

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
)	Docket Nos. 50-247-LR and
ENTERGY NUCLEAR OPERATIONS, INC.)	50-286-LR
)	
(Indian Point Nuclear Generating Units 2 and 3))	
)	April 20, 2015

**ENTERGY'S ANSWER OPPOSING NEW YORK STATE'S
MOTION TO STRIKE PROPRIETARY DESIGNATIONS**

Pursuant to 10 C.F.R. § 2.323(c) and in accordance with the Atomic Safety and Licensing Board’s (“Board”) September 4, 2009 Protective Order,¹ Entergy Nuclear Operations, Inc. (“Entergy”) submits this Answer opposing New York State’s (“New York”) April 9, 2015 Motion for a Board order striking the proprietary designations of five documents previously produced by Entergy as part of the mandatory disclosure process in this proceeding.² Those documents include a memorandum prepared by the Pressurized Water Reactor Owners Group (“PWROG”),³ and four calculation notes prepared by Westinghouse Electric Company LLC (“Westinghouse”),⁴ (individually, the “PWROG Memo” and “Calculation Notes”, and collectively, “the Documents”).

¹ Licensing Board Protective Order (Sept. 4, 2009) (unpublished) (“Protective Order”).

² State of New York Motion to Withdraw the Proprietary Designation of Various Pressurized Water Reactor Owners' Group and Westinghouse Documents (Apr. 9, 2015) ("Motion"). By asking the Board to strike the proprietary designations altogether, it appears that New York seeks public disclosure of all five documents in their entirety. In its Motion, New York does not explicitly ask that Westinghouse issue redacted versions of the documents, to the extent that the creation of redacted versions would even be practicable or useful in this instance.

³ PWROG, BTP 5-3 Industry Issue; Executive Review (Oct. 28, 2014) (“PWROG Memo”).

⁴ See Westinghouse, CN-PAFM-09-77, Indian Point Units 2 & 3 Accumulator Nozzle Environmental Fatigue Evaluation (2010); Westinghouse, CN-PAFM-12-35, Indian Point Unit 2 and Unit 3 EAF Screening Evaluations (2012); Westinghouse, CN-PAFM-13-32, Indian Point Unit 2 (IP2) and Unit 3 (IP3) Refined EAF Analyses and EAF Screening Evaluations (2013); CN-PAFM-13-40, Indian Point Unit 2 Pressurizer Spray Nozzle Transfer Function Database Development and Environmental Fatigue Evaluations (2013).

For the reasons set forth below and in the attached Affidavits and Declaration executed by authorized PWROG and Westinghouse officials, New York's Motion should be denied in its entirety. As an initial matter, this is not a case of failure to disclose any documents—Entergy promptly disclosed to New York all of the documents subject to this Motion pursuant to the Protective Order. Further, all of the parties to this proceeding were able to prepare for and proceed to the Track 1 hearings involving proprietary information efficiently and with little or no hardship to the parties or public participation. Therefore, there is a presumption that they can do so again for the Track 2 hearing.⁵ But more importantly, forced public disclosure of the Documents, which contain valuable confidential commercial information, is likely to cause substantial harm to the competitive positions of the PWROG and its members and Westinghouse. New York has not shown that the public interest outweighs the substantial competitive harm that would accrue to the PWROG and Westinghouse as a result of the forced public disclosure of the Documents. Thus, the Board should find that continued protection of the Documents from public disclosure is warranted under 10 C.F.R. § 2.390 and the Protective Order.

I. BACKGROUND

Normally, proprietary documents containing trade secrets and privileged or confidential commercial or financial information are not to be made publicly available, even if they are discoverable in an ongoing adjudication. Indeed, for that reason, NRC regulations permit the use of protective orders to allow parties, other than the holder of the proprietary information, to access

⁵ Although it was not necessary for the Board to hold any *in camera* hearing sessions for the Track 1 contentions, the Board did admit into evidence numerous documents that were withheld from public disclosure because they are proprietary and/or are subject to copyright protection. See Board Order (Issuing Appendix B to the Partial Initial Decision) (Nov. 27, 2013) & Appendix B (Track 1 Exhibit List). For example, Entergy Exhibits ENT000068, ENT000070, and ENT000071, which were admitted in connection with Contention RK-TC-2 (Flow-Accelerated Corrosion), were withheld from public disclosure as Electric Power Research Institute (EPRI) proprietary information.

proprietary documents while still preserving their confidentiality.⁶ The Commission long has endorsed the use of protective orders, and such orders are routinely issued in NRC adjudications.⁷

This proceeding is no exception. On September 4, 2009, the Board issued the Protective Order in this proceeding to allow all parties full access to proprietary documents that may be relevant to admitted contentions.⁸ The Initial Holder of the proprietary information may designate documents proprietary upon a “good faith belief” that the document contains trade secrets or privileged or confidential commercial or financial information.⁹

Pursuant to the general discovery requirements of 10 C.F.R. § 2.336, and the agreement among the parties as submitted to the Board on January 13, 2009,¹⁰ Entergy disclosed the existence of the Documents to the parties to this proceeding.¹¹ Based on the requirements of the Protective Order, and a good faith belief that these documents contain trade secrets or privileged

⁶ 10 C.F.R. § 2.390(b)(6).

⁷ *See, e.g., Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-80-24, 11 NRC 775, 777 (1980) (“[T]he Commission’s regulations, 10 CFR [2.390], contemplate that sensitive information may be turned over to intervenors in NRC proceedings *under appropriate protective orders.*”) (emphasis added).

⁸ *See* Protective Order at 1. Access is subject to certain reasonable conditions, such as signing an agreement not to disclose the content of the documents. *See id.* at 4 & Attach. A (Nondisclosure Agreement and Acknowledgment). There is no concern that these conditions have been met in this proceeding or that they are somehow unreasonable.

⁹ Protective Order at 2. The Protective Order states that “counsel, witnesses, employees, members, officers, consultants, and others representing a party or interested governmental entity in this proceeding (all of whom are referred to herein, collectively, as ‘Participants’) shall be permitted access to proprietary documents held by another Participant in this proceeding (‘Initial Holders’) otherwise required to be disclosed in accordance with 10 C.F.R. § 2.336(a) upon the conditions set forth herein.” *Id.* Thus, Entergy views itself as the Initial Holder of the proprietary Documents, whereas as the PWROG and Westinghouse are the actual owners of the Documents.

¹⁰ Letter from P. Bessette to the Administrative Judges, Agreement of the Parties Regarding Mandatory Discovery Disclosures (Jan. 13, 2009), *available at* ADAMS Accession No. ML090270876.

¹¹ Letter from P. Bessette to the Parties, Seventy-first Update to Disclosures Pursuant to 10 C.F.R. § 2.336; Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-247-LR and 50-286-LR (Jan. 5, 2015) (disclosing the PWROG Memorandum); Letter from P. Bessette to the Parties, Twenty-Second Update to Disclosures Pursuant to 10 C.F.R. § 2.336; Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-247-LR and 50-286-LR (Dec. 1, 2010) (disclosing CN-PAFM-09-77); Letter from P. Bessette to the Parties, Forty-sixth Update to Disclosures Pursuant to 10 C.F.R. § 2.336; Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-247-LR and 50-286-LR (Dec. 5, 2012) (disclosing CN-PAFM-12-35); Letter from P. Bessette to the Parties, Fifty-seventh Update to Disclosures Pursuant to 10 C.F.R. § 2.336; Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-247-LR and 50-286-LR (Nov. 4, 2013) (disclosing CN-PAFM-13-32); Letter from P. Bessette to the Parties, Fifty-eighth Update to Disclosures Pursuant to 10 C.F.R. § 2.336; Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-247-LR and 50-286-LR (Dec. 4, 2013) (disclosing CN-PAFM-13-40).

or confidential commercial or financial information, Entergy disclosed the documents as “proprietary” on the relevant disclosure logs.¹² Following requests for disclosure, Entergy timely produced each of these documents in their full, unredacted form.¹³

Now, New York challenges the proprietary designation of the Documents, and seeks an order from the Board “striking Westinghouse’s proprietary designations.”¹⁴ New York argues that it should prevail on the Motion “because neither Entergy nor Westinghouse have shown [past tense] that the documents at issue contain” information within the scope of 10 C.F.R. § 2.390.¹⁵ New York has not alleged any problems related to access to the proprietary information that would hinder it from effectively participating in this proceeding. Instead, it contests proper application of the Protective Order—the need for and contents of which it endorsed nearly six years ago—inexplicably claiming that it “is contrary to the NRC’s regulations.”¹⁶

II. LEGAL STANDARDS

The Protective Order states that, upon the filing of a motion for disclosure, the Board will review the information against the criteria in 10 C.F.R. § 2.390,¹⁷ “which embodies the standards of Exemption 4 of the Freedom of Information Act (FOIA).”¹⁸ FOIA requires federal agencies to, *inter alia*, make available certain records to members of the public upon specific request for those

¹² See *id.*

¹³ See Bates Nos. IPECPROP00081155-60; IPECPROP00057823-916; IPECPROP00072778-861; IPECPROP00078338-425; IPECPROP00079751-873.

¹⁴ Motion at 6.

¹⁵ *Id.* However, New York misconstrues the Protective Order, which requires only that the holder of the proprietary information meet its burden of proof regarding the proprietary nature of the documents *after* a motion to compel disclosure has been filed (*i.e.*, in the answer to the motion). See Protective Order at 3-4. As demonstrated in Section III below and by the attached Affidavits and Declaration provided by authorized PWROG and Westinghouse officials, the Initial Holder (Entergy) has, in fact, satisfied its burden of proof.

¹⁶ Motion at 13.

¹⁷ Protective Order at 4.

¹⁸ *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 163 (2005). See also *Gen. Elec. Co. v. NRC*, 750 F.2d 1394, 1397-98 (7th Cir. 1984).

records *except to the extent that the records are exempt from public disclosure* by one of the nine enumerated exemptions.¹⁹ FOIA Exemption 4 protects from public disclosure “trade secrets and commercial or financial information obtained from a person and [is] privileged or confidential.”²⁰ Under Exemption 4, the generally accepted legal definition of “confidential” is information whose disclosure is likely to (1) impair the government’s future ability to obtain necessary information; (2) impair other government interests such as compliance, program efficiency and effectiveness, and the fulfillment of an agency’s statutory mandate; or (3) cause substantial harm to the competitive position of the person from whom the information was obtained.²¹

NRC regulations at 10 C.F.R. § 2.390 encompass the FOIA exemptions as well as instructions for outside entities who might submit nonpublic information to the NRC.²² These requirements and exemptions reflect a balancing of public disclosure with confidentiality that Congress struck when enacting FOIA.²³ The Commission looks to federal case law applying FOIA Exemption 4 in applying 10 C.F.R. § 2.390 to commercial or financial information.²⁴

Section 2.390 sets forth a two-pronged test for determining whether information should be held as proprietary: first, the information must be a trade secret or confidential or privileged commercial or financial information; and second, the public interest must be outweighed by the

¹⁹ *Shaw Group Inc.* (NRC Investigation Case No. 2-2013-001), CLI-13-5, 77 NRC 223, 228 (2013) (citing 5 U.S.C. § 552).

²⁰ 5 U.S.C. § 552(b)(4).

²¹ *Private Fuel Storage*, CLI-05-1, 61 NRC at 163-64 (citing *McDonnell Douglas Corp. v. Nat’l Aeronautics and Space Admin.*, 180 F.3d 303, 305 (D.C. Cir. 1999), *reh’g en banc denied*, No. 98-5251 (D.C. Cir. Oct. 6, 1999); *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (*en banc*), *cert. denied*, 507 U.S. 984 (1993), *approving on this ground but rev’g and vacating on other grounds*, 830 F.2d 278, 286 (D.C. Cir. 1987); *9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 7-10 (1st Cir. 1983)).

²² *Shaw Group*, CLI-13-5, 77 NRC at 228 (citing 10 C.F.R. § 2.390).

²³ *Id.* at 228-29 (citing *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989)).

²⁴ *Private Fuel Storage*, CLI-05-1, 61 NRC at 163.

commercial harm of disclosure.²⁵ As to the first prong, the regulations state that consideration of the information should include whether: (1) it has been held in confidence; (2) it is of a type customarily held in confidence and whether there is a rational basis for doing so; (3) it was sent to the NRC in confidence; (4) it is available in public sources; and (5) its disclosure is likely to cause substantial harm to the competitive position of the owner of the information.²⁶

For purposes of the competitive harm prong of the analysis, actual competitive harm need not be demonstrated.²⁷ Rather, the Initial Holder needs only to explain that it faces commercial competition, and that there is a mere “likelihood” of competitive injury.²⁸ The federal courts are divided on the question of what constitutes “competitive injury.”²⁹ New York cites the narrower standard—that the competitive harm must flow from use of the proprietary information only by competitors.³⁰ However, the Commission has adopted the broader standard—that the competitive harm can flow from either competitors or non-competitors (*e.g.*, customers or suppliers).³¹

If the Board determines that the information is, in fact, a trade secret or confidential commercial or financial information, then the second prong of the test requires it to “determine

²⁵ 10 C.F.R. § 2.390(b)(3), (5).

²⁶ *Id.* § 2.390(b)(4)(i)-(v). The last factor includes consideration of “the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.” *Id.* § 2.390(b)(4)(v).

²⁷ *Private Fuel Storage*, CLI-05-1, 61 at 171, 173 (citing *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988); *Gulf & Western Indus., Inc. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979)).

²⁸ *Id.* at 172-73 (citing *Gulf & Western Indus.*, 615 F.2d at 530; *Niagara Mohawk Power Corp. v. Dep’t of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999); *Frazee v. Forest Serv.*, 97 F.3d 367, 371 (9th Cir. 1996); *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994); *Pub. Citizen Health Research Grp. v. Food and Drug Admin.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983); *Pub. Citizen Health Research Grp. v. Nat’l Inst. of Health*, 209 F. Supp. 2d 37, 46 (D.D.C. 2002)).

²⁹ *See, e.g., McDonnell Douglas.*, 180 F.3d at 307; *cf. e.g., CNA*, 830 F.2d at 1152.

³⁰ Motion at 9.

³¹ *Private Fuel Storage*, CLI-05-1, 61 NRC at 164 (“[W]e find the broader interpretation to be closer to the heart of Exemption 4 and 10 C.F.R. § [2.390], and thus we adopt it.”). *See also id.* at 172-72 (“[T]he well-established rule [is] that a company can demonstrate substantial harm to its competitive position without showing “actual competitive harm,” *i.e.*, harm directly caused by disclosure of information to a company’s competition. Rather, all that is required under Exemption 4 is a showing that it faces both actual competition and a *likelihood* of substantial competitive injury.”) (emphasis in original; internal citations omitted).

whether the right of the public to be fully apprised as to the bases for and effects of the proposed action outweighs the demonstrated concern for protection of a competitive position.”³² The Commission has emphasized that “[t]he public interest to be weighed in this balance has been narrowly defined as an interest in determining the bases for and effects of agency action (*i.e.*, determining ‘what the government is up to’).”³³ In this context, the public interest “does *not* include incidental benefits from disclosure that may be enjoyed by members of the public.”³⁴

III. THE DOCUMENTS ARE CONFIDENTIAL COMMERCIAL INFORMATION

New York argues that its Motion should be granted because Entergy and Westinghouse “have failed to show” that the documents at issue are proprietary and because they have not yet offered an affidavit explaining the proprietary designations.³⁵ Yet, New York does not identify any authority requiring Entergy and Westinghouse to have done so during informal consultation or prior to the filing of the Motion.³⁶ Nor could it. In fact, the Protective Order states precisely the opposite—that “the good faith representation and designation of documents as proprietary . . . serves in lieu of the requirement for an affidavit 10 C.F.R. § 2.390(b).”³⁷ New York also casually dismisses Entergy’s good faith representation as “conclusory.”³⁸ New York’s arguments on these points are baseless and, furthermore, are not material to the findings that the Board must make in ruling on the Motion.

³² 10 C.F.R. § 2.390(b)(5).

³³ Final Rule, Availability of Official Records, 68 Fed. Reg. 18,836, 18,837 (quoting *Pub. Citizen Health Research Grp. v. FDA*, 185 F. 3d 898, 904 (D.C. Cir. 1999)).

³⁴ *Id.* (citing *Pub. Citizen*, 185 F.3d at 905) (emphasis added).

³⁵ Motion at 7.

³⁶ The Commission has noted that the proprietary determination decision-making process usually provides several opportunities for the submitter to make a case for withholding information from public disclosure, and that, as a practical matter, the final determination may be the outcome of a series of exchanges between the agency and the submitter. Final Rule, Availability of Official Records, 68 Fed. Reg. at 18,837.

³⁷ Protective Order at 3.

³⁸ Motion at 7.

Ordinarily, an entity that submits a document to the NRC (whether voluntarily or to meet a legal or regulatory requirement) and seeks to have the document withheld from public disclosure as proprietary would file a supporting affidavit at that time.³⁹ This is not the case here, where the documents at issue were not submitted directly by Westinghouse to the NRC, but instead were disclosed by Entergy to the other parties as part of the mandatory disclosure process. In response to the Motion, and to assist Entergy in meeting its burden under the Protective Order, authorized PWROG and Westinghouse officials prepared affidavits that address, with specificity, the considerations listed in 10 C.F.R. § 2.390(b)(4). Those affidavits set forth the bases for withholding the Documents from public disclosure and are included as Attachments 1 and 2 to this Answer. Westinghouse also has provided a separate declaration by one of its Principal Engineers that further explains the bases for the company's position in view of certain arguments made by New York in its Motion.⁴⁰ That declaration is included as Attachment 3 to this Answer.

A. The PWROG Memo Constitutes Confidential Commercial Information

Attachment 1 is an Affidavit executed by Mr. Anthony Nowinowski, Manager, PWROG Project Management Office.⁴¹ The Nowinowski Affidavit addresses each of the criteria set forth in 10 C.F.R. § 2.390(b)(4). It states that the information sought to be withheld from public disclosure: (1) is owned and has been held in confidence by the PWROG and its individual members; (2) is of a type customarily held in confidence by the PWROG and its individual members and not disclosed to the public; (3) has been transmitted to and received by the NRC in

³⁹ 10 C.F.R. § 2.309(b)(1).

⁴⁰ New York states that it “reserves its right to file an appropriate motion or reply” in response to any affidavits submitted by Entergy in support of Westinghouse’s proprietary designation of the Documents. Motion at 15. However, neither NRC regulations (10 C.F.R. §§ 2.323 and 2.390) nor the relevant Board Orders (the Board’s July 2014 Scheduling Order and September 2009 Protective Order) give New York a “right” to file a reply. Further, New York never raised this request during its several consultations with the Parties on this Motion.

⁴¹ See Affidavit of W. Anthony Nowinowski, Manager, PWROG Project Management Office (Apr. 20, 2015) (“Nowinowski Affidavit”) (Attach. 1).

confidence (in this case under the terms of the Protective Order); (4) is not, as compiled and used in the PWROG Memo, available in public sources; and (5) is likely, if publicly disclosed, to cause substantial harm to the competitive position of the PWROG and one or more of its individual members.⁴²

The Nowinowski Affidavit explains why there is a rational basis for treating the PWROG Memo as confidential and withholding it from public disclosure.⁴³ Further, it states that the PWROG Memo has substantial commercial value because: (1) the PWROG and one or more of its individual members plan to utilize the information contained in that document to prepare a response to NRC Branch Technical Position (“BTP”) 5-3; and (2) the PWROG Memo reveals the preliminary, strategic deliberations of the PWROG and one or more of its individual members.⁴⁴ The PWROG Memo is specifically directed to PWROG leadership and was prepared with the intent of supporting resolution of BTP 5-3.⁴⁵ The mere fact that the PWROG Memo “addresses issues that have been the subject of several public meetings and presentations before the NRC,” or that the “PWROG made a presentation of its understanding of the BTP 5-3 issue,” as New York argues,⁴⁶ does not alter the deliberative nature of the PWROG Memo. Therefore, as the Nowinowski Affidavit further attests, public disclosure of the PWROG Memo is likely to cause substantial harm to the competitive position of the PWROG and its members.⁴⁸

⁴² See Nowinowski Affidavit at ¶¶ (3)(i)-(vi).

⁴³ See *id.* at ¶¶ (3)(ii)-(iii).

⁴⁴ See *id.* at ¶¶ (3)(vi)(b)(i)-(ii).

⁴⁵ PWROG Memo at 1.

⁴⁶ Motion at 11.

⁴⁸ See Nowinowski Affidavit at ¶ (3)(vi) (paragraph following paragraph (3)(vi)(b)(ii). New York states that federal case law holds that a document should not be withheld from disclosure “because it may be embarrassing to its owner.” Motion at 9. It is unclear to Entergy how this principle applies to the instant dispute. Insofar as New York is suggesting that Entergy is reluctant to disclose the PWROG Memo, there is simply no basis for such statements. Entergy also notes that the document is classified as proprietary by the PWROG, not Entergy. Furthermore, as discussed above, the PWROG seeks to have the PWROG Memo withheld from public disclosure because it reflects the

B. The Westinghouse Calculation Notes Constitute Confidential Commercial Information

Attachment 2 is an Affidavit executed by Mr. James A. Gresham, Manager, Regulatory Compliance, Westinghouse.⁴⁹ The Gresham Affidavit similarly explains that the Calculation Notes have been held in confidence; are customarily held in confidence, with a rational basis for doing so; were provided to the NRC (via the Protective order) in confidence; are not available in public sources; and, are likely, if disclosed, to cause competitive harm to Westinghouse.⁵⁰ As further stated in the Gresham Affidavit, the Calculation Notes have substantial commercial value because Westinghouse plans to use the methods described therein to sell services to its customers for the purpose of supporting reactor internals aging management, and the Calculation Notes reveal distinguishing aspects of methodologies that were developed by Westinghouse.⁵¹

Attachment 3 is a declaration prepared by Mark Gray, a Principal Engineer at Westinghouse.⁵² In his declaration, Mr. Gray further explains the bases for Westinghouse's treatment of the Calculation Notes as proprietary. Mr. Gray states that he is familiar with the Westinghouse intellectual property management policy and procedure and each of the four Calculation Notes.⁵³ According to Mr. Gray, each of the Calculation Notes contains special methodologies or calculation techniques developed by or for Westinghouse using a knowledge base that is not available in the open literature, contains Entergy's proprietary information, or

preliminary, strategic deliberations of the PWROG, not because it is the source of any presumed or hypothetical embarrassment to the organization or Entergy.

⁴⁹ Affidavit of James A. Gresham, Manager, Regulatory Compliance, Westinghouse Electric Company LLC (Apr. 16, 2015) ("Gresham Affidavit") (Attach 2).

⁵⁰ *Id.* at ¶¶ (4)(i)-(vi).

⁵¹ *Id.* at ¶¶ (4)(vi)(b)(i)-(ii).

⁵² Declaration of Mark A. Gray, Principal Engineer, Westinghouse Electric Company LLC (Apr. 20, 2015) ("Gray Declaration") (Attach. 3).

⁵³ *Id.* at ¶¶ 2, 6.

contains information that Westinghouse does not disclose to competitors.⁵⁴ Consequently, each of the Calculation Notes is identified as Westinghouse Proprietary Class 2 pursuant to the Westinghouse intellectual property management policy and procedure.⁵⁵ Mr. Gray further explains why each of Calculation Notes is designated Westinghouse Proprietary Class 2, and why substantial competitive harm to Westinghouse would result from the public disclosure thereof:

- CN-PAFM-09-77 contains analyses that were performed using derived value functions and the transfer function methodology contained within Westinghouse's proprietary WESTEMSTM software code, as well as Westinghouse methodology for application of ASME Code stress classification.⁵⁶ Public disclosure of CN-PAFM-09-77 would provide a competitor with insights into the specific functioning of the WESTEMSTM software code and the specific considerations used by Westinghouse to determine how the WESTEMSTM software code is applied on a plant-specific basis, as well as insights into the Westinghouse methodology for application of ASME Code stress classification.⁵⁷
- CN-PAFM-12-35 contains supplemental environmentally-assisted fatigue ("EAF") screening analyses for the Class 1 piping performed and derived using comparisons made between the IP2/IP3-specific components and similar components included in Westinghouse's proprietary piping Reference Fatigue Analysis ("RFA") database. The methodology utilized for these screening analyses relied upon Westinghouse's proprietary database of component fatigue evaluations and related experience to establish the common analysis basis of comparison. Public disclosure of CN-PAFM-12-35 would give a competitor insights into how this methodology was derived and is used by Westinghouse.⁵⁸
- CN-PAFM-13-32 contains piping EAF screening evaluations that were performed and derived using a combination of Indian Point-specific inputs and Westinghouse's proprietary piping RFA database. The methodology used for these screening evaluations relied upon Westinghouse's proprietary database of component fatigue evaluations and

⁵⁴ *Id.* at ¶ 7.

⁵⁵ *Id.* at ¶¶ 7, 8.

⁵⁶ WESTEMSTM is a software code used by Westinghouse to conduct fatigue evaluations in support of license renewal and other activities at many nuclear plants, including Indian Point Units 2 and 3. WESTEMSTM is a computer program that implements the requirements of the American Society of Mechanical Engineers ("ASME") Section III Code. *See* WESTEMSTM User's Manual, Version 4.5, Vol. 2 at 38 (NYS00358A). Attachment 4 to this Answer is a publicly-available Westinghouse brochure that describes the WESTEMSTM software code in greater detail, including its significant analytical, computational, and cost-reduction capabilities. *See* Nuclear Services/Engineering Services (NES)-0210, "WESTEMSTM Fatigue Analysis, Diagnostics and Monitoring System (Nov. 2011) (Attach. 4).

⁵⁷ Gray Declaration at ¶ 7.a. (Attach. 3).

⁵⁸ *Id.* at ¶ 7.b.

related experience. Public disclosure of CN-PAFM-13-32 would provide a competitor with insights into how this methodology was derived and is used by Westinghouse.⁵⁹

- CN-PAFM-13-40 contains analyses that were performed using derived value functions and the transfer function methodology contained within Westinghouse's proprietary WESTEMS™ software code. In addition, it reflects Westinghouse's use of special methodologies involving user peak editing to remove redundancies, as discussed in Appendix D of the Calculation Note, to fully satisfy NRC Regulatory Information Summary 2011-14.⁶⁰ It also describes specific assumptions made regarding spray operations during plant evolutions based on plant data and their detailed implementation in transient loading development. Public disclosure of CN-PAFM-13-40 would provide a competitor with insights into the specific functioning of the WESTEMS™ software code and the specific considerations used by Westinghouse to determine how WESTEMS™ is applied on a plant-specific basis, as well as provide a competitor with insights into the how these special methodologies were derived and are utilized by Westinghouse.⁶¹

Accordingly, the Calculation Notes contain information that has substantial commercial value, the public disclosure of which would undermine the competitive advantage enjoyed by Westinghouse as a result of its exclusive ownership of that information. The Gresham Affidavit states that “[t]he development of the technology described in part by the information [in the Calculation Notes] is the result of applying the results of many years of experience in an intensive Westinghouse effort and the expenditure of a considerable sum of money.”⁶² Further, public disclosure of this proprietary information “would enhance the ability of competitors to provide similar technical evaluation justifications and licensing defense services for commercial power reactors without commensurate expenses,” or “to use the information to meet NRC requirements for licensing documentation without purchasing the right to use the information.”⁶³ In short, there is ample basis to conclude that public disclosure of this proprietary information is likely to cause substantial harm to the competitive position of Westinghouse.

⁵⁹ *Id.* at ¶ 7.c.

⁶⁰ Regulatory Information Summary 2011-14, “Metal Fatigue Analysis Performed by Computer Software” (Dec. 29, 2011), *available at* NRC ADAMS Accession No. ML11143A035.

⁶¹ Gray Declaration at ¶ 7.d. (Attach. 3).

⁶² Gresham Affidavit at ¶ (4)(vi)(b) (Attach. 2).

⁶³ *Id.*

New York's arguments fail to support a different conclusion. First, contrary to New York's claim, the Calculation Notes do, in fact, reveal commercially valuable information about Westinghouse's analytical processes and methodologies.⁶⁴ The Gresham Affidavit and Gray Declaration confirm this fact. Westinghouse regulatory compliance and engineering personnel, not New York counsel, are more qualified to make this determination.⁶⁵ The Board, therefore, should accord the Gresham Affidavit and Gray Declaration their due weight.

Second, with one exception cited by New York, the information sought to be protected is not available in public sources, or available information has not been previously employed in the same original manner or method to the best of Westinghouse's knowledge and belief.⁶⁶ That exception is a collateral citation to a calculation result (*i.e.*, a specific "CUF_{en}" value) from CN-PAFM-12-35 in NRC Inspection Report 05000247/2013010—the information was made public without Westinghouse's prior knowledge or consent.⁶⁷ A federal agency's release of proprietary information without the initial holder's knowledge or consent is insufficient to consider that information "in the public domain and no longer entitled to confidential treatment."⁶⁸

Relatedly, New York argues that the CUF_{en} values have no "intrinsic value" for

⁶⁴ See Motion at 12.

⁶⁵ Cf. *Struth v. FBI*, 673 F.Supp. 949, 954 (E.D.Wis. 1987) ("Courts have consistently held that a requester's opinion disputing the risk created by disclosure is not sufficient to preclude summary judgment for the agency, when the agency possessing the relevant expertise has provided sufficiently detailed affidavits.").

⁶⁶ Gresham Affidavit at ¶ (4)(v) (Attach. 2).

⁶⁷ *Id.* In a related vein, New York asserts that in a decision issued in the *Vermont Yankee* license renewal proceeding, the board freely discussed Entergy's CUF_{en} analyses, comparing various CUF_{en} values presented during the proceeding. Motion at 12-13. That decision explicitly reflects the fact that another vendor, not Westinghouse, prepared the CUF_{en} analyses supporting the Vermont Yankee license renewal application. See *Entergy Nuclear Vt. Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), LBP-08-25, 68 NRC 763, 796, 803 (2008).

⁶⁸ See *Martin Marietta Corp. v. Dalton*, 974 F.Supp. 37, 40 (D.D.C. 1997); accord *Parker v. Bureau of Land Mgmt.*, 141 F.Supp.2d 71, 80 (D.D.C. 2001).

Westinghouse.⁶⁹ New York misses the point. Those values do not exist in a vacuum. They were derived from analyses and calculations—which New York seeks to make public—that do have intrinsic and substantial commercial value to Westinghouse for the reasons stated in the Gresham Affidavit and Gray Declaration.⁷⁰ New York’s attempt to analogize EAF analysis data and results (which are the end product of Westinghouse’s application of its engineering expertise and experience) to raw “emissions or effluent data” submitted to the Environmental Protection Agency rings hollow.⁷¹ Without question, the two categories of data are markedly different.

Finally, New York states that it has identified in ADAMS three Westinghouse calculations in both un-redacted and redacted form.⁷² Consequently, Entergy asked Westinghouse to review the specific documents cited by New York in its Motion. Mr. Gray states in his declaration that with the exception of those three documents, he is not aware of any other instances in which Westinghouse has distributed a calculation note on a non-confidential basis outside of Westinghouse.⁷³ Westinghouse’s previous disclosure of the three documents cited by New York (two of which are redacted and none of which is remotely related to the Calculation Notes) does not constitute a concession by Westinghouse that the Calculation Notes or any other Westinghouse proprietary documents should be made publicly available.⁷⁴

⁶⁹ Motion at 12.

⁷⁰ *Cf. Allnet Comm’n Servs. v. FCC*, 800 F.Supp 984, 987 (D.D.C. 1982) (finding that “output data and reports and extensive descriptive and instructional material which accompanies the software” were properly withheld from public disclosure as confidential commercial information within the meaning of FOIA Exemption 4).

⁷¹ Motion at 13-14.

⁷² *Id.* at 3 n. 13.

⁷³ Gray Declaration at ¶ 5 (Attach. 3).

⁷⁴ *See Powertech USA, Inc.* (Dewey-Burdick In Situ Uranium Facility), Licensing Board Order (Ruling on Confidentiality of Exhibits OST-029 through OST-041) at 6 (Jan. 12, 2015) (unpublished), *available at* ADAMS Accession No. ML15012A372 (stating that even though an applicant “publicly released some well log data in its application, this does not mean the company is now bound to release all other log data it possesses,” and that the well logs at issue contained different data, not information identical to that already in the public domain).

**IV. NEW YORK HAS NOT SHOWN THAT THE PUBLIC INTEREST
OUTWEIGHS THE SUBSTANTIAL COMMERCIAL HARM THAT
LIKELY WOULD RESULT FROM DISCLOSURE OF THE DOCUMENTS**

New York argues that, even if the Documents are proprietary, they should be disclosed because the Board’s Protective Order creates an “unnecessarily burdensome filing process.”⁷⁵ As support, New York cites its asserted recent need to file both redacted and unredacted pleadings.⁷⁶ But that argument is unavailing. Parties to countless NRC adjudications—including the parties to this proceeding—have routinely filed documents under protective cover due to their proprietary nature. The NRC’s hearing rules and related agency guidance specifically address the treatment of proprietary or nonpublic information.⁷⁷ Indeed, the NRC’s Electronic Information Exchange (“EIE”) System features a separate platform for making nonpublic filings. Thus, the Board’s Protective Order, which has been in place for almost six years, is not unduly burdensome—it simply implements longstanding agency procedures designed to protect proprietary and other sensitive information from inadvertent or unnecessary public disclosure.

New York further argues that the Protective Order serves as a “general cloak of secrecy” that is “contrary to the NRC’s regulations.”⁷⁸ That argument is specious, given the Commission’s explicit endorsement of such protective orders in 10 C.F.R. § 2.390(b)(6) and the prior application of the Board’s Protective Order in this proceeding with respect to certain Track 1 hearing exhibits. Moreover, such generalized attacks on the Protective Order itself are not only groundless, they are

⁷⁵ Motion at 14.

⁷⁶ *Id.* In point of fact, the Protective Order does not require the filing of both redacted and unredacted versions of pleadings. *See* Protective Order at 6-7.

⁷⁷ *See* 10 C.F.R. § 2.390(a)(4), (b).

⁷⁸ Motion at 13.

irrelevant to the Board’s task here; *i.e.*, to determine “whether, on balance, protection of the document[s] from public disclosure is warranted under 10 C.F.R. § 2.390.”⁷⁹

Finally, New York claims that Westinghouse’s allegedly “unwarranted use” of the proprietary designation for the Documents “deprives the public of access to information relevant to NRC decision-making.”⁸⁰ That argument is frivolous on its face. New York, which purports to represent the public interest, has not been denied access to the information in question. On the contrary, Entergy and Westinghouse have been forthcoming in their disclosures of relevant proprietary information, and have provided New York with timely access to that information via the procedures established by the Protective Order.⁸¹ Taken to its logical extreme, New York’s argument would mean that *any* information that informs NRC safety determinations and decision-making must be disclosed to the general public. That outcome is patently inconsistent with the statutory and regulatory schemes under which the NRC conducts its day-to-day business. Furthermore, it would severely undermine the basic policy underlying protective orders, which is to facilitate the exchange of relevant non-public documents in an adjudication while limiting disclosure of such documents to participants in the proceeding.⁸² Parties would have a reduced incentive to enter into Protective Orders if they feared that their proprietary documents would be readily disclosed to the public.

Although the 10 C.F.R. § 2.390 balancing test allows for public disclosure of proprietary information in certain, limited circumstances, the Commission has “stresse[d] that it rarely, if ever,

⁷⁹ Protective Order at 4.

⁸⁰ Motion at 14.

⁸¹ See pp. 3-4, *supra*.

⁸² See, e.g., *Micro Motion, Inc. v. Kane Steel Co., Inc.*, 894 F.2d 1318, 1325 (Fed. Cir. 1990) (stating that the purpose of a “protective order is to prevent harm by limiting disclosure of relevant and necessary information,” and that “[i]n appropriate cases, particularly where the company from whom discovery is sought has an affinity with a party to the main litigation, a protective order may be effective protection to a nonparty”) (citation omitted).

has released proprietary information over the objection of a submitter.”⁸³ For the reasons stated in the Nowinowski and Gresham Affidavits, “[p]ublic disclosure of this proprietary information is likely to cause substantial harm to the competitive position of Westinghouse because it would enhance the ability of competitors to provide similar technical evaluation justifications and licensing defense services for commercial power reactors without commensurate expenses.”⁸⁴ This is certainly a “demonstrated concern for protection of a competitive position,” as required by 10 C.F.R. § 2.390(b)(5). The D.C. Circuit spoke to this point in applying FOIA Exemption 4:

Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA’s principal aim of promoting openness in government.⁸⁵

Under the Section 2.390 balancing test, the Board must determine whether this concern is outweighed by “the right of the public to be fully apprised as to the bases for and effects of the proposed action.”⁸⁶ New York has not explained how public dissemination of the Documents would serve the goal of informing the public with respect to agency decision-making. The PWROG Memorandum has not previously been provided to the NRC, and is not the basis for any such decision-making. “[T]here is no countervailing public interest in disclosure” of the PWROG Memorandum because it “sheds no light whatsoever on [the NRC’s] performance of its duties.”⁸⁷

⁸³ Final Rule, Availability of Official Records, 68 Fed. Reg. 18,837.

⁸⁴ Gresham Affidavit ¶ (4)(vi) (paragraph following paragraph (4)(vi)(b)(ii)).

⁸⁵ *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (1981) (reversing a lower court’s granting of summary judgment in favor of an EPA decision to release information (*i.e.*, test results and design specifications of products in “production verification” reports) that the submitters sought to have withheld under Exemption 4).

⁸⁶ 10 C.F.R. § 2.390(b)(5).

⁸⁷ See *Gilmore v. U.S. Dep’t of Energy*, 4 F.Supp.2d 912, 923 (N.D. Cal. 1998).

Additionally, the bases for the NRC Staff's approval of Entergy's EAF-related aging management activities are discussed in its safety evaluation report ("SER"), as supplemented.⁸⁸ The Staff's SER and supplements thereto provide the essential details that the public needs to understand and inquire into the Commission's actions.⁸⁹ Those details will be further vetted during the Track 2 evidentiary hearings, which will culminate in the issuance of a detailed merits decision by this Board.⁹⁰ At the end of the day, New York's generalized grievance regarding "public [] access to information"⁹¹ does not outweigh the substantial competitive harm that PWROG or Westinghouse is likely to experience if the Documents are disclosed. The PWROG and Westinghouse should not be subjected to the unnecessary regulatory taking and wide-scale public disclosure of their valuable commercial information absent sufficient justification, which is not present here.

⁸⁸ See NUREG-1930, Vol. 2 "Safety Evaluation Report Related to the License Renewal of Indian Point Nuclear Generating Plant Units 2 and 3" at 4-41 to 4-47 (Nov. 2009); NUREG-1930, "Safety Evaluation Report Related to the License Renewal of Indian Point Nuclear Generating Plant Units 2 and 3," Supp. 1 at 4-1 to 4-3 (Aug. 2011); NUREG-1930, "Safety Evaluation Report Related to the License Renewal of Indian Point Nuclear Generating Plant Units 2 and 3," Supp. 2 at 3-50 to 3-53 (Nov. 2014).

⁸⁹ Specifically, the SER and two supplements thereto (*see* n. 88, *supra*) describe the relevant regulatory requirements and guidance, the NRC Staff's review of Entergy's license renewal application and related correspondence (including Entergy responses to numerous NRC Staff requests for additional information), and the technical bases for the NRC Staff's conclusion that Entergy has demonstrated that the effects of metal fatigue, including the effects of the reactor water environment (*i.e.*, EAF), will be adequately managed, such that affected components will remain capable of performing their intended function throughout the period of extended operation, consistent with the requirements 10 C.F.R. §§ 54.21(a)(3), (c)(1)(iii), and 54.29(a).

⁹⁰ As another licensing board noted, assuming that, as in this case, a protected information claim is supported by a properly executed affidavit, there is "no reason at this juncture to engage in the considerable effort that may be involved in parsing the various parties' pleadings to identify and then resolve the question of what information has that protected status. This is a matter that is best left to the conclusion of the merits of this litigation." *See Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), LBP-00-6, 51 NRC 101, 135 (2000).

⁹¹ Motion at 14.

V. CONCLUSION

For all of these reasons, New York's Motion should be denied in its entirety.

Respectfully submitted,

William B. Glew, Jr., Esq.
Entergy Nuclear Operations, Inc.
440 Hamilton Avenue
White Plains, NY 10601
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E-mail: wglew@entergy.com
Phone: (202) 739-5738

Signed (electronically) by Paul M. Bessette
Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
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MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
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E-mail: pbessette@morganlewis.com

Counsel for Entergy Nuclear Operations, Inc.

Dated in Washington, D.C.
this 20th day of April 2015

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

April 20, 2015

20

ATTACHMENT 1

**Affidavit of W. Anthony Nowinowski, Manager, Pressurized Water
Reactor Owners Group Project Management Office (Apr. 20, 2015)**

UNITED STATES NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In re: License Renewal Application Submitted by:
Entergy Nuclear Indian Point 2, LLC
Entergy Nuclear Indian Point 3, LLC and
Entergy Nuclear Operations, Inc.

Docket Nos. 50-247-LR; 50-286-LR
ASLBP No. 07-858-03-LR-BD01
DPR-26; DPR-64

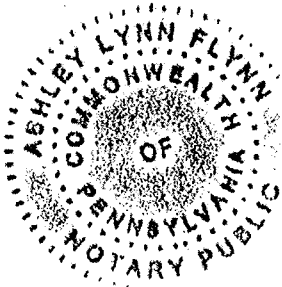
AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA:

ss

COUNTY OF BUTLER:

Before me, the undersigned authority, personally appeared W. Anthony Nowinowski, who, being by me duly sworn according to law, deposes and says that he is authorized to execute this Affidavit on behalf of the PWR Owners Group (PWROG), and that the averments of fact set forth in this Affidavit are true and correct to the best of his knowledge, information, and belief:

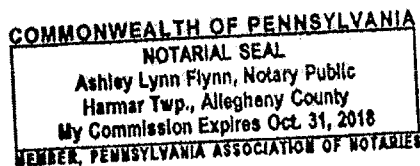


A handwritten signature of W. Anthony Nowinowski in black ink.

W. Anthony Nowinowski, Manager
PWROG Project Management Office

Sworn to and subscribed before me
this 20 day of April 2015

A handwritten signature of Ashley Lynn Flynn in black ink.
Notary Public



- (1) I am Manager, PWROG Project Management Office, and as such, I have personal knowledge of the criteria and procedures utilized by the PWROG in designating information as trade secret, privileged or as confidential commercial or financial, and am authorized to apply for its withholding on behalf of the PWROG.
- (2) I am making this Affidavit in conformance with the provisions of 10 CFR Section 2.390 of the Commission's regulations and the Atomic Safety and Licensing Board's September 4, 2009 protective order ("Protective Order").
- (3) Pursuant to the provisions of paragraph (b)(4) of Section 2.390 of the Commission's regulations, the following is furnished for consideration by the Commission in determining whether the information sought to be withheld from public disclosure should be withheld.
 - i. The information sought to be withheld from public disclosure is owned and has been held in confidence by the PWROG and its individual members.
 - ii. The information is of a type customarily held in confidence by the PWROG and its individual members and not customarily disclosed to the public. The PWROG has a rational basis for determining the types of information customarily held in confidence by it and its individual members and, in that connection, utilizes a system to determine when and whether to hold certain types of information in confidence. The application of that system and the substance of that system constitute PWROG policy and provide the rational basis required.

Under that system, information is held in confidence if it falls in one or more of several types, the release of which might result in the loss of an existing or potential competitive advantage, as follows:

- (a) The information reveals the distinguishing aspects of a process (or component, structure, tool, method, etc.) of the PWROG or one or more of its individual members which constitutes a competitive economic advantage over third parties.
- (b) It consists of supporting data, including test data, relative to a process (or component, structure, tool, method, etc.), the application of which data secures a competitive economic advantage, e.g., by optimization or improved marketability, to the PWROG or one or more of its individual members.

- (c) Its use by a third party would reduce his expenditure of resources or improve his competitive position in the design, manufacture, shipment, installation, assurance of quality, or licensing a similar product.
- (d) It reveals cost or price information, production capacities, budget levels, or commercial strategies of the PWROG, its individual members, customers or suppliers.
- (e) It reveals aspects of past, present, or future PWROG or customer funded development plans and programs of potential commercial value to the PWROG or one or more of its individual members.
- (f) It contains patentable ideas, for which patent protection may be desirable.

iii. There are sound policy reasons behind the PWROG system which include the following:

- (a) The use of such information by the PWROG gives the PWROG and one or more of its individual members a competitive advantage over their competitors. It is, therefore, withheld from disclosure to protect the PWROG or one or more of its individual member's competitive position.
- (b) It is information that is marketable in many ways. The extent to which such information is available to third parties diminishes the PWROG's and its individual members' ability to sell products and services involving the use of the information.
- (c) Use by a third party would put the PWROG or one or more of its individual members at a competitive disadvantage by reducing the third party's expenditure of resources at the expense of the PWROG or its individual members.
- (d) Each component of proprietary information pertinent to a particular competitive advantage is potentially as valuable as the total competitive advantage. If competitors acquire components of proprietary information, any one component may be the key to the entire puzzle, thereby depriving PWROG or its individual members of a competitive advantage.
- (e) Unrestricted disclosure would jeopardize the position of prominence of the PWROG or its individual members in the world market, and thereby give a market advantage to the competition of those countries.
- (f) The PWROG capacity to invest assets in research and development depends upon the success in obtaining and maintaining a competitive advantage.

- iv. The information was transmitted to the Atomic Safety and Licensing Board by a party to this proceeding in confidence and, under the provisions of the Protective Order, it was received in confidence by the Atomic Safety and Licensing Board.
- v. The information sought to be protected is not available in public sources or available information has not been previously employed in the same original manner or method to the best of our knowledge and belief.
- vi. The proprietary information sought to be withheld in this submittal is that which is contained within the following PWROG document: BTP 5-3 Industry Issue, Executive Review: October 28-2014".
 - (a) This information is part of that which will enable PWROG or its individual members to:
 - i. Develop and support reactor vessel internals aging management.
 - (b) Further this information has substantial commercial value as follows:
 - i. PWROG and one or more of its individual members plan to employ the information used in this document to prepare a response to the U.S. NRC Branch Technical Position 5-3 for the purpose of supporting reactor internals aging management.
 - ii. The information requested to be withheld reveals the preliminary, strategic deliberations of the PWROG and one or more of its individual members.

Public disclosure of this proprietary information is likely to cause substantial harm to the competitive position of PWROG and one or more of its individual members because it provides insight into the PWROG's and its individual member's preliminary, strategic deliberations related to responding to the issues surrounding U.S. NRC Branch Technical Position 5-3.

In order for competitors of PWROG to duplicate this information, similar technical programs would have to be performed and a significant manpower effort, having the requisite talent and experience, would have to be expended.

Further the deponent sayeth not.

ATTACHMENT 2

**Affidavit of James A. Gresham, Manager, Regulatory Compliance,
Westinghouse Electric Company LLC (Apr. 16, 2015)**



Westinghouse Electric Company
Engineering, Equipment and Major Projects
1000 Westinghouse Drive, Building 3
Cranberry Township, Pennsylvania 16066
USA

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board
In re: License Renewal Application Submitted by:
Entergy Nuclear Indian Point 2, LLC
Entergy Nuclear Indian Point 3, LLC
Entergy Nuclear Operations, Inc.

Direct tel: (412) 374-4643
Direct fax: (724) 940-8560
e-mail: greshaja@westinghouse.com
Proj letter: 79173

CAW-15-4157

April 16, 2015

**APPLICATION FOR WITHHOLDING PROPRIETARY
INFORMATION FROM PUBLIC DISCLOSURE**

Subject: CN-PAFM-09-77, Rev. 0, "Indian Point Units 2 & 3 Accumulator Nozzle Environmental Fatigue Evaluation" (Proprietary)
CN-PAFM-12-35, Rev. 1, "Indian Point Unit 2 and Unit 3 EAF Screening Evaluations" (Proprietary)
CN-PAFM-13-32, Rev. 2-A, "Indian Point Unit 2 (IP2) and Unit 3 (IP3) Refined EAF Analyses and EAF Screening Evaluations" (Proprietary)
CN-PAFM-13-40, Rev. 1, "Indian Point Unit 2 and Unit 3 Pressurizer Spray Nozzle Transfer Function Database Development and Environmental Fatigue Evaluations" (Proprietary)

The proprietary information for which withholding is being requested in the above-referenced reports is further identified in Affidavit CAW-15-4157 signed by the owner of the proprietary information, Westinghouse Electric Company LLC. The Affidavit, which accompanies this letter, sets forth the basis on which the information may be withheld from public disclosure by the Commission and the Board and addresses with specificity the considerations listed in paragraph (b)(4) of 10 CFR Section 2.390 of the Commission's regulations.

The subject documents were prepared and classified as Westinghouse Proprietary Class 2. Westinghouse requests that each of the documents be considered proprietary in its entirety. As such, a non-proprietary version will not be issued.

Accordingly, this letter authorizes the utilization of the accompanying Affidavit by Entergy Nuclear Indian Point 2, LLC; Entergy Nuclear Indian Point 3, LLC; and Entergy Nuclear Operations, Inc.

Correspondence with respect to the proprietary aspects of the Application for Withholding or the Westinghouse Affidavit should reference CAW-15-4157, and should be addressed to James A. Gresham, Manager, Regulatory Compliance, Westinghouse Electric Company, 1000 Westinghouse Drive, Building 3 Suite 310, Cranberry Township, Pennsylvania 16066.

Very truly yours,

James A. Gresham, Manager

Regulatory Compliance

CAW-15-4157

April 16, 2015

UNITED STATES NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In re: License Renewal Application Submitted by:
Entergy Nuclear Indian Point 2, LLC
Entergy Nuclear Indian Point 3, LLC and
Entergy Nuclear Operations, Inc.

Docket Nos. 50-247-LR; 50-286-LR
ASLBP No. 07-858-03-LR-BD01
DPR-26; DPR-64

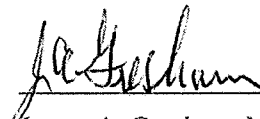
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COMMONWEALTH OF PENNSYLVANIA:

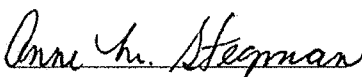
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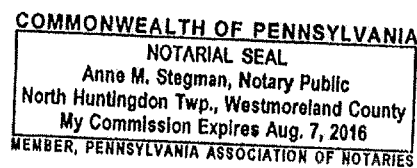
COUNTY OF BUTLER:

Before me, the undersigned authority, personally appeared James A. Gresham, who, being by me duly sworn according to law, deposes and says that he is authorized to execute this Affidavit on behalf of Westinghouse Electric Company LLC (Westinghouse), and that the averments of fact set forth in this Affidavit are true and correct to the best of his knowledge, information, and belief:


James A. Gresham, Manager
Regulatory Compliance

Sworn to and subscribed before me
this 16th day of April 2015


Notary Public



- (1) I am Manager, Regulatory Compliance, Westinghouse Electric Company LLC (Westinghouse), and as such, I have been specifically delegated the function of reviewing the proprietary information sought to be withheld from public disclosure in connection with nuclear power plant licensing and rule making proceedings, and am authorized to apply for its withholding on behalf of Westinghouse.
- (2) I am making this Affidavit in conformance with the provisions of 10 CFR Section 2.390 of the Commission's regulations and the Atomic Safety and Licensing Board's September 4, 2009 protective order ("Protective Order").
- (3) I have personal knowledge of the criteria and procedures utilized by Westinghouse in designating information as a trade secret, privileged or as confidential commercial or financial information.
- (4) Pursuant to the provisions of paragraph (b)(4) of Section 2.390 of the Commission's regulations, the following is furnished for consideration by the Commission in determining whether the information sought to be withheld from public disclosure should be withheld.
 - (i) The information sought to be withheld from public disclosure is owned and has been held in confidence by Westinghouse.
 - (ii) The information is of a type customarily held in confidence by Westinghouse and not customarily disclosed to the public. Westinghouse has a rational basis for determining the types of information customarily held in confidence by it and, in that connection, utilizes a system to determine when and whether to hold certain types of information in confidence. The application of that system and the substance of that system constitute Westinghouse policy and provide the rational basis required.

Under that system, information is held in confidence if it falls in one or more of several types, the release of which might result in the loss of an existing or potential competitive advantage, as follows:

 - (a) The information reveals the distinguishing aspects of a process (or component, structure, tool, method, etc.) where prevention of its use by any of

Westinghouse's competitors without license from Westinghouse constitutes a competitive economic advantage over other companies.

- (b) It consists of supporting data, including test data, relative to a process (or component, structure, tool, method, etc.), the application of which data secures a competitive economic advantage, e.g., by optimization or improved marketability.
 - (c) Its use by a competitor would reduce his expenditure of resources or improve his competitive position in the design, manufacture, shipment, installation, assurance of quality, or licensing a similar product.
 - (d) It reveals cost or price information, production capacities, budget levels, or commercial strategies of Westinghouse, its customers or suppliers.
 - (e) It reveals aspects of past, present, or future Westinghouse or customer funded development plans and programs of potential commercial value to Westinghouse.
 - (f) It contains patentable ideas, for which patent protection may be desirable.
- (iii) There are sound policy reasons behind the Westinghouse system which include the following:
- (a) The use of such information by Westinghouse gives Westinghouse a competitive advantage over its competitors. It is, therefore, withheld from disclosure to protect the Westinghouse competitive position.
 - (b) It is information that is marketable in many ways. The extent to which such information is available to competitors diminishes the Westinghouse ability to sell products and services involving the use of the information.
 - (c) Use by our competitor would put Westinghouse at a competitive disadvantage by reducing his expenditure of resources at our expense.

- (d) Each component of proprietary information pertinent to a particular competitive advantage is potentially as valuable as the total competitive advantage. If competitors acquire components of proprietary information, any one component may be the key to the entire puzzle, thereby depriving Westinghouse of a competitive advantage.
 - (e) Unrestricted disclosure would jeopardize the position of prominence of Westinghouse in the world market, and thereby give a market advantage to the competition of those countries.
 - (f) The Westinghouse capacity to invest corporate assets in research and development depends upon the success in obtaining and maintaining a competitive advantage.
- (iv) The information was transmitted to the Atomic Safety and Licensing Board by a party to this proceeding in confidence and, under the provisions of the Protective Order, it was received in confidence by the Atomic Safety and Licensing Board.
- (v) With one exception, the information sought to be protected is not available in public sources or available information has not been previously employed in the same original manner or method to the best of our knowledge and belief. As to the one exception, a collateral citation to a calculation result from CN-PAFM-12-35, Rev 1 in NRC Inspection Report 05000247/2013010, the information was made public without Westinghouse's prior knowledge or consent.
- (vi) The proprietary information sought to be withheld in this submittal is that which is contained within the following Westinghouse documents: CN-PAFM-09-77, Rev. 0, "Indian Point Units 2 & 3 Accumulator Nozzle Environmental Fatigue Evaluation," CN-PAFM-12-35, Rev. 1, "Indian Point Unit 2 and Unit 3 EAF Screening Evaluations," CN-PAFM-13-32, Rev. 2-A, "Indian Point Unit 2 (IP2) and Unit 3 (IP3) Refined EAF Analyses and EAF Screening Evaluations," and CN-PAFM-13-40, Rev. 1, "Indian Point Unit 2 and Unit 3 Pressurizer Spray Nozzle Transfer Function Database Development and Environmental Fatigue Evaluations."

- (a) This information is part of that which will enable Westinghouse to:
 - (i) Support reactor vessel internals aging management.
- (b) Further this information has substantial commercial value as follows:
 - (i) Westinghouse plans to employ the method(s) used in each of these documents to sell services to its customers for the purpose of supporting reactor internals aging management.
 - (ii) The information requested to be withheld reveals the distinguishing aspects of a methodology(ies) which was developed by Westinghouse.

Public disclosure of this proprietary information is likely to cause substantial harm to the competitive position of Westinghouse because it would enhance the ability of competitors to provide similar technical evaluation justifications and licensing defense services for commercial power reactors without commensurate expenses. Also, public disclosure of the information would enable others to use the information to meet NRC requirements for licensing documentation without purchasing the right to use the information.

The development of the technology described in part by the information is the result of applying the results of many years of experience in an intensive Westinghouse effort and the expenditure of a considerable sum of money.

In order for competitors of Westinghouse to duplicate this information, similar technical programs would have to be performed and a significant manpower effort, having the requisite talent and experience, would have to be expended.

Further the deponent sayeth not.

ATTACHMENT 3

**Declaration of Mark A. Gray, Principal Engineer,
Westinghouse Electric Company LLC (Apr. 20, 2015)**

UNITED STATES NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In re: License Renewal Application Submitted by: Docket Nos. 50-247-LR; 50-286-LR
Entergy Nuclear Indian Point 2, LLC ASLBP No. 07.858-03-LR-BD01
Entergy Nuclear Indian Point 3, LLC and DPR-26; DPR-64
Entergy Nuclear Operations, Inc.

DECLARATION OF MARK A. GRAY

I, Mark A. Gray, declare as follows:

1. I am currently a Principal Engineer for Westinghouse Electric Company LLC ("Westinghouse").
2. I am familiar with the Westinghouse intellectual property management policy and procedure.
3. According to such policy and procedure, Westinghouse considers any information that provides Westinghouse with a significant competitive advantage, including documents which contain special methodology or calculation techniques developed by or for Westinghouse using a knowledge base that is not available in the open literature, documents that contain third party proprietary information, and documents that contain any information that should not be released to a competitor, as confidential and proprietary. Westinghouse classifies and designates such information as "Westinghouse Proprietary Class 2".
4. According to such policy and procedure, a protective agreement is required before any "Westinghouse Proprietary Class 2" information is distributed for use outside of Westinghouse and, prior

to the distribution of "Westinghouse Proprietary Class 2" information outside of Westinghouse, a review process is implemented to verify that such required protective agreement is in place.

5. With the exception of the three documents identified in the third footnote of "State of New York Motion to Withdraw the Proprietary Designation of Various Pressurized Water Reactor Owners' Group and Westinghouse Documents" filed April 9, 2015, I am not aware of any instance in which Westinghouse has distributed a calculation note on a non-confidential basis outside of Westinghouse.

6. I am aware of and have reviewed certain Westinghouse calculation notes, including CN-PAFM-09-77, CN-PAFM-12-35, CN-PAFM-13-32, CN-PAFM-13-40 (collectively the "Calculation Notes"), which were generated by Westinghouse for Entergy Nuclear Operations, Entergy Nuclear Indian Point 2, and Entergy Nuclear Indian Point 3 (collectively "Entergy").

7. Each of the Calculation Notes contains special methodology or calculation techniques developed by or for Westinghouse using a knowledge base that is not available in the open literature, contains Entergy's proprietary information, or contains information that Westinghouse does not disclose to competitors and, as such, which is identified as Westinghouse Proprietary Class 2 pursuant to the Westinghouse intellectual property management policy and procedure. More specifically:

- a. CN-PAFM-09-77 contains analyses that were performed using derived value functions and the transfer function methodology contained within Westinghouse's proprietary WESTEMS software code, as well as Westinghouse methodology for application of ASME Code stress classification. Public disclosure of CN-PAFM-09-77 would provide a competitor with insights into the specific functioning of the WESTEMS software code and the specific considerations used by Westinghouse to determine how the WESTEMS software code is applied on a plant-specific basis, as well as insights into the Westinghouse methodology for application of ASME Code stress classification.
- b. CN-PAFM-12-35 contains supplemental EAF screening analyses for the Class 1 piping performed and derived using comparisons made between the IP2/IP3-specific components and similar components included in Westinghouse's proprietary piping Reference Fatigue Analysis (RFA) database. The methodology utilized for these screening analyses relied upon Westinghouse's proprietary database of component fatigue evaluations and related experience to establish the common analysis basis of

comparison. Public disclosure of CN-PAFM-12-35 would provide a competitor with insights into how this methodology was derived and is utilized by Westinghouse.

c. CN-PAFM-13-32 contains piping EAF screening evaluations that were performed and derived using a combination of Indian Point-specific inputs and Westinghouse's proprietary piping reference fatigue analyses (RFA) database. The methodology utilized for these screening evaluations relied upon Westinghouse's proprietary database of component fatigue evaluations and related experience. Public disclosure of CN-PAFM-13-32 would provide a competitor with insights into how this methodology was derived and is utilized by Westinghouse.

d. CN-PAFM-13-40 contains analyses that were performed using derived value functions and the transfer function methodology contained within Westinghouse's proprietary WESTEMS software code. In addition, special Westinghouse methodologies were employed related to user peak editing to remove redundancies, as discussed in Appendix D, to fully satisfy NRC RIS 2011-14. It also describes specific assumptions made regarding spray operations during plant evolutions based on plant data and their detailed implementation in transient loading development. Public disclosure of CN-PAFM-13-40 would provide a competitor with insights into the specific functioning of the WESTEMS software code and the specific considerations used by Westinghouse to determine how the WESTEMS software code is applied on a plant-specific basis, as well as provide a competitor with insights into the how these special methodologies were derived and are utilized by Westinghouse.

8. Westinghouse designated and marked the Calculation Notes as "Westinghouse Proprietary Class 2" in accordance with Westinghouse policy and procedure.

9. The Calculation Notes were disclosed to the Atomic Safety and Licensing Board (the "Board") pursuant to Board's September 4, 2009 protective order ("Protective Order").

I declare under penalty of perjury under the laws of the Commonwealth of Pennsylvania that the foregoing is true and correct and that this declaration was executed on the 20th day of April 2015.

A handwritten signature in black ink, reading "Mark A. Gray". The signature is written in a cursive style with a horizontal line underneath the name.

Mark A. Gray

Principal Engineer

Westinghouse Electric Company LLC

ATTACHMENT 4

Nuclear Services/Engineering Services (NE-ES)-0210, “WESTEMS™ Fatigue Analysis, Diagnostics and Monitoring System (Nov. 2011)



Nuclear Services/Engineering Services

WESTEMS™ Fatigue Analysis, Diagnostics and Monitoring System

Background

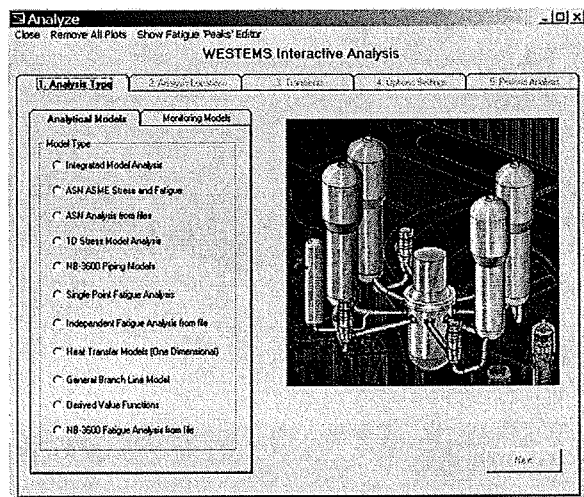
Westinghouse's WESTEMS™ integrated modeling technology for fatigue analysis and monitoring represents the next generation in engineering products and services. The WESTEMS software is designed as a dual-use technology, used both for American Society of Mechanical Engineers (ASME) code design analysis and for online transient and fatigue monitoring. Design analysis models built within the WESTEMS system are then used in the ongoing monitoring of the plant. New models can be added at a later time to increase monitoring opportunities, as needed.

The models are capable of automatically calculating and tracking transients and fatigue usage factors. When configured for online monitoring, the WESTEMS software also provides surveillance activities such as technical specification cycle counting, U.S. Nuclear Regulatory Commission Bulletin (NRCB) 88-08 thermal stratification monitoring, and unanticipated event qualification. These features help the plant achieve superior levels of surveillance and awareness concerning the structural integrity of the primary system, related systems and components.

The WESTEMS computer, when connected to the plant's information technology infrastructure, can be configured to update automatically at a customer-determined frequency.

Description

The WESTEMS system is a Windows®-based integrated analysis, diagnostic and monitoring system. Modular in design, it uses plant-specific models and a suite of user-configurable components. The system performs ASME design stress and fatigue analyses using NB-3200



WESTEMS interactive analysis menu (v4.5)

or NB-3600 criteria. Projects developed within the WESTEMS software use integrated models that contain plant thermal-hydraulic models, mechanical interaction models, local stress models and more.

The flexibility of the WESTEMS integrated software is demonstrated by a number of features, including:

- Flexible data acquisition methods
- Component stress and fatigue monitoring
- Automatic transient cycle counting
- Customizable user interface
- User-configurable modeling
- Accessible database of information

The WESTEMS software attains a significant computational advantage over traditional stress

analysis methods through the use of integrated models, technologies such as the transfer function method, and advanced data management and analysis techniques. The plant-specific models, once created, are easily reused in future design and monitoring activities, which reduces costs and leads to improved quality. Significant cost reductions can also be achieved when analyzing new transients or considering actual plant transients during requalification. Fully developed models can be used simultaneously by multiple users for independent tasks such as design basis fatigue analysis, fracture mechanics qualifications, and online transient and fatigue monitoring.

The WESTEMS software integrates a number of surveillance functions and related engineering tasks into one program, including the following:

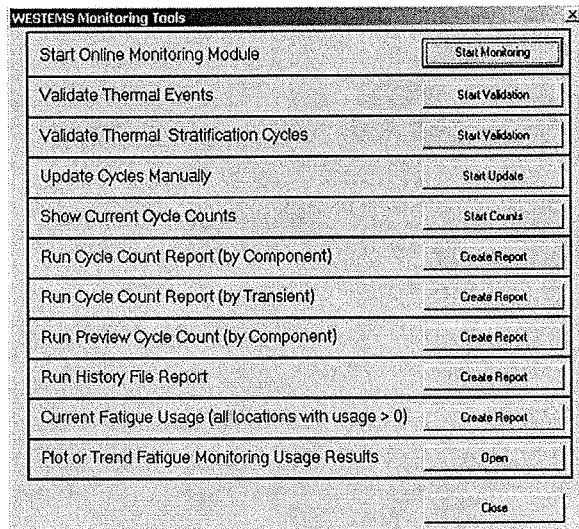
- Design basis transient cycle counting
- Heat-up and cooldown rate limit surveillance
- ASME structural integrity screening evaluation of unanticipated events
- NRCB 88-08 thermal stratification monitoring
- Stress and fatigue monitoring

Benefits

In addition to the obvious reduction in cost of component life-cycle engineering, using the WESTEMS software models and technology for ongoing engineering analysis surveillance also provides major cost benefits for the plant, such as the following:

- Stress and fatigue analyses take less time and effort to perform than do traditional design analysis methods.
- Models developed for the design evaluations can be directly applied by the plant as part of its required ongoing monitoring and diagnostic programs.

WESTEMS software is the first diagnostic and monitoring tool to take steps toward achieving large-scale integration goals that link design and online models. The WESTEMS software's integrated models offer continuous surveillance service that can provide much more than just compliance with qualification requirements.



WESTEMS monitoring tools menu (v4.5)

It can also provide the following:

- Improved operational awareness of plant's production facilities
- Diagnostic information for determining optimized replacement costs of equipment and parts
- Optimal maintenance schedules and improved risk management and mitigation practices

Deliverables

The WESTEMS software license includes the following:

- Model development support for pressurizer lower head and up to four fatigue monitoring points
- On-site training and monitoring configuration support
- User's manual

The WESTEMS software also can be central to a plant's aging management program by managing fatigue when used as the official monitoring tool for operating transients.

Experience

Westinghouse has installed and applied the WESTEMS system for several nuclear power plants over the past 15 years.

WESTEMS is a trademark or registered trademark of Westinghouse Electric Company LLC in the United States and may be registered in other countries throughout the world. All rights reserved. Unauthorized use is strictly prohibited.

Windows is a registered trademark of Microsoft Corporation in the United States and other countries.

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July 2011 NS-ES-0210

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

April 20, 2015

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