UNITED STATES
NUCLEAR REGULATORY COMMISSION

BEFORE COMMISSIONERS
KRISTINE L. SVINICKI,
WILLIAM C. OSTENDORFF,
JEFF BARAN AND
CHAIRMAN STEPHEN G. BURNS

In re:	Docket Nos. 50-247-LR; 50-286-LR
License Renewal Application Submitted by	ASLBP No. 07-858-03-LR-BD01
Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	DPR-26, DPR-64 August 14, 2015

STATE OF NEW YORK PETITION PURSUANT TO 10 C.F.R. § 2.341 FOR COMMISSION INTERLOCUTORY REVIEW OF THE JULY 20, 2015 ATOMIC SAFETY AND LICENSING BOARD ORDER DENYING NEW YORK MOTION TO WITHDRAW PROPRIETARY DESIGNATIONS

PUBLIC, REDACTED

Office of the Attorney General
for the State of New York
The Capitol
State Street
Albany, New York 12224

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FEDERAL REGULATIONS

Pursuant to 10 C.F.R. § 2.341, the State of New York petitions the U.S. Nuclear Regulatory Commission for review of a July 20, 2015 order of the Atomic Safety and Licensing Board that denied New York State's Motion to withdraw the proprietary designation of five documents produced by Entergy.[1] The State has identified three issues in the Order that warrant interlocutory review by the Commission. First, the Order failed to address the State's objection to Westinghouse's participation in the proceeding, implicitly allowing Westinghouse to enter and remain as a party without explaining the nature or extent of its rights or obligations in the proceeding. Second, the Order reached beyond the scope of the State's Motion to issue a *sua sponte* ruling on the admissibility of one of the documents. Third, the Order erred in its application of NRC regulations and its own September 4, 2009 Protective Order[2] by improperly shifting the burden to the State to show that each document, in its entirety, was not proprietary and by ignoring many of the State's arguments. The Order irreparably and adversely affects the State's ability to put forward its case during the upcoming November 2015 evidentiary hearing on its "Track 2" contentions, interferes with the public's awareness of important, noncommercial issues, and warrants interlocutory review now by the Commission.

PROCEDURAL HISTORY

This dispute concerns the State's efforts to remove the proprietary designation and obtain the public release of five documents (collectively, the documents): (1) four calculation notes (the calculation notes) prepared by Westinghouse Electric Company LLC (Westinghouse) for Entergy in support of Entergy's application for permission to operate two reactors at Indian Point for an additional 20 years, and (2) a memorandum entitled "BTP 5-3 Industry Issue: Executive

[1] *Entergy Nuclear Operations, Inc.* (Indian Point Generating Units 2 and 3) Order (Denying New York Motion to Withdraw Proprietary Designation) (July 20, 2015) (unpublished) (ML15201A488).

[2] *See Entergy Nuclear Operations, Inc.* (Indian Point Generating Units 2 and 3), Protective Order (September 4, 2009) (unpublished) (ML092470105).

Review" (the PWROG Memo)[3] prepared for the Pressurized Water Reactor Owners Group (PWROG).[4] Entergy possessed these five documents, and it disclosed them to the State as relevant to this proceeding. In early February 2015, the State asked Entergy if the State could publicly refer to results of fatigue evaluations reported in the calculation notes, which had been disclosed as proprietary documents subject to the Board's Protective Order. The fatigue evaluations are commonly referred to as cumulative usage factors adjusted for environmental effects or "CUF_{en}" values. Thereafter, on February 10, 2015, Entergy indicated that it had consulted with Westinghouse on the State's request, and that Westinghouse's position was that the CUF_{en} output values were proprietary, except to the extent they had been reported in Entergy's license renewal application (LRA) or its public supplements. Neither Westinghouse nor Entergy offered any explanation for its treatment of the bare CUF_{en} output values as proprietary information.[5]

On March 9, 2015, following the procedure set forth in the Board's 2009 Protective Order in this proceeding, the State filed a Notice of Objection with Entergy, formally objecting to the proprietary designation of the calculation notes, as well as the PWROG Memo, and requesting that Entergy or its vendor specify what portions of the documents were considered proprietary, the basis for that claim, and the harm that would result from disclosure. NYS Objection, Attachment 1 to NYS Motion.[6] During subsequent verbal consultations, counsel for

[3] "BTP 5-3" refers to NRC Branch Technical Position 5-3 contained in NRC's Standard Review Plan, Rev. 2, NUREG-0800, ML070850035.

[4] The PWR Owners Group includes companies interested in the operation of pressurized water reactors made by Combustion Engineering, Babcock & Wilcox, and Westinghouse; Entergy is a member of the group. A Westinghouse employee, Anthony Nowinowski, is the PWROG Manager. Nowinowski Affidavit ¶ 1 (April 20, 2015).

[5] *See* E-mail Chain Between New York State Assistant Attorney General (AAG) John Sipos and Attorney Paul Bessette, NRC Staff Counsel Sherwin Turk, *et al*., dated February 4 to 10, 2015, Attachment 1 to NYS Reply.

[6] In order to clarify the nature and timing of filings in this dispute, the State has included a list of relevant filings, their attachments, and short cites as Attachment 1, which also indicates whether the filings were submitted publicly or non-publicly.

Entergy suggested that Westinghouse might be more inclined to consider disclosure if the State narrowed its request to particular portions of the Calculation Notes. Accordingly, on March 19, 2015, in an effort to resolve the issue and without prejudice to its position, the State sent an e-mail to Entergy identifying specific portions of the calculation notes that the State believed were both particularly relevant and non-proprietary. After further consultations with Westinghouse, Entergy reiterated Westinghouse's generic and unsupported position that no part of any of the documents could be publicly disclosed.[7]

The State, continuing along the procedural path set forth in the Protective Order for disputes over proprietary designations, filed its "Motion to Withdraw the Proprietary Designation of Various Pressurized Water Reactors Owners' Group and Westinghouse Documents" on April 9, 2015. The State briefed the history of the dispute, noted that Westinghouse has not provided support for its across-the-board position, and set forth the relevant legal standards, which place the burden of establishing the proprietary status of the documents on the initial holder of the documents. NYS Motion, at 1-2; *see* Protective Order, at ¶ D.

NRC Staff filed an answer that neither supported nor opposed the NYS Motion, but set forth some legal standards. NRC Staff's Answer (April 20, 2015; corrected April 21, 2015). Entergy opposed the motion in its "Answer Opposing New York State's Motion to Strike Proprietary Designations," filed on April 20, 2015. In support of its opposition, Entergy for the first time submitted two affidavits and a declaration from Westinghouse employees. *See* Entergy's Answer, attachments 1-3. Although the affidavits and declaration were prepared in direct response to the State's Motion, they contained skeletal, *pro forma* arguments and conclusory allegations of competitive harm in support of the continued proprietary designation of

[7] *See* March 9-30, 2015 E-mail Thread between AAG Lisa Kwong and Attorney Raphael Kuyler, Attachment 7 to NYS Motion, at 2-3.

each document in its entirety. *Id.* The State obtained permission from the Board[8] to file a "Reply in Support of Motion to Withdraw Proprietary Designations," which it submitted on May 1, 2015. The NYS Reply responded to the recent arguments by Entergy and the Westinghouse employees and argued that Entergy had failed to meet its burden to establish that each document was proprietary in full. NYS Reply, at 5-10.

The Board, observing that "the burden is on Entergy to demonstrate that the five documents – in their entirety – are entitled to protection" and noting that Entergy has failed to offer "an explanation as to *how* disclosure of these documents—many pages of which contain summary results, void of methodology, complex formula, or inputs—would result" in competitive harm to Westinghouse, ordered oral arguments on the NYS Motion. The Board asked the parties to be prepared to discuss (1) "*section by section*, the contents of the documents in dispute, and specifically how competitive injury could follow [from public disclosure], and the likelihood thereof;" and (2) "the public interest, or lack thereof, in disclosure of the information." *Id.* at 3. The Board also offered counsel for Westinghouse and PWROG the opportunity to participate in the oral arguments.[9]

After the State submitted its Reply, and nearly three months after Entergy alerted and consulted with Westinghouse regarding the dispute over the CUF_{en} output values, Westinghouse moved for permission to "appear specially" in order to defend the proprietary designation of the documents. Motion to Appear Specially (May 5, 2015) (ML15126A341). Westinghouse did not identify any NRC regulation or Board order permitting it to "appear specially" in connection with a fully-briefed motion. Westinghouse sought to link the timeliness of its motion to the May

[8] *See Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), Order (Granting New York's Motion for Leave to File Reply) (April 24, 2015) (unpublished) (ML15114A367 (redacted)) (ML15114A365 (unredacted)).

[9] *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), Order (Setting Oral Argument on Proprietary Designation of Documents) (May 5, 2015) (unpublished), at 2-3 (ML15125A239).

1 NYS Reply, arguing that "[i]t was only after the New York Reply was filed . . . that many aspects of the attack by the State of New York on the proprietary nature of the Documents became known." *Id.*, at unnumbered page 4. Moreover, Westinghouse essentially conceded that – although Entergy consulted with Westinghouse in early February and March 2015 regarding the State's request for public disclosure of CUF_{en} results in the calculation notes and Westinghouse employees provided sworn statements to the Board in mid-April – Westinghouse had not yet considered the basis for its proprietary designation of the documents, noting that "[t]here is a need for Westinghouse to consider [the State's] attack, both from a legal and technical standpoint, and this consideration must be made by personnel who will need to be diverted from their normal responsibilities." *Id.*[10]

The State opposed Westinghouse's Motion to "appear specially." NYS Answer to Motion to Appear Specially (May 6, 2015). The State noted that Westinghouse had failed to identify any authority permitting it to "appear specially" in connection with an already fully-briefed motion and that the motion was untimely under 10 C.F.R. § 2.323(a)(2), because Westinghouse failed to move to appear within 10 days of the April 9, 2015 NYS Motion to remove the proprietary designation of the documents. *Id.* at 5-9. The Board scheduled oral argument on the proprietary designation of the documents for May 14, 2015 and held Westinghouse's motion "in abeyance until after the telephonic oral argument."[11]

The Board held oral argument on May 14, 2015. [redacted]

[10] No appearance was made for the PWR Owners Group.

[11] *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), Order (Scheduling Oral Argument), at 2 (May 8, 2015) (ML15128A360) (ML15128A360).

[redacted]

[redacted]

Entergy and Westinghouse submitted the Joint Industry Brief on June 4, 2015. [redacted]

The State filed its "Reply to Joint Brief of Entergy and Westinghouse Regarding Proprietary Documents" on June 18, 2015. The State reiterated its objection to Westinghouse's participation in the proceeding, noting that Westinghouse's Motion to Specially Appear was untimely. NYS Reply to Joint Industry Brief, at 13-14. The State also argued that Entergy and Westinghouse should be required to show the existence of competitive harm from the release of

[12] After the State alerted it to filing errors, Westinghouse filed a non-public version of the June 4 submission. Westinghouse has not filed a public, redacted version of that submission.

the documents, noting that Westinghouse and Entergy had not previously raised the argument that the *Critical Mass* test should apply, and that *Critical Mass* was directly contradicted by NRC regulations. *Id.* at 14-16. The State argued that Westinghouse and Entergy had failed to establish that the calculation notes and PWROG Memo were proprietary in their entirety, such that it was appropriate to withhold each document, in total, from public disclosure. *Id.* at 17-30.

NRC Staff filed a "Response to Joint Brief of Entergy and Westinghouse Regarding Proprietary Documents" on June 25, 2015.[13] [redacted]

The Board issued its Order on July 20, 2015, denying the NYS Motion in its entirety. The Board noted that "[b]ased on the information provided, the financial or competitive harm that would flow from the release of the PWROG memo is marginal at best" and that "the effort to establish this document as trade secret or confidential information is weak[.]" Order, at 6. Rather than order disclosure of the document, in whole or in part, the Board *sua sponte* ruled that the PWROG Memo "is not reliable hearsay" and "would not be received in evidence." *Id.* The Board noted that "[t]he 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." *Id.* Accordingly, the Board could "see no public interest in its release." *Id.* With respect to the Calculation Notes, the Board concluded that they "are of a type maintained in confidence by the company and contain

[13] The NRC Staff response was filed non-publicly, and no redacted public version has ever been filed, although much of the brief contains information which is not proprietary.

information which, if released, likely would lead to substantial competitive harm to Westinghouse." Order, at 6-7. In particular, the Board held that "Westinghouse has established that they have a substantial 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." *Id.* at 7. According to the Board, "the information in the Calculation Notes, if taken piece-by-piece or together, would enable a competitor to undercut Westinghouse's market position." *Id.* Finally, the Board stated that the 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." *Id.* The Board did not address the issue of partial redaction.

The State now submits this Petition for Review of the Board's July 20, 2015 Order. The Petition for Review is being submitted within 25 days after service of the Board's Order, and is therefore timely pursuant to 10 C.F.R. § 2.341(b)(1).

LEGAL STANDARDS

I. Legal Standards Governing Petition for Review

A party may petition the Commission for review of an ASLB decision or action pursuant to 10 C.F.R. § 2.341. A petition for review must: (1) summarize the decision of which review is sought (2) identify where the matters of fact or law raised in the petition for review were previously raised before the presiding office and, if they were not, why they could not have been raised, (3) explain why in the petitioner's view the decision or action is erroneous, (4) state why Commission review should be exercised. 10 C.F.R. § 2.341(b)(2). The Commission may grant a petition for review if a substantial question exists with respect to the following considerations: (1) a finding of material fact is clearly erroneous; (2) legal conclusion is without governing

precedent or is contrary to law; (3) a substantial and important question of law, policy, or discretion has been raised; (4) the conduct of the proceeding involved a prejudicial procedural error; or (5) any other consideration which the Commission may deem to be in the public interest. *Id.* § 2.341(b)(4). Where a party seeks interlocutory review of a Board order, the petition should demonstrate that the issue for which the party seeks interlocutory review:

> (i) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or
>
> (ii) Affects the basic structure of the proceeding in a pervasive or unusual manner.

Id. § 2341(f)(2).

II. Substantive Legal Standards

An agency must comply with its own regulations, even if the results are undesired or inconvenient. *See Service v. Dulles*, 354 U.S. 363, 388 (1957); *Environmental LLC v. Federal Communications Comm'n.*, 661 F.3d 80, 85 (D.C. Cir. 2011). NRC regulations establish a presumption that documents submitted to the agency should be made available for public inspection and copying. 10 C.F.R. § 2.390(a). Under these regulations, "disclosure of information in NRC files shall be the rule, and nondisclosure the exception." *Westinghouse Electric Corp. v. U.S. Nuclear Regulatory Comm'n.*, 555 F.2d 82, 87 (3d Cir. 1977). One such exception permits nondisclosure of "[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential." *Id.* § 2.390(a)(4). The Commission makes the ultimate determination on "whether information sought to be withheld from public disclosure . . . (i) Is a trade secret or confidential or privileged commercial or financial information; and (ii) If so, should be withheld from public disclosure." *Id.* § 2.390(b)(3). In making this determination, the Commission considers the following factors:

> (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.

Id. § 2.390(b)(4). Even if a document contains confidential commercial information, the Commission must "determine 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, and whether the information should be withheld from public disclosure under this paragraph." *Id.* § 2.390(b)(5).

The Commission has held that 10 C.F.R. § 2.390(a)(4) "embodies the standards of Exemption 4 of the Freedom of Information Act (FOIA), so we look for guidance to the plentiful federal case law on that exemption." *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-05-08, 61 N.R.C. 129, 163 (2005) (footnotes omitted) (citing 5 U.S.C. § 552 [b] [4]). The FOIA exemptions have been described by the Supreme Court as "limited exemptions" that "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Accordingly, the exemptions "must be narrowly construed" and the burden is on the entity seeking to withhold information from disclosure to establish the exemption's applicability. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (internal quotation marks omitted); *accord Multi Ag Media LLC v. Department of Agriculture*, 515 F.3d 1224, 1227 (D.C. Cir. 2008).

FOIA Exemption 4, like 10 C.F.R. § 2.390(a)(4), exempts from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential[.]" "Commercial" is not defined in 10 C.F.R. Part 2 or in FOIA. However, "not every bit of information submitted to the government by a commercial entity" is considered commercial or financial information; rather, "the terms 'commercial' and 'financial' in the exemption should be given their ordinary meanings." *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). Accordingly, information is "commercial" under Exemption 4 "if, 'in and of itself,' it serves a 'commercial function' or is of a 'commercial nature.'" *National Assoc. of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002), quoting *Am. Airlines, Inc. v. Nat'l Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978). Information may also be considered commercial "when the provider of the information has a commercial interest in the information submitted to the agency." *Baker & Hostetler, LLP v. U.S. Dept. of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006). However, a document should not be withheld from disclosure just because it may be embarrassing to its owner or a regulator. *Pub. Citizen Health Research Group v. FDA*, 964 F. Supp. 413, 415 (D.D.C. 1997) (disclosure of safety concerns or public reaction are not a cognizable competitive injury to drug manufacturer that sought to avoid disclosure of post-approval study to assess adverse reactions in patients); *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 341 (D.C. Cir. 1989).

Commercial or financial information is only considered confidential "if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks and Conservation Assoc. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted). The

D.C. Circuit has also held that in certain situations where a private entity has voluntarily submitted allegedly exempt information to a government situations, such information will be considered "'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Critical Mass Energy Project*, 975 F.2d at 879. Notably, however, the *Critical Mass* test for "voluntary" submissions has not been adopted by the Supreme Court or the majority of Circuit Courts. *See, e.g., Dow Jones Co. v. Federal Energy Regulatory Comm'n.*, 219 F.R.D. 167, 177-178 (C.D. Ca. 2002) (noting that "the test set forth in *Critical Mass* has not been adopted by any Circuit other than the District of Columbia Circuit and has been the subject of criticism by some courts."); *see, e.g., New Hampshire Right to Life v. United States Dept. of Health and Human Servs.*, 778 F.3d 43, 52 n 8 (1st Cir. 2015), *cert. filed* April 21, 2015 (declining to adopt *Critical Mass*); *American Management Servs. v. Dept. of the Army*, 703 F.3d 724, 731 (4th Cir. 2013) (same).

In this proceeding, requests for nondisclosure of allegedly proprietary information are governed by the Board's September 4, 2009 Protective Order. The Protective Order imposes certain obligations on the "Initial Holders" of any allegedly proprietary information. Protective Order, at 2-3. The "Initial Holder" is any "Participant in this proceeding" who wishes to designate documents in its possession as "proprietary." *Id.* at 2. Among other things,

> if the Initial Holder of proprietary information or its counsel has a good faith belief that a document or portion thereof contains information that qualifies as a trade secret and/or commercial or financial information that is privileged or confidential under 10 C.F.R. §§ 2.390(a)(4) and (b)(4)(i)-(v), the Initial Holder or its counsel may designate such document on its proprietary log as a 'proprietary document,' and it shall be protected in accordance with the terms and conditions of this Protective Order.

Protective Order, ¶ A. Notably, the Protective Order also provides for the partial redaction of a document where the document contains both proprietary information and non-proprietary

information. *Id.* at ¶ C. The Protective Order further authorizes a party that has received a document designated as containing proprietary information to challenge that designation and seek the removal of that designation. *Id.* at ¶ D. The Protective Order sets forth a procedure by which a party seeking public disclosure of an allegedly proprietary document must first consult with the Initial Holder, then file a motion for with the Board. *Id.* In this situation,

> the Initial Holder shall have the burden of showing that the applicable information in the proprietary document is a trade secret and/or commercial or financial information that is privileged or confidential so that the Board can determine, as applicable, whether, on balance, protection of the document from public disclosure is warranted under 10 C.F.R. § 2.390.

Id. In short, the Protective Order contemplates that a party which has received allegedly proprietary information in the course of disclosures may seek a Board order for public disclosure of that information.[14]

ARGUMENT

I. The Commission Should Grant Interlocutory Review of the Board's Failure to Rule on Whether Westinghouse Is a Proper Participant in this Proceeding.

The Board's Order fails to resolve the State's argument that Westinghouse is not a proper participant in this proceeding. Order, at 5-6. The Board has never issue a written order resolving Westinghouse's Motion to Specially Appear and the State's opposition to that Motion as untimely. [redacted] The Board, in allowing Westinghouse to participate in this proceeding, has failed to follow NRC regulations and leaves the current status of Westinghouse's role in the relicensing proceeding unclear. The State raised this issue at the earliest opportunity,

[14] The Protective Order also includes a provision for review of a Board order granting public disclosure by the Commission. Protective Order, ¶ E.

when it immediately objected to the Westinghouse Motion to Specially Appear on the grounds that the motion did not cite any authority for Westinghouse's participation and that the motion was untimely under NRC regulations. NYS Answer to Westinghouse Motion to Specially Appear, at 5-9. The State reiterated its opposition to Westinghouse's participation in its Reply to the Joint Industry Brief. NYS Reply to Joint Industry Brief, at 13-14. *See* 10 C.F.R. § 2.341(b)(2)(ii); (b)(5).

The Board's implicit approval of Westinghouse's participation in this proceeding departs from governing NRC regulations. *See* 10 C.F.R. § 2.341(b)(2)(iii). Under 10 C.F.R. § 2.323 (a)(2), "*All motions* must be made no later than ten (10) days after the occurrence or circumstances from which the motion arises" (emphasis added). [redacted] Westinghouse did not move to specially appear until May 5, 2015. *See* Westinghouse Motion to Appear Specially, at 1. Accordingly, the motion was untimely and should have been denied.[16]

[15] Additionally, a non-party participant under 10 C.F.R. § 2.315 is limited to "making an oral or written statement of his or her position" and "may not otherwise participate in the proceeding." 10 C.F.R. § 2.315(a).

[16] [redacted]

This is a substantial issue that warrants review by the Commission. As described above, the Board's *sub silento* approval of Westinghouse's participation in the proceeding clearly departs from the applicable legal principles set forth in NRC regulations. *See* 10 C.F.R. § 2.341(b)(2)(iv); (b)(4)(ii). Additionally, this is a substantial and important issue that should be clarified by the Commission. If industry parties can appear in NRC proceedings at any time to defend interests that may be affected by the proceeding, then similar solicitude should be extended to States whose interests are clearly affected by decisions relating to nuclear plant operation.[17] *See id.* § 2.341(b)(2)(iv); (b)(4)(iii). Additionally, the Board's failure to provide a reasoned basis for allowing Westinghouse to participate fails to define the scope of Westinghouse's rights in the proceeding, which is a prejudicial procedural error as the State must now prepare for and conduct the Track 2 evidentiary hearing without knowing whether or how Westinghouse will seek to participate in or comment upon the proceedings. *See id.* § 2.341(b)(2)(iv); (b)(4)(iv). If Westinghouse is to remain a party in the proceeding, it should be required to comply with the same obligations imposed on other parties, such as submitting monthly disclosures.

Finally, interlocutory review of this issue is appropriate. First, Westinghouse's participation in the proceeding had the immediate and irreparable effect of allowing the industry an additional opportunity to defend the proprietary designation of the documents, after the issue had been fully briefed. *See* 10 C.F.R. § 2.341(f)(2)(i). Second, the sudden presence of a second

[redacted].

[17] [redacted]

industry party affects the basic structure of the eight-year-old proceeding, and – absent clarification by the Commission – the nature and scope of Westinghouse's rights and obligations going forward will be unclear. *See id.* § 2.341(f)(2)(ii). Commission review of this issue after a final order on the State's remaining contentions will not protect the State's interests, as by that time any harm arising from Westinghouse's unexplained participation will have already occurred.

II. The Commission Should Grant Interlocutory Review of the Board's *Sua Sponte* Ruling that the PWROG Memo is Inadmissible.

Although no party has objected to the admissibility of the PWROG Memo as an evidentiary exhibit, the Board issued a preemptive, *sua sponte* ruling that the PWROG Memo is inadmissible hearsay with "no probative value." Order, at 6. Indeed, the Board stated unambiguously that "the memo would not be received in evidence." *Id.* This ruling goes beyond the scope of the NYS Motion, and imposes legal requirements with no basis in NRC regulations.

[redacted] Inasmuch as no party sought to hold the PWROG Memo inadmissible, the State had no other opportunities to address this argument. *See* 10 C.F.R. § 2.341(b)(2)(ii); (b)(5).

The Board's preemptive ruling on the admissibility of the PWROG Memo is erroneous because it goes beyond the scope of issues presented for the Board's resolution of the NYS Motion and departs from NRC regulations and the Board's own Protective Order. *See* 10 C.F.R § 2.341(b)(2)(iii). The PWROG Memo was disclosed by Entergy in the course of its normal disclosures, [redacted]

[redacted] Although the document does not include an author, no party has suggested that it is anything other than what it appears to be. Indeed, in defending the proprietary designation of the document, Entergy and Westinghouse have submitted declarations and affidavits from PWROG managers that confirm that the document was prepared by someone within PWROG and that it was sufficiently reliable to serve as a basis for PWROG decision-making. *See* Nowinowski Affidavit, ¶ 3(iv), Attachment 1 to Entergy's Answer (April 20, 2015); [redacted]

Entergy's January 2015 disclosure of the document included the following information:

10/28/2014	Morgan Lewis & Bockius	Memorandum	"PWROG Executive Summary - Branch Technical Position (BTP) 5-3"	NYS-25	PWROG Proprietary Information

The Board's holding essentially penalizes the State and the public for having only the information provided in Entergy's disclosure log.

Furthermore, because under the 2004 Part 2, Subpart L procedural regulations the State does not have a right to take depositions of industry employees or document custodians to establish a further foundation for a document such as the PWROG Memo, *see* 10 C.F.R. § 2.1203(d), the State could not obtain additional information regarding this document, even if the State had notice that the Board was considering ruling on the admissibility of the PWROG Memo. [redacted]

Moreover, neither 10 C.F.R. § 2.390 nor the Board's Protective Order require that a party seeking public disclosure of an allegedly proprietary document must first establish that the document is admissible evidence. To the contrary, the Protective Order contemplates that a party may receive an allegedly proprietary document in the course of discovery, and seek to obtain public disclosure of that document, in which case the burden to establish that the document contains proprietary information rests on the party that designated the document as proprietary. *See* Protective Order, at ¶¶ A, D. The requesting party's intended use of the document is irrelevant. *See, e.g., Consumers' Checkbook, Ctr. for the Study of Servs. v. U.S. Dept. of Health and Human Servs.*, 554 F.3d 1046, 1051 (D.C. Cir. 2009), *cert. denied* 559 U.S. 1067 (2010) (under FOIA, "[t]he requesting party's intended use for the information is irrelevant[.]"). Additionally, the Protective Order *requires* that an objection to a proprietary designation be "submitted no later than sixty (60) days before the first scheduled day of hearing," Protective Order, ¶ D, indicating that the issue of whether a proprietary designation is appropriate necessarily will be resolved prior to the determination of whether the document is admissible.

The Board's preemptive, *sua sponte* holding that the PWROG Memo is inadmissible presents a substantial issue warranting review by the Commission. First, the Board's holding is without governing legal precedent and contrary to established law, as there is no basis for requiring a party seeking public disclosure of an allegedly proprietary document to first establish the evidentiary admissibility of the document. *See* 10 C.F.R. § 2.341(b)(2)(iv); (b)(4)(ii). Second, the holding presents a substantial and important question of law, as it threatens to impose additional requirements on any party objecting to the proprietary designation of an industry document in an NRC proceeding. Additionally, it would allow industry parties to avoid review of proprietary designations by simply omitting information on a document's author. *See*

id. § 2.341(b)(2)(iv); (b)(4)(iii). Finally, the holding is a prejudicial procedural error as it has the effect of preemptively preventing the State from offering the PWROG Memo – confidentially or publicly – into evidence.[18] *See id.* § 2.341(b)(2)(iv); (b)(4)(iv).

Finally, the Commission should grant interlocutory review of this issue. The Board's Order inflicts immediate and irreparable impact and affects the basic structure of this proceeding in a pervasive and unusual manner, as it prevents the State from using the PWROG Memo as evidence in the Track 2 evidentiary hearing. Review of this error after the Board issues a final decision on the State's remaining contentions will not be adequate, because by that time the State will have been required to litigate its contentions without the benefit of the PWROG Memo, [redacted] *See* 10 C.F.R. § 2.341(f)(2).

III. The Commission Should Grant Interlocutory Review of the Board's Determination that the Documents Should Not Be Publicly Disclosed.

The Board's Order denied the NYS Motion to withdraw the proprietary designation of the documents. Order, at 6-7. With respect to the PWROG Memo, the Board acknowledged that Westinghouse and Entergy had failed to establish that the document was a trade secret or confidential information, but nonetheless refused to allow its public disclosure because the PWROG Memo was not admissible evidence. *Id.* at 6. With respect to the calculation notes, the Board held that the industry had met its burden to establish that the documents contained trade secrets or commercial information, but failed to address the State's arguments. *Id.* at 5-6. The State has briefed this issue many times, including in the NYS Objection, the NYS Motion (at 7-14), the NYS Reply (at 5-10), and in NYS Response to Joint Industry Brief (at 17-30). *See* 10 C.F.R. § 2.341(b)(2)(ii); (b)(5).

[18] Indeed, the State has offered the PWROG Memo into evidence as a non-public document as Exhibit NYS000519.

The Board's refusal to order the public disclosure of any portion of any of the documents is erroneous because it departs from judicial and Commission precedent, NRC regulations and the Board's own Protective Order. *See* 10 C.F.R § 2.341(b)(2)(iii). With respect to the PWROG Memo, the Board recognized that Westinghouse and Entergy had failed to establish that the document is proprietary, observing that "the financial or competitive harm that would flow from the release of the PWROG memo is marginal at best" and that "the effort to establish this document as trade secret or confidential information is weak[.]" Order, at 6. [redacted] Under 10 C.F.R § 2.390 and the Protective Order, the Board's conclusion – which essentially accepted the State's argument – means that Entergy and Westinghouse had failed to establish that the PWROG Memo should be considered proprietary, and should have resulted in the public disclosure of this document.[19] Nonetheless, the Board shifted to the State the burden to show that the PWROG Memo was admissible evidence, a requirement set forth in no regulation or NRC precedent.

With respect to the Calculation Notes, the Board failed to address the State's arguments regarding Westinghouse's own public disclosure of a variety of the information contained in the Calculation Notes or that the public interest in disclosure of the Calculation Notes outweighed the industry's interest in non-disclosure. As the State has previously described, much of the

[19] [redacted] The Board also suggested that additional briefing might be appropriate if the PWROG Memo were admissible evidence. Order, at 6. Further briefing on the proprietary nature of the PWROG Memo is not appropriate. Entergy and Westinghouse have had multiple opportunities to defend the proprietary nature of the PWROG Memo, in whole or in part, and have failed to do so. Because they have failed to meet their burden to show that the document contains proprietary information, the Commission should order the public disclosure of the PWROG Memo.

information in the Calculation Notes has been publicly disclosed by Westinghouse employees, severely undermining its claim that disclosure will result in competitive harm. *See* NYS Reply to Joint Industry Brief, at 17-19. A paper entitled "License Renewal Environmental Fatigue Screening Application," PVP2014-29093, was presented at the 2014 American Society of Mechanical Engineers (ASME) Pressure Vessels and Piping Conference in Anaheim, California. Attachment 1 to Lusignan Declaration, NYS Reply to Joint Industry Brief. In that paper, Westinghouse employees publicly described Westinghouse's methodology for performing environmentally-assisted fatigue (EAF) screening analyses in support of license renewal applications. Contrary to the Board's conclusion that disclosure of the calculation notes "if taken piece-by-piece or together, would enable a competitor to undercut Westinghouse's market position," Order, at 7, Westinghouse has already presented a veritable "roadmap" for performing an EAF screening evaluation such as that performed for Indian Point. The ASME paper does not specifically identify the plant to which Westinghouse's EAF screening methodology was applied for illustration purposes; [redacted]

Additionally, the ASME paper notes that Westinghouse's fatigue calculation methodology is similar to the methodology set forth in EPRI Report 1024995, "EAF Screening: Process and Technical Basis for Identifying EAF Limiting Locations" (August 2012),[20] and that "the only fundamental difference" between the proposed EPRI method and the method described in Gray's 2014 paper is in the comparison of component fatigue usage on a common basis with respect to

[20] Attachment 2 to Lusignan Declaration, NYS Reply to Joint Industry Brief.

the stress analysis methods. ASME Paper, at 2. Because the EPRI Report is a publicly available document, it would take little effort for a competitor to identify the basic elements of Westinghouse's EAF screening strategy and technique. Simply put, publicly disclosed commercial information is not entitled to confidential treatment.

The Board erroneously described the State's "claims questioning the proprietary nature of the information" as "general in nature" and noted that they "did not suggest that Westinghouse's sworn statements were inaccurate." Order, at 7. To the contrary, as described above, the State described several specific ways in which Westinghouse's characterization of the notes as "confidential" was inaccurate. Moreover, it was not the State's burden to show that the Westinghouse's sworn statements were inaccurate. Rather, Westinghouse and Entergy had the burden to show that the calculation notes were proprietary in their entirety.

The Board failed to address the State's alternative argument that, even if the Calculation Notes are proprietary, 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" pursuant to 10 C.F.R. § 2.390(b)(5). NYS Reply to Joint Industry Brief, at 20-24. [redacted] In particular, the CUF_{en} values support NRC's determination of whether Entergy is able to fulfill License Renewal Application Commitments 43 and 49. A CUF_{en} value of more than 1.0 requires corrective action. *See* LRA Commitment 49, Attachment 1 to Letter from Fred Dacimo to USNRC

Document Control Desk, NL-13-052 (May 7, 2013), at 9. [redacted]

[redacted]

The propriety of the Board's ruling on the documents presents a substantial issue warranting Commission review. First, the Board departed from established law when it shifted to the State the burden to establish the admissibility of the PWROG Memo and the non-proprietary nature of the Calculation Notes. *See* 10 C.F.R. § 2.341(b)(2)(iv); (b)(4)(ii). Second, the issue is a substantial and important question of law and policy, calling into question the extent to which industry representatives can avoid public disclosure of documents that serve as the basis for agency decisionmaking by making pro-forma assertions of confidentiality. Indeed, the Board's holding would essentially invest the industry with complete discretion to designate what documents are confidential commercial information, and would require parties seeking disclosure of allegedly proprietary information to retain an industry expert. *See id.* § 2.341(b)(2)(iv); (b)(4)(iii), (v). Third, the Board's ruling involved a prejudicial procedural error, as the continued designation of the entirety of all five documents as proprietary imposes a significant administrative burden on the State, which must submit both nonpublic, nonredacted versions and public, redacted versions of any document that refer to any portion of allegedly proprietary documents – and impedes public access to NRC proceedings. *See id.* §

2.341(b)(2)(iv); (b)(4)(iv), (v).[21] The administrative burden of the Protective Order was illustrated when Westinghouse and Entergy filed the Joint Industry Brief, but failed to comply with the requirements of the Protective Order. *See* note 12, *supra*.

Finally, interlocutory review of the Board's refusal to order disclosure of the documents is appropriate. The Order has an immediate and adverse irreparable impact and affects the basic structure of the proceeding in a pervasive and unusual manner, as the public's ability to obtain non-proprietary information about issues of public interest and to follow the proceeding will be immediately and irreparably impaired. Additionally, the State will incur the administrative burdens described above if the documents remain subject to the protective order throughout the hearing. Correcting the Board's error after a final ruling on the State's contentions will not address these effects. *See* 10 C.F.R. § 2.341(f)(2).

CONCLUSION

For the reasons described above, the Commission should grant the State's Petition for Review and reverse the Board's Order.

Dated: August 14, 2015

Respectfully submitted,

Signed (electronically) by
John J. Sipos
Brian Lusignan
Assistant Attorneys General
Office of the Attorney General
of the State of New York
The Capitol
Albany, New York 12224
(518) 776-2380

[21] Notably, none of the other parties – including NRC Staff – have filed public, redacted versions of their non-public briefs in the course of this dispute.

ATTACHMENT 1

OVERVIEW OF FILINGS IN PROPRIETARY DOCUMENT DISPUTE

DATE	TITLE	SHORT CITE	ATTACHMENTS
09/04/2009*	ASLB Protective Order	Protective Order	None
03/09/2015#	Notice of Object to Proprietary Designations	NYS Objection	None (Included as Attachment 1 to NYS Motion)
04/09/2015^	State of New York Motion to Withdraw the Proprietary Designation of Various Pressurized Water Reactor Owners' Group and Westinghouse Documents	NYS Motion	Kwong Declaration, with seven attachments: 1 – March 9, 2015 Notice of Objection to Proprietary Designation 2 – PWROG Memo 3 – Calculation Note CN-PAFM-09-77 4 – Calculation Note CN-PAFM-12-35 5 – Calculation Note CN-PAFM-13-32 6 – Calculation Note CN-PAFM-13-40 7 – March 9-30, 2015 E-mail Thread between L. Kwong and R. Kuyler
04/20/2015*	Entergy's Answer Opposing New York State's Motion to Strike Proprietary Designations	Entergy's Answer	1 – Affidavit of W. Nowinowski, Manager, PWROG 2 – Affidavit of James A. Gresham, Manager, Westinghouse 3 – Declaration of Mark A. Gray, PE, Westinghouse 4 – WESTEMS™ Fatigue Analysis, Diagnostics and Monitoring System
04/20/2015*	NRC Staff's Answer to "State of New York Motion to Withdraw Proprietary Designation of Various Pressurized Water Reactor Owners' Group and Westinghouse Documents"	NRC Staff's Answer	None
05/01/2015^	State of New York Reply in Support of Motion to Withdraw Proprietary Designations	NYS Reply	None
05/05/2015*	ASLB Order (Setting Oral Argument on Proprietary Designation of Documents)	None	None

05/05/2015*	Motion of Westinghouse Electric Company LLC to Appear Specially, etc.	Motion to Appeal Specially	None
05/06/2015^	State of New York Answer Opposing Motion of Westinghouse Electric Co. LLC to Appear Specially, etc.	Answer to Motion to Appear Specially	1 – E-mail Chain between Assistant Attorney General John Sipos and Attorney Paul Bessette, dated February 4 to 10, 2015
05/08/2015*	ASLB Order (Scheduling Oral Argument)	None	None
05/14/2015#	Transcript Oral Argument on Proprietary Designations	Oral Argument Transcript	None
06/04/2015#	Joint Brief of Entergy and Westinghouse Regarding Proprietary Documents	Joint Industry Brief	1 – Declaration of Mark A. Gray 2 – Declaration of W. Anthony Nowinowski 3 – Letter from Jack Stringfellow, Chairman, PWROG, to W. Anthony Nowinowski
06/18/2015^	State of New York Reply to Joint Brief of Entergy and Westinghouse Regarding Proprietary Documents	NYS Reply to Joint Industry Brief	Lusignan Declaration, with six attachments: 1 – Paper No. PVP2014-29093, Kupper & Gray, *License Renewal Environmental Fatigue Screening Application* (July 20-24, 2014) 2 – EPRI Report 1024995, *EAF Screening: Process and Technical Basis for Identifying EAF Limiting Locations* 3 – NRC Staff's License Renewal Team Inspection Report 05000247/ 2013010 (Sept. 29, 2013) 4 – Summary of February 19, 2014 public meeting to discuss RPV issues 5 – E-mail from Hearing Docket on Joint Industry Brief filing, dated June 4, 2015 6 – E-mail from AAG

			Lusignan to Counsel for Westinghouse, Entergy and NRC Staff re: non-public filing, dated June 15, 2015
06/25/2015[#]	NRC Staff's Response to Joint Brief of Entergy and Westinghouse Regarding Proprietary Documents	NRC Staff Response to Joint Industry Brief	None
07/20/2015[*]	ASLB Order (Denying New York Motion to Withdraw Proprietary Designation)	Order	None

* = Public Filing
# = Non-public Filing Only, No Redacted Version Filed
^ = Non-public and Redacted Public Filings

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSIONERS

In re:	Docket Nos. 50-247-LR and 50-286-LR
License Renewal Application Submitted by	ASLBP No. 07-858-03-LR-BD01
Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	DPR-26, DPR-64 August 14, 2015

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2015, public, redacted copies of the State of New York's Petition for Interlocutory Review of July 20, 2015 ASLB Order Denying New York's Motion to Withdraw Proprietary Designations were served electronically via the Electronic Information Exchange public submission portal on the following recipients:

Lawrence G. McDade, Chair
Richard E. Wardwell, Administrative Judge
Michael F. Kennedy, Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738
Lawrence.McDade@nrc.gov
Richard.Wardwell@nrc.gov
Michael.Kennedy@nrc.gov

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738

Kathleen Schroeder, Law Clerk
Alana Wase, Law Clerk
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738
Kathleen.Schroeder@nrc.gov
Alana.Wase@nrc.gov

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mailstop 16 G4
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
ocaamail@nrc.gov

Office of the Secretary
Attn: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738
hearingdocket@nrc.gov
brian.newell@nrc.gov

Sherwin E. Turk, Esq.
David E. Roth, Esq.
Beth N. Mizuno, Esq.
Brian G. Harris, Esq.
Anita Ghosh, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mailstop 15 D21
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
sherwin.turk@nrc.gov
david.roth@nrc.gov
beth.mizuno@nrc.gov
brian.harris@nrc.gov
anita.ghosh@nrc.gov

Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
Raphael Kuyler, Esq.
Grant Eskelsen, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
ksutton@morganlewis.com
pbessette@morganlewis.com
rkuyler@morganlewis.com
geskelsen@morganlewis.com

Martin J. O'Neill, Esq.
Morgan, Lewis & Bockius LLP
Suite 4000
1000 Louisiana Street
Houston, TX 77002
martin.o'neill@morganlewis.com

William B. Glew, Jr., Esq.
Entergy Nuclear Operations, Inc.
440 Hamilton Avenue
White Plains, NY 10601
wglew@emtergy.com

Mark Churchill, Esq.
Matthew M. Leland, Esq.
McDermott Will & Emery LLC
600 13th Street, NW
Washington, DC 20005-3096
mchurchill@mwe.com
mleland@mwe.com

Emre N. Ilter, Esq.
McDermott Will & Emery LLC
500 North Capitol Street, NW
Washington, DC 20001
eilter@nwe.com

Richard A. Meserve, Esq.
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
rmeserve@cov.com

Elise N. Zoli, Esq.
Goodwin Procter, LLP
Exchange Place
53 State Street
Boston, MA 02109
ezoli@goodwinprocter.com

Robert D. Snook, Esq.
Assistant Attorney General
Office of the Attorney General
State of Connecticut
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
robert.snook@ct.gov

Melissa-Jean Rotini, Esq.
Assistant County Attorney
Office of the Westchester County Attorney
Michaelian Office Building
148 Martine Avenue, 6th Floor
White Plains, NY 10601
MJR1@westchestergov.com

Theresa Knickerbocker, Mayor
Kevin Hay, Village Administrator
Village of Buchanan
Municipal Building
236 Tate Avenue
Buchanan, NY 10511-1298
Administrator@villageofbuchanan.com
theresak@villageofbuchanan.com

Daniel Riesel, Esq.
Thomas F. Wood, Esq.
Victoria S. Treanor, Esq.
Sive, Paget & Riesel, P.C.
460 Park Avenue
New York, NY 10022
driesel@sprlaw.com
vtreanor@sprlaw.com

Michael J. Delaney, Esq.
Director
Energy Regulatory Affairs
NYC Department of Environmental Protection
59-17 Junction Boulevard
Flushing, NY 11373
mdelaney@dep.nyc.gov

Richard Webster, Esq.
Public Justice, P.C.
Suite 200
1825 K Street, NW
Washington, DC 20006
rwebster@publicjustice.net

Andrew B. Reid, Esq.
Springer & Steinberg, P.C.
1600 Broadway, Suite 1200
Denver, CO 80202
areid@springersteinberg.com

Peter A. Gross
Executive Director
Hudson River Sloop Clearwater, Inc.
724 Wolcott Avenue
Beacon, NY 12508
peter@clearwater.org

David A. Repka, Esq.
counsel for
Westinghouse Electric Company LLC
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006-3817
drepka@winston.com

Deborah Brancato, Esq.
Riverkeeper, Inc.
20 Secor Road
Ossining, NY 10562
dbrancato@riverkeeper.org

Signed (electronically) by

_____

Brian Lusignan
Assistant Attorney General
State of New York
(518) 776-2399
Brian.Lusignan@ag.ny.gov

Dated at Albany, New York
this 14th day of August 2015