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 September 18, 2015

STATE OF NEW YORK
COMBINED REPLY IN SUPPORT OF PETITION FOR INTERLOCUTORY REVIEW

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for the State of New York
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Pursuant to 10 C.F.R. § 2.341, the State of New York ("State") submits this combined reply in further support of its August 14, 2015 petition for interlocutory review ("Petition") of a July 20, 2015 Atomic Safety and Licensing Board ("Board") Order. Entergy and NRC Staff filed answers on September 8, 2015 opposing the State's Petition ("Entergy Answer" and "NRC Staff Answer," respectively). On the same day, Westinghouse submitted a motion for leave to file an *amicus curiae* brief along with a proposed brief opposing the State's Petition ("Westinghouse Motion" and "Westinghouse Brief"). This is a combined reply to all three submissions.[1] Although Entergy, NRC Staff and Westinghouse offer a variety of *post hoc* rationalizations to clarify and limit the scope of the Board's Order, they ultimately fail to rebut the State's argument that three clear errors in the Board's Order have inflicted and will continue to inflict irreparable harm on the State and affect the basic structure of the proceeding in a pervasive or unusual manner, pursuant to 10 C.F.R. § 2.341(f), thus warranting immediate Commission review.

DISCUSSION

I. The Board's Failure to Rule on Westinghouse's Role in This Proceeding Warrants Immediate Review

Entergy, NRC Staff and Westinghouse seek to explain and minimize Westinghouse's role in the proceeding, notwithstanding the fact that the Board has never ruled on Westinghouse's motion to "appear specially," let alone delineated any kind of restrictions on its participation. Westinghouse assures the State that it is not a party and will not seek to interfere in the Track 2 evidentiary hearing, Westinghouse Brief, at 6-9, but that is a self-described limitation with no basis in a Board order or other pronouncement. Rather than address the State's position that

[1] During § 2.323 consultations, the State agreed to not oppose Westinghouse's motion to file an *amicus curiae* brief as long as Westinghouse did not object to the State submitting a response to Westinghouse's brief. Westinghouse stated it "does not object to a State reply in accordance with 10 C.F.R. § 2.341(b)(3)." Westinghouse Motion, at 3.

Westinghouse's motion to appear specially failed to comply with the clear and unambiguous 10-day time limit applicable to "[a]ll motions," 10 C.F.R. § 2.323(a)(2), the Board simply allowed Westinghouse to enter the proceeding after initial briefing on the State's motion had already been submitted, and to define its own role. In so doing, Westinghouse has avoided the framework established by the Board to resolve disputes regarding confidentiality designations, and the Board's Order should be reviewed by the Commission.

Entergy notes that Westinghouse sought to appear "less than 30 days after New York filed its initial Motion" and describes this timeframe as "reasonable." Entergy Answer, at 16. However, the timeliness of motions is not subject to a generic "reasonableness" test, but is specifically set as 10 days under 10 C.F.R. § 2.323(a)(2). In fact, when NRC promulgated the current section 2.323, it specifically rejected a comment opposing the set 10-day time limit because of the "'broad nature' of motions." 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004). The section was later amended in 2012 to clarify that the 10-day time period applies to all motions, except motions made pursuant to section 2.309(c), which are specifically exempted. 77 Fed. Reg. 46,562, 46,567 (Aug. 3, 2012). Moreover, unlike some other time periods set forth in the NRC's procedural regulations, the time period for bringing a motion does not allow the application of some "other period as determined by . . . the presiding officer." *E.g.* 10 C.F.R. § 2.323(c). The time periods set forth in section 2.323, furthermore, have been strictly applied to the Commission and licensing boards. *See e.g. First Energy Nuclear Operating Company* (Beaver Valley Power Station, Unit Nos. 1 and 2, *et al.*), CLI-06-02, 63 N.R.C. 9, 16 n. 36 (2006) (rejecting request for "clarification" from proposed intervenors submitted three weeks after issuance of revised order); *First Energy Nuclear Operating Company* (Davis-Besse Nuclear Power Station, Unit 1), LBP-11-34, 74 N.R.C. 685, 693 (2011) (rejecting opposition to a motion

from intervenor non-profit organizations that was filed three days late). The Board should have applied the time limit set forth in this section to Westinghouse's motion to specially appear. It did not, leaving in doubt Westinghouse's role in this proceeding.

As described in the State's Petition, the Board's Order causes irreparable harm to the State in several important ways. First, Westinghouse's participation in the proceeding after the submission of Entergy's initial briefing had the immediate and irreparable effect of allowing industry extra time and additional opportunities to supplement its initial position and briefing that the Board acknowledged was "conclusionary in nature" and that "basically recant[ed] the regulations,"[2] and to defend the proprietary designation of the documents after the issue had been fully briefed. *See* Petition at 16. Second, the Board's Order creates substantial ambiguity as to the nature and scope of Westinghouse's rights and obligations going forward. For example, the State has had no opportunity to obtain section 2.336 disclosures from Westinghouse that may call into question essential assumptions that Entergy has presented in this proceeding. At the same time, Westinghouse remains on the service list to the proceeding and has full access to filings which go to issues unrelated to the confidentiality of its information, and while its own employee, Mr. Mark Gray, is an anticipated witness in the upcoming evidentiary hearing. Indeed, Mr. Gray has already provided pre-filed testimony in these proceedings on issues that go squarely to the merits of the State's contentions and will presumably provide testimony in support of Entergy's license renewal application.[3] The ambiguity of Westinghouse's continued

[2] Official Transcript of Proceedings, ASLBP No. 07-858-03-LR-BD01 (May 14, 2015) at 4645.

[3] *See* Testimony of Entergy Witnesses Nelson F. Azevedo, Robert J. Dolansky, Alan B. Cox, Jack R. Strosnider, Timothy J. Griesbach, Randy G. Lott, and Mark A. Gray RegardingContention NYS-25 (Embrittlement) (Aug. 10, 2015), Exh. ENT000616; Revised Testimony of Entergy Witnesses Nelson F. Azevedo, Alan B. Cox, Jack R.Strosnider, Randy G. Lott, Mark A. Gray, and Barry M. Gordon Regarding Contention NYS-26B/RK-TC-1B (Metal Fatigue) (Aug. 10, 2015), Exh. ENT000679; Revised Testimony of Entergy Witnesses Nelson F. Azevedo, Robert J. Dolansky, AlanB. Cox, Jack R. Strosnider, Timothy J. Griesbach, Barry M. Gordon, Randy G. Lott, and Mark A. Gray Regarding Contention NYS-38/RK-TC-5 (Safety Commitments) (Aug. 10, 2015), Exh. ENT000699; and Curriculum Vitae of Mark A. Gray, ENTR00186.

role threatens the basic structure of this proceeding, and, contrary to Entergy's claims, Entergy Answer, at 13-14, this argument is not moot. Although Westinghouse has unilaterally agreed not to participate as a party in the proceeding, that restriction is self-imposed, and the Board's Order does not resolve this issue. To the extent that Westinghouse is permitted to continued participation in these proceedings, it would be impractical for the State to seek to object to Westinghouse's participation after a final decision has been rendered by the Board. The Commission should grant interlocutory review of the Board's error.

II. The Board's *Sua Sponte* Exclusion of the PWROG Memo Warrants Immediate Review

Entergy, NRC Staff and Westinghouse provide a variety of unconvincing *post hoc* justifications for the Board's unprompted decision to bar the PWROG Memo from evidence. Fundamentally, however, all three parties fail to address the essential error in the Board's Order: nothing in the Atomic Energy Act (AEA), the Freedom of Information Act (FOIA), 10 C.F.R. § 390, the Board's September 4, 2009 Protective Order, or any other arguably applicable legal authority required the State to establish that a document is admissible evidence before challenging a proprietary designation. Indeed, under the Protective Order, disputes over proprietary designations *must* be raised 60 days in advance of the hearing. Protective Order, ¶ D. Likewise, under FOIA – which is the basis for the NRC's public disclosure regulations and relevant to their interpretation – the intended use of a document is not relevant to whether it should be publicly disclosed. *See 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). The Board, by adding a new predicate to public disclosure of allegedly proprietary documents, altered the nature of the proceeding in a fundamental way.

The Board's ruling that the PWROG Memo is inadmissible is not just "preemptive," as Westinghouse suggests. Westinghouse Brief, at 12. Nor is it mere "*dicta* that portend how the Board may rule when New York proffers the document into evidence," as argued by NRC Staff. NRC Staff Answer, at 19. Rather, the Board made an unprompted ruling on an issue that had not been briefed or even raised by the parties, stating unequivocally that the PWROG Memo "would not be received in evidence." Board's Order, at 6. Indeed, the Board left no room for doubt, determining that the PWROG Memo "has no probative value," and that it "is not reliable hearsay," despite also conceding that any harm to Westinghouse from disclosure is "marginal at best." *Id.*

The Commission should review the Board's determination because it causes significant harm to the State that rises above mere "legal error," as suggested by Entergy. Entergy Answer, at 10-11. The effect of this holding is immediate and irreparable, as the State must prosecute its case without the benefit of the PWROG Memo, which contains specific and unique information not available from any other source. The Board's Order undercuts the State's ability to develop its case, for which it relies on documents produced by Entergy, such as the PWROG Memo, and threatens to preclude the State from presenting evidence adverse to Entergy's position, all while Entergy relies on the same type of information in its license renewal application to the NRC. As previously briefed, review of this error after the Board issues a final decision gives the State an inadequate remedy, since the State will have been required to litigate its contentions without the benefit of the PWROG Memo, a document which contains information that does not appear elsewhere in NRC or industry documents. Petition at 20. The holding is more than a standard procedural ruling on the admissibility of an exhibit – it marks a fundamental departure from the traditional role of the Board as arbiter of disputes. The Board has determined that a memo that

was within Entergy's possession and that Entergy disclosed and produced pursuant to the Commission's discovery regulations was nonetheless inadmissible. The Board's ruling raises the question of what other exhibits will be excluded from evidence on the grounds that the author is not specified, and how the State is supposed to establish the foundation necessary to authenticate and offer such exhibits as evidence when depositions of document custodians are not permitted as of right. Most immediately, the effect of the Board's Order is to remove the PWROG Memo from the State's evidence, a document that would still be fully available as evidence to the State had it not raised its objection to the document's confidentiality designation. Indeed, the Board's Order handicaps the State from presenting such evidence, and exposes the State to *sua sponte* admissibility determinations in its future challenges to designations of confidentiality. Finally, the Board's Order undermines the State's role in ensuring that the public has open access to the proceeding. These issues should be corrected before the State goes to evidentiary hearing in November.[4]

Entergy also attempts to prop up the Board's *sua sponte* evidentiary ruling using the Board's general powers to manage the hearing process. Entergy Answer, at 19. However, none of these general powers authorize the Board to preemptively and *sua sponte* block a party from presenting its case. The public release of allegedly proprietary information is governed by 10 C.F.R. § 2.390(b) and the Board's Protective Order, while the standard for admissible evidence is governed by 10 C.F.R. § 2.337. Nothing in these provisions authorizes what the Board did here. The Commission should grant interlocutory review to address the threat of harm to the State caused by the Board's Order.

[4] At a minimum the Commission should afford the State the opportunity to depose Westinghouse and Entergy's records custodians and the Westinghouse and PWROG representatives who submitted statements to the Board to further develop the foundation for the document.

Lastly, waiting until the end of the hearing to correct the Board's error would raise the prospect of re-litigating the track 2 contentions at a new hearing. This would be a significant waste of resources in this proceeding, when the Commission has the opportunity now to simply resolve the issue. The Commission has previously recognized that interlocutory appeals have value as a way to avoid interminable delays in proceedings that have already dragged on for many years. *See Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-16, 58 N.R.C. 360 (Nov. 13, 2003) (ordering interlocutory appeals to expedite resolution of seven-year-old proceeding).

III. The Board's Failure to Order Disclosure or Redaction of the Documents Warrants Immediate Review

Entergy, NRC Staff, and Westinghouse attempt to minimize the effect that the Board's Order will have on the upcoming hearing, to no avail. All three parties suggest that the State should be content to have access to the documents, and that withholding these documents from the public is of no great consequence to the State's ability to litigate its contentions. Entergy Answer, at 5; NRC Staff Brief, at 1; Westinghouse Brief, at 2. They suggest – as they have throughout this dispute – that the State must show some special reason to obtain public disclosure of the documents, which are directly relevant to the relicensing of Indian Point. Their position, which the Board Order approved, ignores the presumption of public disclosure established by 10 C.F.R. §§ 2.328, and 2.390(a), the Protective Order, and relevant judicial precedent. *See Westinghouse Electric Corp. v. U.S. Nuclear Regulatory Comm'n.*, 555 F.2d 82, 87 (3d Cir. 1977) ("disclosure of information in NRC files shall be the rule, and nondisclosure the exception."). The Board's Order threatens to convert most or all of the upcoming evidentiary hearing into a non-public proceeding, and should be reviewed and reversed immediately by the Commission.

Entergy and Westinghouse continue to argue that the D.C. Circuit's decision in *Critical Mass*, which does not require a showing of competitive harm, should apply to the documents, even though that standard was not raised until very late in this dispute and is directly contradicted by NRC regulations. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n.*, 975 F.2d 871 (D.C. Cir. 1992). Westinghouse Brief, at 16-18; Entergy Answer, at 7-9. As an initial matter, the *Critical Mass* test for documents that have been voluntarily submitted to the Government has not been adopted by the Supreme Court or the majority of Circuit Courts.[5] Moreover, notwithstanding the 1993 holding in *Critical Mass*, the NRC's regulations still require the Commission to consider "[w]hether 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 . . . ." 10 C.F.R. § 2.390(b)(4). Entergy and Westinghouse have not sought a waiver of this regulatory requirement as required by 10 C.F.R. § 2.335(a). Likewise, when the Board set oral argument on the State's Motion it specifically ordered the industry to be prepared to discuss "*section by section*, the contents of the documents in dispute, and specifically how competitive injury could follow [from public disclosure], and the likelihood thereof." *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), Order (Setting Oral Argument on Proprietary Designation of Documents) (May 5, 2015) (unpublished). Entergy and Westinghouse proceeded under the assumption that the competitive harm requirement should apply throughout this dispute, up until the filing of their June 3, 2015 Joint Brief.[6]

[5] *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; *American Management Servs. v. Dept. of the Army*, 703 F.3d 724, 731 (4th Cir. 2013); *Dow Jones Co. v. Federal Energy Regulatory Comm'n.*, 219 F.R.D. 167, 177-178 (C.D. Ca. 2002).

[6] In its initial opposition to the NYS Motion, Entergy's counsel argued the *National Parks* test should apply, including the requirement to show that public disclosure of the documents would result in "substantial competitive harm" to Westinghouse. Entergy Answer, at 2, 5, 8-11. Entergy was clearly aware of the *Critical Mass* decision, as it cited that case in a footnote, but said nothing to indicate that the relaxed test described therein should apply. *Id.* at 5 n. 21. Thereafter, in opposing the State's motion to file a reply, Entergy criticized the State for failing to anticipate allegations of substantial competitive harm, noting that "[t]he likelihood of competitive harm associated with public

Finally, the policy justifications underlying the *Critical Mass* decision do not apply here. The Court in *Critical Mass* recognized that private entities who voluntarily submit confidential commercial information to the Government should have some assurance that the information will not be disclosed to competitors, lest they refuse to voluntarily submit similar information in the future. *See Critical Mass*, 975 F.2d at 878. Here, neither Westinghouse nor Entergy "voluntarily" submitted the documents to the NRC. Rather, Entergy obtained the documents from Westinghouse because they contain information necessary for license renewal, and disclosed them to the State, Riverkeeper, and NRC Staff pursuant to its mandatory disclosure obligations. Entergy disclosed calculation notes to NRC Staff during a 2013 inspection of IP2, conducted as part of the Staff's regulatory functions and as part of Entergy's attempt to obtain the renewal licenses. *See* License Renewal Team Inspection Report 05000247/2013010 (Sept. 19, 2013) (ML13263A). In short, a showing of a likelihood of substantial competitive injury from disclosure of the documents is required by a specific regulatory requirement, a Board Order, the longstanding position of the parties, and the lack of countervailing public policy justifications. The Commission should clarify this point immediately, to inform future discussions or litigation over proprietary designations in this proceeding.

Entergy, NRC Staff, and Westinghouse utterly fail to address the State's argument that the Calculation Notes cannot be considered proprietary in light of Westinghouse's own public disclosure of the information. As set forth in the State's Petition, the examples of such public disclosure by Westinghouse of information that it has designated as confidential in this

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disclosure of the information in question *is a principal consideration* in determining whether that information constitutes a trade secret or confidential commercial information that should be withheld from public disclosure." Entergy Answer Opposing NYS Motion for Leave to File a Reply, at 5 (April 23, 2015) (emphasis added). During oral arguments, counsel for Westinghouse stated: "Under the *National Parks* standard, it requires, as does the NRC regulations, to show that it's confidential. It has to show there's competitive harm. It certainly is Westinghouse's view that there's competitive harm in the release of these documents . . . ." Oral Argument Hearing Transcript, at 4647.

proceeding are many and varied. Petition, at 21-23. Most glaring, however, is Westinghouse's concession, Westinghouse Brief at 16, that one of its Principle Engineers, Mr. Mark Gray, who provided an affidavit in the underlying briefing and swore to Westinghouse's practice of keeping such information in confidence, is the person who presented that same information publicly at a professional trade conference. The Board's failure to consider Westinghouse's waiver of this information in reaching its decision on confidentiality was in error. Thus, even assuming Westinghouse's methodology for EAF evaluations is entitled to proprietary protection, the public comments and presentations of Mr. Gray on the subject effectively waived that privilege.

Additionally, Westinghouse urges the Commission to defer to its affiant's conclusion that the Calculation Notes are proprietary despite its acknowledgement that the information has been publicly released. Westinghouse Brief, at 16. There is no legal basis to "defer" to the blanket confidentiality claims of industry representatives, especially when the State submitted specific evidence contradicting those claims. Nonetheless, the Board appears to have shifted the burden onto the State to disprove the industry's affiants. *See* Board Order, at 7 (describing the State's "claims questioning the proprietary nature of the information" as "general in nature" and noting that they "did not suggest that Westinghouse's sworn statements were inaccurate."). The rule for disclosure propounded by Westinghouse and accepted by the Board would allow industry parties to avoid public disclosure of any documents described as "confidential" by an industry affiant, unless proven wrong through expert submissions from another party. This clear subversion of the public nature of NRC activities and applicable legal standards for withholding of proprietary information is presents a fundamental change in the nature of this proceeding.

Entergy, NRC Staff, and Westinghouse also fail to seriously rebut the State's claims that the public's interest in reviewing information in the Calculation Notes – namely, CUF_{en} output

values and methods used to bring those values below 1.0 – outweighs the concern for protecting the industry's competitive position. Entergy claims that the public interest in this information is minimal because "the Board may or may not rely on the disputed documents in its future merits decision" Entergy's Answer, at 24. Meanwhile, Entergy has submitted revised versions of the Calculation Notes – designated as proprietary, of course – as Exhibits to support its position that the LRA adequately addresses the effects of fatigue. *See* Exhs. ENT000683, ENT000688. In particular, Entergy used the further revised Calculation Notes and results reported therein as a basis to establish that it had fulfilled Commitments 43 and 49 in the LRA. *See* Ent. Revised SOP on NYS-26B/RK-TC-1B, at 58-60 (Exh. ENT000678) (Aug. 10, 2015). On the one hand, Entergy is using the Calculation Notes to assure the Board that the public health and safety will be protected during the period of extended operation, while on the other, it is refusing to allow the public to review those Calculation Notes. This effectively precludes the public from gaining an understanding of how the information in the Calculation Notes impact the NRC's decision on Entergy's license renewal application. The Board utterly failed to consider the public's interest in knowing the bases for Entergy's claims that the operation of Indian Point out to 60 years is safe. To the extent Entergy urges that a decision on public disclosure wait until the proceeding is over, Entergy Answer, at 24, this contravenes the Protective Order ¶ D, which provides for the resolution of disputes over proprietary designations *before* a hearing.

Entergy's position that redaction of documents containing both proprietary and nonproprietary information is not required, Entergy Answer, at 21-22, runs counter to the Board's Protective Order, as well as the NRC regulations and relevant FOIA case law. Both 10 C.F.R. § 2.390(b) and the Protective Order ¶ A provide procedures for the designation of a document or "portion" of a document as containing allegedly proprietary "information," clearly

contemplating that documents containing both proprietary and nonproprietary information should not be subject to wholesale claims of nondisclosure. The Protective Order also mandates that the parties "shall consult and endeavor" to resolve disputes over proprietary designations through "use of redaction." Protective Order, ¶ C. Additionally, case law interpreting FOIA clearly establishes that even if an entity seeking to withhold information establishes an exemption, "it must nonetheless disclose all reasonably segregable, nonexempt portions of the requested record(s)." *Roth v. United States DOJ*, 542 F.3d 1161, 1167 (D.C. Cir. 2011). Significant portions of the Calculation Notes – such as tables of CUF_{en} values, references, tables of contents, etc. – are non-proprietary and could be segregated from truly proprietary descriptions of CUF_{en} calculation methodologies, yet the Board never considered redaction of the documents. Westinghouse can, and should, employ redaction to limit public disclosure of genuinely proprietary information, as it has done in the past. For example, during the course of NRC's acceptance review of Westinghouse's WESTEMS fatigue evaluation software, redaction was used to create a non-proprietary version of "Topical Report on ASME Section III Piping and Component Fatigue Analysis Utilizing the WESTEMS Computer Code," WCAP-17577-NP, Rev. 2, June 2013. ML13170A026. Indeed, NRC's limited use of redaction in its "Safety Evaluation Report of Topical Report WCAP-17577-NP, Rev. 2," September 2013, enabled NRC to present its technical assessment of Westinghouse's fatigue evaluation software and methodology without disclosing proprietary information. ML13248A423.

Under Entergy's "no redaction" rule, which the Board tacitly approved by declining to order any redaction of the documents, any document that contains even a single piece of protected information becomes entirely nonpublic, no matter how much relevant, otherwise public information it contains. Entergy recently illustrated the breadth of its rule, when it offered

only nonpublic versions of its pre-filed testimony and statements of position on the remaining Track 2 contentions. *See* Exhs. ENT000615, ENT000616, ENT000678, ENT000679, ENT000698, ENT000699. Although many aspects of the remaining contentions involve public exhibits and information, the fact that the testimony and statements of position included some reference to Calculation Notes and other allegedly proprietary documents rendered the entire document nonpublic.[7] This means that much, if not all, of the Track 2 hearing might be conducted non-publicly, putting the lie in Entergy's claim that there is "no reason to believe that the Board will not attempt to hold public hearings to the maximum extent practicable." Entergy Answer, at 22. This approach fundamentally alters the presumptively public nature of NRC proceedings, *see* 10 C.F.R. § 2.328, and warrants immediate review and correction.

On the other hand, the State has diligently undertaken the administrative burden required to redact documents in order to achieve the greatest possible disclosure of public information. Many of the nonpublic documents submitted by the State and cited by NRC Staff Answer, at 9,[8] are only designated as nonpublic because they contain citations or references to the documents subject to this dispute. *See, e.g.*, Exh. NYS000482. Should the Commission agree that the PWROG Memo and portions of the Calculation Notes are not proprietary, the State will offer fully public versions of many of these exhibits.

[7] Although not conceding that redaction is legally required, Entergy has agreed to offer redacted versions of its exhibits into evidence. In the absence of any recognized legal requirement for it to do so, however, the nature and scope of redaction are left entirely to Entergy's discretion.

[8] On September 11, 2015, NRC Staff "corrected" its Answer, which was submitted September 8, 2015 to include references to the State's evidentiary submissions from September 9, 2015. Although the amendment of a pleading to include references to post-dated materials seems inappropriate, the State has not objected to this correction and reserves its right to submit similar amendments should Entergy or NRC Staff submit relevant additional information in the future.

IV. The Board's Order causes the State irreparable harm and alters the basic structure of the proceeding

Entergy and NRC dismiss the public benefit of information disclosure, but their arguments fall flat. Entergy Answer, at 23-24, NRC Answer, at 8-9. One important role of the State in this proceeding is to ensure public access to information that forms the basis of NRC's decision-making on Entergy's license renewal application. The right of the public to access NRC's decision-making is embodied in the Atomic Energy Act, 42 U.S.C. § 2239, which was amended to provide for, among other things, an insurance program and public adjudicatory hearings on licensing applications and decisions. One of the sponsors of the legislation, Senator Anderson, stated his position that the federal regulator should conduct its licensing actions "out of doors" in a transparent manner. 1957 Congressional Record 4093-94 (Mar. 21, 1957). That public policy of transparency remains applicable to the current licensing proceeding.

There is substantial harm to the State's interest in public disclosure to have information shielded from public review that is not confidential, that has already been made available to the public, that was not voluntarily provided to the government, and which has been preemptively held to be inadmissible. The Board's Order sets up a hearing which will require segregated, in camera argument with respect to information that should not otherwise be withheld, and which the public will not have access to in understanding the NRC's decision-making on an issue of significant interest to the public – the relicensing of a nuclear power facility for a 20-year period beyond its design life.

CONCLUSION

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

Dated: September 18, 2015

Respectfully submitted,

Signed (electronically) by

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2015, public copies of the State of New York's combined reply in support of its petition for interlocutory review were served electronically via the Electronic Information Exchange non-public submission portal on the following recipients:

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Dated at Albany, New York
this 18th day of September 2015