CONCLUSION

For all of these reasons, New York's third Motion on the subject of Westinghouse proprietary documents should be denied in its entirety.

Respectfully submitted,

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Dated in Washington, D.C.
this 23rd day of December 2015

⁴⁹ See *Mead*, 566 F.2d at 260 (stating that an agency need not “commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content.”).

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ANSWER CERTIFICATION

Counsel for Entergy certifies that he has made a sincere effort to make himself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that his efforts to resolve the issues have been unsuccessful.

Executed in Accord with 10 C.F.R. § 2.304(d)

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I hereby certify that, on this date, copies of “Entergy’s Answer Opposing State of New York Motion for Public Disclosure of Six Revised Westinghouse Documents” were served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Raphael P. Kuyler

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