

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of	)	Docket Nos. 50-247-LR
	)	50-286-LR
Entergy Nuclear Operations, Inc.	)	
	)	
(Indian Point Nuclear Generating	)	
Units 2 & 3)	)	May 5, 2015

**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**

Westinghouse Electric Company LLC, files this Motion to Appear Specially before the Atomic Safety and Licensing Board (“ASLB” or “Licensing Board”) to appear specially to contest the State of New York’s “Motion to Withdraw the Proprietary Designation of Various Pressurized Water Reactor Owners’ Group and Westinghouse Documents,” dated April 9, 2015 (“New York Motion”).

The New York Motion challenges the proprietary designation of five documents produced by Entergy Nuclear Operations, Inc. (“Entergy”), as part of its disclosure in this proceeding. The five documents consist of four calculation notes prepared by Westinghouse (the “Calculation Notes”) and a document of the Pressurized Water Reactor Owners Group (the “PWROG Memorandum”) which contains Westinghouse proprietary information. These five documents (collectively, “the Documents”) were produced in this proceeding under the Atomic Safety and Licensing Board’s Protective Order dated September 4, 2009 (“Protective Order”). None of the Documents have ever been made public by Westinghouse or by PWROG, and none of the Documents were otherwise provided to the U.S. Nuclear Regulatory Commission (“NRC”), either in connection with NRC review of the applications which are involved in this proceeding or otherwise.

Westinghouse has not had the opportunity to fully consider the New York Motion and the State of New York Reply in Support of Motion to Withdraw Proprietary Designations, dated May 1, 2015 (the “New York Reply”). However, based on a review of the New York Motion and a preliminary brief review of the New York Reply, it appears that there is a misunderstanding by New York on both the law applicable to treatment of proprietary information under Exemption 4 of the Freedom of Information Act (“FOIA”), the case law applicable to the FOIA and the NRC regulations in 10 CFR 2.390 relating to the FOIA. Further, there appears to be a misunderstanding by New York on the facts relating to the Documents. Today (May 5, 2015), the ASLB issued an order (“Setting Oral Argument on Proprietary Designation of Documents”). In that order, the Board states that it will convene a telephonic oral agreement during the week of May 11, 2015, and further states that “counsel for Westinghouse may also participate”.

Westinghouse appreciates the Board understanding that the substantial harm alluded to in the applicable NRC regulation would fundamentally impact Westinghouse, and further appreciates the opportunity to participate in the oral argument. Westinghouse believes that a written filing by Westinghouse in opposition to New York Motion in connection with this special appearance, would enhance the discussion and the understanding of the Westinghouse position. Accordingly, Westinghouse requests ten (10) days to file its answer to the New York Motion and New York Reply. Westinghouse also requests a brief postponement of the oral argument from the week of May 11, 2015 to the week of May 18, 2015.

## **I. Background**

On September 9, 2009, the Licensing Board issued a Protective Order (“Protective Order”) in this proceeding to allow all parties full access to proprietary documents that might be relevant to admitted contentions. Pursuant to the discovery requirements in 10 C.F.R. 2.336, and the Protective Order, Entergy disclosed the existence of and produced the Documents to the parties to this proceeding. (The disclosures were made by Entergy at various times between 2010 and January 2015.)

On April 9, 2015, the State of New York, seeking to compel public disclosure of the Documents, filed the New York Motion to withdraw the proprietary designation of the Documents. Entergy (on April 20, 2015) and the NRC Staff (on April 20, 2015, corrected April 21, 2015) filed Answers to the New York Motion.

On April 22, 2015, the State of New York filed a “New York Motion for Leave to File Reply in Support of Motion to Withdraw Proprietary Designations”, which Motion was opposed by Entergy in a filing on April 23, 2015. The Licensing Board issued an Order on April 24, 2015, “Granting New York’s Motion for Leave to File Reply,” and on May 1, 2015, the New York Reply was filed.

## **II. Right to Appear Specially to Protect An Interest**

None of the documents which are involved in this dispute are Entergy documents. Rather, the Calculation Notes are Westinghouse documents, and the PWROG Memorandum is a document prepared by Westinghouse on behalf of the PWROG and contains Westinghouse proprietary information. Proprietary information comprises an integral part and is at the heart of Westinghouse business. It is crucial to the ability of Westinghouse to maintain its competitive position in the nuclear supply and services industry, both in the United States and abroad. The value of Westinghouse proprietary information to its ongoing business can be maintained, however, only so long as the proprietary information is protected from disclosure and use by, or for the benefit of, Westinghouse competitors. Thus, Westinghouse has an interest relating to the proprietary documents that are the subject of the action before the Board.

Disposition of the New York Motion may, as a practical matter, impair the ability of Westinghouse to protect its interest in maintaining the Documents as proprietary. None of the parties in this proceeding, including Entergy, have the interest that Westinghouse has in the protection of Westinghouse proprietary information. Thus, Westinghouse is entitled to enter a special appearance in this proceeding for the limited purpose of protecting the proprietary

designation of the Documents. See, *In the Matter of Kansas Gas and Electric Company and Kansas City Power and Light Company* (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-311, 3 NRC 85 (1976).

The Federal Rules of Civil Procedure offer insight into the standards that should be applied to permit a special appearance by anyone who claims an interest relating to the property that is the subject of a proceeding. Federal Rule of Civil Procedure 24 states, in part:

Rule 24. Intervention

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

- (1) ...
- (2) Claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) *In General*. On timely motion, the court may permit anyone to intervene who:

- (A) ...
- (B) has a claim or defense that shares with the main action a common question of law or fact."

See *Appleton v. Food and Drug Administration*, 310 F.Supp.2d 194 (D.C.D.C. 2004).

What is true under in Federal court proceedings should be true in NRC proceedings. A non-party must be entitled to enter a special appearance in an ASLB proceeding for the limited purpose of protecting its interest. Westinghouse has entered special appearances or otherwise participated in a number of NRC licensing proceedings to protect its proprietary interests, including proceedings in connection with licensing of the Monticello Nuclear Generating Plant (Unit 1), Midland Plant (Units No. 1 & 2), Point Beach Nuclear Plant (Unit 2), and Zion Nuclear Plant (Unit 1).

**III. PERMITTING WESTINGHOUSE TO APPEAR SPECIALLY  
WILL NOT DELAY PROCEEDING**

Granting this Motion for Westinghouse to appear specially in this proceeding to protect its proprietary information will not delay this proceeding. The State of New York and all other parties to the proceeding already are in possession, under the Protective Order, of the documents which are the subject of the New York Motion. Those documents, to the extent they are applicable to the contentions in this proceeding, can be utilized in preparation for the hearing. Moreover, the hearing in this proceeding is not scheduled to begin for more than seven months – on November 16, 2015. By fully considering the matters raised by the New York Motion, including the position of Westinghouse, those matters should be able to be resolved long before the hearing is scheduled to begin.

Westinghouse needs fifteen (15) days to prepare and file the Westinghouse response to the New York Motion and the New York Reply. In this connection, we note that all of the Westinghouse Calculation Notes that are the subject of the New York Motion were produced to the State of New York, subject to the Protective Order more than 16 months ago - on January 7, 2011, December 17, 2012 (color version, January 7, 2013), November 11, 2013, and December 12, 2013, respectively. The PWROG Memorandum was produced on January 14, 2015. However, the New York Motion was not filed until April 9, 2015 - more than 16 months after the production of the last of the Calculation Notes and almost three months after production of the PWROG Memorandum.

It was only after the New York Reply was filed late last Friday afternoon, May 1, 2015, that many aspects of the attack by the State of New York on the proprietary nature of the Documents became known. There is a need for Westinghouse to consider that attack, both from a legal and technical standpoint, and this consideration must be made by personnel who will need to be diverted from their normal responsibilities. This consideration will take time, but Westinghouse believes the Board and the parties will benefit from a written statement of the Westinghouse position. Thus, Westinghouse is requesting ten (10) days to prepare and file its response.

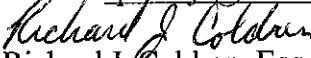
#### **IV. CONCLUSION**

For the reasons set forth above, Westinghouse requests that it be permitted to appear specially in this proceeding in connection with the State of New York Motion to Strike Proprietary Designations of Westinghouse and PWROG proprietary documents, and that it be afforded fifteen days to file a response to the New York Motion.

Respectfully submitted,

Barton Z. Cowan, Esq.  
Counsel for Westinghouse Electric Company LLC  
E-mail: [teribart61@aol.com](mailto:teribart61@aol.com)

Joseph C. Spadacene, Esq.  
Deputy General Counsel  
Westinghouse Electric Company LLC  
E-mail: [spadacjc@westinghouse.com](mailto:spadacjc@westinghouse.com)

  
Richard J. Coldren, Esq.  
Senior Counsel  
Westinghouse Electric Company LLC  
E-mail: [coldrerj@westinghouse.com](mailto:coldrerj@westinghouse.com)

Dated at Cranberry, Pennsylvania  
May 5, 2015

**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)	)	
	)	May 5, 2015

**MOTION CERTIFICATION**

Pursuant to 10 C.F.R. § 2.323(b), counsel for Westinghouse certifies that he made a sincere effort to contact the other parties in this proceeding, to explain to them the factual issues raised in this Motion, and to resolve those issues, and he certifies that his efforts have been unsuccessful. The NRC Staff and Entergy support this Motion, NYS opposes the Motion. The NRC Staff, Entergy, and NYS had no objection to Westinghouse's request to make its initial filings via email instead of the NRC's Electronic Information Exchange.

Respectfully submitted,



Richard J. Coldren, Esq.  
Joseph C. Spadacene, Esq.  
Westinghouse Electric Company LLC  
1000 Westinghouse Drive  
Cranberry Township, PA 16066  
Phone: (412) 374-6645  
Fax: (724) 940-8508  
E-mail: coldrerj@westinghouse.com

Barton Z. Cowan, Esq.  
307 S. Dithridge Street #814  
Pittsburgh, PA 15213-3519  
Phone: (412) 418-2414  
E-mail: teribart61@aol.com  
*Counsel for Westinghouse Electric  
Company LLC.*

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

In the Matter of	)	Docket Nos. 50-247-LR
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Entergy Nuclear Operations, Inc.	)	
	)	
(Indian Point Nuclear Generating	)	
Units 2 & 3)	)	May 5, 2015

**NOTICE OF APPEARANCE OF RICHARD J. COLDREN**

The undersigned, being an attorney at law in good standing admitted to practice before the courts of the Commonwealth of Pennsylvania, enters his appearance in the above-captioned matter as counsel for Westinghouse Electric Company LLC.

Respectfully submitted,



Richard J. Coldren, Esq.  
1000 Westinghouse Drive  
Cranberry Township, PA 16606  
Phone: 412-374-6645  
Fax: 724-940-8508  
E-Mail: [coldrerj@westinghouse.com](mailto:coldrerj@westinghouse.com)

*Counsel for Westinghouse Electric Company  
LLC*

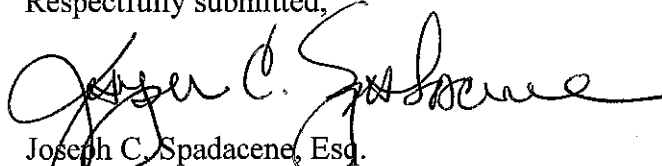
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**NUCLEAR REGULATORY COMMISSION**  
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In the Matter of	)	Docket Nos. 50-247-LR
	)	50-286-LR
Entergy Nuclear Operations, Inc.	)	
	)	
(Indian Point Nuclear Generating	)	
Units 2 & 3)	)	May 5, 2015

**NOTICE OF APPEARANCE OF JOSEPH C. SPADACENE**

The undersigned, being an attorney at law in good standing admitted to practice before the courts of the Commonwealth of Pennsylvania, enters his appearance in the above-captioned matter as counsel for Westinghouse Electric Company LLC.

Respectfully submitted,



Joseph C. Spadacene, Esq.  
1000 Westinghouse Drive  
Cranberry Township, PA 16606  
Phone: 412-374-2282  
Fax: 724-940-8508  
E-Mail: [spadacjc@westinghouse.com](mailto:spadacjc@westinghouse.com)

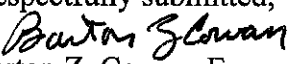
*Counsel for Westinghouse Electric Company LLC*

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

In the Matter of	)	Docket Nos. 50-247-LR
	)	50-286-LR
Entergy Nuclear Operations, Inc.	)	
	)	
(Indian Point Nuclear Generating	)	
Units 2 & 3)	)	May 5, 2015

**NOTICE OF APPEARANCE OF BARTON Z. COWAN**

The undersigned, being an attorney at law in good standing admitted to practice before the courts of the Commonwealth of Pennsylvania, enters his appearance in the above-captioned matter as counsel for Westinghouse Electric Company LLC.

Respectfully submitted,  
  
Barton Z. Cowan, Esq.  
307 S. Dithridge Street, #814  
Pittsburgh, PA 15213-3519  
Phone: 412-418-2414 (cell)  
Fax: 412-682-6555  
E-Mail: [teribart61@aol.com](mailto:teribart61@aol.com)

*Counsel for Westinghouse Electric Company LLC*



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

In the Matter of	)	Docket Nos. 50-247-LR
	)	50-286-LR
Entergy Nuclear Operations, Inc.	)	
	)	
(Indian Point Nuclear Generating	)	
Units 2 & 3)	)	May 5, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing "Motion of Westinghouse Electric Company LLC to Appear Specially in Connection with the State of New York Motion to Strike Proprietary Designations of Westinghouse and PWROG Proprietary Documents" dated May 5, 2015 and a copies of the Notice of Appearance of Richard J. Coldren, Joseph C. Spadacene, and Barton Z. Cowan were served via email on the following recipients:

Respectfully submitted,



Richard J. Coldren, Esq.  
1000 Westinghouse Drive  
Cranberry Township, PA 16606  
Phone: 412-374-6645  
Fax: 724-940-8508  
E-Mail: [coldrerj@westinghouse.com](mailto:coldrerj@westinghouse.com)

*Counsel for Westinghouse Electric Company LLC*

[pbessette@morganlewis.com](mailto:pbessette@morganlewis.com);  
[dbrancato@riverkeeper.org](mailto:dbrancato@riverkeeper.org);  
[bburchfield@mwe.com](mailto:bburchfield@mwe.com);  
[dcalhoun@morganlewis.com](mailto:dcalhoun@morganlewis.com) ;  
[rcearley@riverkeeper.org](mailto:rcearley@riverkeeper.org);  
[kathryn.deluca@ag.ny.gov](mailto:kathryn.deluca@ag.ny.gov);  
[nduncan@sprlaw.com](mailto:nduncan@sprlaw.com);  
[christina.england@nrc.gov](mailto:christina.england@nrc.gov);  
[geskelsen@morganlewis.com](mailto:geskelsen@morganlewis.com);  
[mfreeze@morganlewis.com](mailto:mfreeze@morganlewis.com);  
[anita.ghosh@nrc.gov](mailto:anita.ghosh@nrc.gov);

wglew@entergy.com;  
mannajo@clearwater.org;  
brian.harris@nrc.gov;  
administrator@villageofbuchanan.com;  
hearingdocket@nrc.gov;  
laura.heslin@ag.ny.gov;  
eilter@mwe.com;  
catherine.kanatas@nrc.gov;  
rkuyler@morganlewis.com;  
lisa.kwong@ag.ny.gov;  
mleland@mwe.com;  
rlighty@morganlewis.com;  
joseph.lindell@nrc.gov;  
brian.lusignan@ag.ny.gov;  
teresa.manzi@ag.ny.gov;  
lawrence.mcdade@nrc.gov;  
bmcglinn@morganlewis.com;  
efmctier@gw.dec.state.ny.us;  
beth.mizuno@nrc.gov;  
brian.newell@nrc.gov;  
OCAAMAIL@nrc.gov;  
martin.o'neill@morganlewis.com;  
laura@nealrgross.com;  
lawyerreid@gmail.com;  
diesel@sprlaw.com;  
david.roth@nrc.gov;  
mirl@westchestergov.com;  
jmr@nei.org;  
kathleen.schroeder@nrc.gov;  
john.sipos@ag.ny.gov;  
robert.snook@ct.gov;  
astolorow@sprlaw.com;  
stefen@nealrgross.com;  
ksutton@morganlewis.com;  
John.Tibbetts@nrc.gov;  
vtreanor@sprlaw.com;  
sherwin.turk@nrc.gov;  
richard.wardwell@nrc.gov;  
alana.wase@nrc.gov;  
maria.webb@pillsburylaw.com;  
rwebster463@gmail.com;  
michael.wentzel@nrc.gov;  
lrichardson@morganlewis.com;  
edward.williamson@nrc.gov;  
ezoli@goodwinprocter.com

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	
ENTERGY NUCLEAR OPERATIONS,	)	Docket Nos. 50-0247-LR and
INC.	)	50-286-LR
	)	
(Indian Point Nuclear Generating Units 2	)	ASLBP No. 07-858-03-LR-BD01
and 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of “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” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 12th day of May 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  
David A. Repka  
Winston & Strawn LLP  
1700 K Street, NW  
Washington, DC 20006-3817

COUNSEL FOR WESTINGHOUSE  
ELECTRIC COMPANY LLC