

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence G. McDade, Chairman  
Dr. Michael F. Kennedy  
Dr. Richard E. Wardwell

In the Matter of

ENTERGY NUCLEAR OPERATIONS, INC.

(Indian Point Nuclear Generating Units 2 and 3)

Docket Nos. 50-247-LR and 50-286-LR

ASLBP No. 07-858-03-LR-BD01

July 20, 2015

ORDER

(Denying New York Motion to Withdraw Proprietary Designation)

I. INTRODUCTION

On April 9, 2015, the State of New York (New York) filed a motion to withdraw the proprietary designation and compel the public disclosure of five documents produced by Entergy Nuclear Operations, Inc. (Entergy) as part of its mandatory disclosures.<sup>1</sup> The five documents at issue are four Calculation Notes prepared by Westinghouse in connection with the Indian Point license renewal<sup>2</sup> and one memorandum prepared by the Pressurized Water Reactors Owners Group (PWROG) addressing technical issues and discussing a preliminary

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<sup>1</sup> State of New York Motion to Withdraw the Proprietary Designation of Various Pressurized Water Reactor Owners' Group and Westinghouse Documents (Apr. 9, 2015).

<sup>2</sup> 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) [hereinafter Calculation Notes].

strategy for resolution of a Nuclear Regulatory Commission (NRC) Staff Branch Technical memo.<sup>3</sup> Entergy opposed the motion.<sup>4</sup> The NRC Staff took no position, but filed a pleading addressing governing legal principles.<sup>5</sup> On April 22, 2015, New York sought leave to file a reply,<sup>6</sup> which Entergy opposed,<sup>7</sup> and which the Board granted.<sup>8</sup> This reply was received on May 1, 2015.<sup>9</sup> On May 14, 2015, the Board held an oral argument on this question, at which New York, the NRC Staff, Entergy, and Westinghouse were represented. At the conclusion of oral argument, the Board directed Entergy and Westinghouse to submit a joint brief in support of its position that all documents should remain marked as proprietary. On June 4, 2015, Entergy and Westinghouse submitted their joint brief<sup>10</sup> and on June 18, 2015, New York State filed their reply brief.<sup>11</sup> On June 25, 2015, the NRC Staff filed its reply brief.<sup>12</sup>

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<sup>3</sup> PWROG, BTP 5-3 Industry Issue, Executive Review (Oct. 28, 2014) [hereinafter PWROG Memo].

<sup>4</sup> Entergy's Answer Opposing New York State's Motion to Strike Proprietary Designations (Apr. 20, 2015).

<sup>5</sup> NRC Staff's Answer to "State of New York Motion to Withdraw the Proprietary Designation of Various Pressurized Water Reactor Owners' Group and Westinghouse Documents" (Apr. 20, 2015).

<sup>6</sup> State of New York Motion for Leave to File Reply in Support of Motion to Withdraw Proprietary Designations (Apr. 22, 2015).

<sup>7</sup> Entergy's Answer Opposing New York State's Motion for Leave to File a Reply to Entergy's April 20, 2015 Answer (Apr. 23, 2015).

<sup>8</sup> Licensing Board Order (Granting New York's Motion for Leave to File a Reply) (Apr. 24, 2015) (unpublished).

<sup>9</sup> State of New York Reply in Support of Motion to Withdraw Proprietary Designations (May 1, 2015).

<sup>10</sup> Joint Brief of Entergy and Westinghouse Regarding Proprietary Documents (June 4, 2015) [hereinafter Joint Brief].

<sup>11</sup> State Of New York Reply To Joint Brief Of Entergy And Westinghouse Regarding Proprietary Documents (June 18, 2015) [hereinafter New York Reply Brief].

<sup>12</sup> NRC Staff's Response to Joint Brief of Entergy and Westinghouse Regarding Proprietary Documents (June 25, 2015) [hereinafter NRC Staff Reply Brief].

## II. LEGAL STANDARDS FOR PROPRIETARY INFORMATION

Pursuant to 10 C.F.R. § 2.390(a), “final NRC records and documents, including . . . correspondence to and from the NRC regarding the issuance . . . of a license . . . shall not, in the absence of an NRC determination of a compelling reason for nondisclosure after a balancing of the interests of the person or agency urging nondisclosure and the public interest in disclosure, be exempt from disclosure,” except for matters that fall within one of the nine specified categories set forth in § 2.390(a)(1)-(9). Among the matters to be withheld from disclosure are confidential proprietary documents – defined in § 2.390(a)(4) as “[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential.” Under 10 C.F.R. § 2.390(b)(3), the Commission will determine whether information constitutes a trade secret or confidential or privileged commercial or financial information under § 2.390(b)(3)(i), considering:

- (i) Whether the information has been held in confidence by its owner;
- (ii) Whether the information is of a type customarily held in confidence by its owner and, except for voluntarily submitted information, whether there is a rational basis therefor;
- (iii) Whether the information was transmitted to and received by the Commission in confidence;
- (iv) Whether the information is available in public sources;
- (v) Whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account 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.”

Finally, the Commission has stated that the regulations in 10 C.F.R. § 2.390(b)(4) embody the standards of FOIA Exemption 4.<sup>13</sup> Because “disclosure of information in NRC files [is] the rule, and nondisclosure the exception,”<sup>14</sup> the Protective Order sets out that the party seeking to restrict the disclosure of relevant information retains the burden of establishing that the information is confidential business information.<sup>15</sup>

### III. THE PARTIES’ ARGUMENTS

In their joint brief, Entergy, Westinghouse, and the PWROG asserted that all of the documents in question are confidential commercial information within the meaning of 10 C.F.R. § 2.390(b)(4). They relied on the FOIA Exemption 4 test adopted in Critical Mass Energy Project v. NRC, for the proposition that if confidential commercial information is submitted to the government voluntarily, it will be protected categorically under Exemption 4 so long as it is the kind of information “that would customarily not be released to the public by the person from whom it was obtained.”<sup>16</sup> The joint brief asserted that Entergy voluntarily submitted the documents to New York State (not the NRC) under the rules of procedure applicable to this proceeding, and made the Calculation Notes available for NRC Staff inspection or review, and thus, argued that these documents fall under FOIA Exemption 4.<sup>17</sup>

In its Reply Brief, the Staff asserted that four of these documents (i.e., the Calculation Notes) should be withheld from public disclosure; but that Westinghouse did not sufficiently identify the portions of the PWROG memorandum that contain confidential, proprietary

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<sup>13</sup> See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-01, 61 NRC 160, 163 (2005) (citing 37 Fed. Reg. 15,127, 15,127 (July 28, 1972)).

<sup>14</sup> Westinghouse Electric Corp. v. U.S. Nuclear Regulatory Comm’n, 555 F.2d 82, 87 (3d Cir. 1977).

<sup>15</sup> Licensing Board Order (Protective Order) (Sept. 4, 2009) at ¶¶ D (unpublished).

<sup>16</sup> Joint Brief at 6 (citing Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc), cert. denied, 507 U.S. 984 (1993)).

<sup>17</sup> Id.

information, the disclosure of which could adversely affect the PWROG's or its members' competitive or financial position.<sup>18</sup> The Staff proposed that the Board should require Westinghouse to further specify the portions of the PWROG Memorandum that should be withheld as confidential, proprietary information.<sup>19</sup>

In its reply brief, New York renewed its objection to Westinghouse's participation in the proceeding as untimely<sup>20</sup> and disputed whether the information fell under the legal standard advanced by Westinghouse and Entergy from the Critical Mass decision.<sup>21</sup> New York argued that substantial competitive injury would not result from disclosure of the calculation notes as Westinghouse has already publicized its methodology for performing environmentally-assisted fatigue screening analyses in industry publications and presentations.<sup>22</sup> New York also asserted that the public's right to know the basis for NRC decision making outweighs any potential competitive harm to Westinghouse and that the CUF<sub>en</sub> values are particularly relevant as they 1) reveal when crack initiation is assumed to have begun in a structural component; and

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<sup>18</sup> NRC Staff Reply Brief at 1-2.

<sup>19</sup> Id.

<sup>20</sup> New York asserts that Westinghouse's Motion to Specially Appear was filed on May 5, 2015 despite Westinghouse having received notice of State's motion on April 9, 2015, in contravention of 10 C.F.R. § 2.323(a)(2). Id. at 13 (citing to Joint Industry Brief at 2 n. 4; Tr. at 4644).

<sup>21</sup> New York Reply Brief at 14.

<sup>22</sup> Id. at 17-18 ("In that paper, Mr. Gray and his co-author, Christopher Kupper, describe Westinghouse's methodology for performing environmentally-assisted fatigue screening analyses in support of license renewal applications. A section of the paper entitled "Method Overview" provides a summary of the process elements of the overall screening method. Each of these process elements is explored in greater depth in subsequent sections entitled "Data Collection," "Transient Sections," "Screening Fen Application," "Stress Basis Comparison," "Leading Location Identification," "Application of Methodology," and "Phase 2 EAF Screening.") (citations omitted); see also New York Reply Brief, attach. 1, Christopher Kupper and Mark Gray, License Renewal Environmental Fatigue Screening Application, Proceedings of the ASME 2014 Pressure Vessels and Piping Conference (July 2014), available at <http://proceedings.asmedigitalcollection.asme.org/proceeding.aspx?articleID=1937745>.

2) form the basis for NRC Staff's conclusion that Entergy's time-limited aging analyses were sufficient and license renewal appropriate.<sup>23</sup> Finally, New York replied that the statements in the PWROG statement are not "commercial," that the memo contains publically available information, and that its disclosure would not cause harm.<sup>24</sup>

#### IV. BOARD RULING

Based on the information provided, the financial or competitive harm that would flow from the release of the PWROG memo is marginal at best but, at this time, we will not require Westinghouse and Entergy to submit further briefing on this issue, as the presentation of more detail regarding the document would not be a useful expenditure of resources.

The PWROG Memo was not prepared by a party, it is not clear who the author was nor is it clear what was the basis for the author's opinions. In the Board's view, this document has no probative value. While the Board may accept hearsay, this memo is not reliable hearsay. While the document was properly discoverable, as Entergy was required to produce in mandatory disclosures not only admissible evidence but also documents such as the PWROG memo that could lead to admissible evidence, this memo would not be received in evidence. Here, New York has access to the document and the opportunity to present it to their experts, who can agree or disagree with the opinions stated therein. If presented, the probative evidence would be the experts' opinions supported by their qualifications and reasoning.

The Board finds that there would be no benefit to this proceeding, or to the public, by the public disclosure of the PWROG memo. While the effort to establish this document as trade secret or confidential commercial information is weak, we see no public interest in its release.

The Board finds that the Calculation Notes contain confidential commercial information, which is entitled to protection under 10 C.F.R. § 2.390(a)(4). The Calculation Notes documents

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<sup>23</sup> New York Reply Brief at 20-22.

<sup>24</sup> Id. at 24-30.

are of a type that is maintained in confidence by the company and contain information which, if released, likely would lead to substantial competitive harm to Westinghouse. Specifically, Westinghouse has established that they have a substantial commercial interest in the market for engineering services for nuclear plants, including ASME Code fatigue screening evaluations, and that the Calculation Notes contain data developed by Westinghouse in conducting ASME Code Section III evaluations.<sup>25</sup> The Board finds that the information in the Calculation Notes, if taken piece-by-piece or together, would enable a competitor to undercut Westinghouse's market position. Moreover, New York State's claims questioning the proprietary nature of the information were general in nature and did not suggest that Westinghouse's sworn statements were inaccurate.

Thus, the Board holds that the documents in question contain confidential and trade secret information within the purview of 10 C.F.R. § 2.390(a)(4), and therefore should remain non-public subject to the Protective Order. New York's Motion to Withdraw the Proprietary Designation for Westinghouse documents is denied.

It is so ORDERED.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD

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Lawrence G. McDade, Chairman  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
July 20, 2015

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<sup>25</sup> Joint Brief at 10-13.

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NUCLEAR REGULATORY COMMISSION

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ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket Nos. 50-247-LR
	)	and 50-286-LR
(Indian Point Nuclear Generating,	)	
Units 2 and 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Denying New York Motion to Withdraw Proprietary Designation)** have been served upon the following persons by Electronic Information Exchange.

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**ORDER (Denying New York Motion to Withdraw Proprietary Designation)**

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[Original signed by Clara Sola]  
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