

Enclosure 1

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April 25, 2008

VIA HAND DELIVERY

Mr. Russell A. Nichols
U.S. Nuclear Regulatory Commission
Freedom of Information Act and Privacy Act Officer
Office of Information Services
Washington, DC 20555-0001

Re: Vermont Yankee Nuclear Power Station
License No. DPR-28 (Docket No. 50-271)
FOIA-2008-0002A

Dear Mr. Nichols:

On behalf of Entergy Nuclear Operations, Inc. ("Entergy" or the "Company"), I am providing this response to your letter, dated March 26, 2008, regarding the above-referenced Freedom of Information Act ("FOIA") request. Below we provide the additional information that you requested. This response underscores that the information Entergy has asked to be withheld from disclosure should be withheld as a matter of well-settled law.

To briefly review the history of this matter, several months ago, the U.S. Nuclear Regulatory Commission ("NRC" or the "Commission") informed Entergy that it had received a FOIA request for information related to Entergy's strike contingency plans, namely, a copy of the Entergy Vermont Yankee Management Alternative Plan ("MAP"). In response, Entergy submitted to the NRC a redacted version of the MAP and requested that the NRC withhold from public disclosure those redacted portions under 10 C.F.R. §§ 2.390(a)(4) and (a)(6) and the related FOIA exemptions.

In your March 26th response, you informed me that the NRC agreed to withhold the redacted portions of the MAP made under § 2.390(a)(6), which protects confidential personnel information, including names and contact information. You also informed me, however, that the NRC did not have enough specific information to determine whether it should withhold from disclosure the redacted information made under § 2.390(a)(4), which protects confidential,

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proprietary and commercial information. As such, you requested (1) additional details about the cost and resources Entergy expended in developing the MAP and (2) further explanation how publicly disclosing the redacted information could place Energy at a disadvantage vis-à-vis industry competitors and various labor unions. This letter provides the additional information requested, as well as applicable legal principles under FOIA and NRC regulations.

After the NRC reaches a decision on this matter, we request that you provide the agency's decision to William C. Dennis, Assistant General Counsel, Entergy Nuclear Operations, Inc., 440 Hamilton Avenue, White Plains, New York 10601, and to me.

FACTUAL BACKGROUND REGARDING THE MAP

The Supplemental Affidavit of Ted A. Sullivan, Vermont Yankee Site Vice President (Enclosure 1) describes the facts regarding the protected MAP information.

I. The MAP Encompasses the Company's Confidential Strategy, Priorities, Staffing and Plans for Addressing a Potential Labor Dispute

Entergy is the NRC-licensed operator of a number of commercial nuclear power plants, including the Vermont Yankee nuclear power station. At Vermont Yankee, Entergy has a collective bargaining agreement (or labor contract) in place with one or more labor unions. Collective bargaining agreements are reached through negotiations between union representatives and Entergy management regarding the terms and conditions of employment, such as wages, hours of work and working conditions. While rare, unions have undertaken strikes during collective bargaining, withholding labor services to disrupt the employer's operations and cause a loss of business or profit. Unions have taken these measures, in part, to exert economic pressure on the employer to acquiesce to union demands during collective bargaining negotiations.

To ensure the safe and continued operation of Vermont Yankee if members of a bargaining unit decide to strike, Entergy has developed and put into place the MAP, which is a confidential and proprietary document that sets out in a detailed manner the plant's strike contingency plan. The MAP, over 80 pages in length, provides a blueprint of the Company's plans for, and response to, a labor strike, describing specific and detailed tactics, strategy, priorities, staffing and operational plans. The portions of the MAP that Entergy requests the NRC to withhold from public disclosure can be grouped into one of seven categories, as outlined below (that is, Group A, B, C, D, E, F or G). To facilitate your review, I have marked the margins of the bracketed copy of the MAP (Enclosure 2) to correspond to one of these seven categories. The bracketed portions of the MAP contain the information Entergy requests the NRC withhold from public disclosure. The seven categories are as follows:

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- ◆ **GROUP A**—Entergy's 5-phase response (which details necessary activities Entergy must take before, during and after a strike occurs);
- ◆ **GROUP B**—Entergy's key assumptions and expectations, including the anticipated behavior of members of the bargaining unit (for example, whether striking employees will provide notice to the Company before leaving their work posts);
- ◆ **GROUP C**—Entergy's staffing requirements and associated plans to ensure the safe and continued operation in several departments (Operations, Maintenance, Radiological Protection, Chemistry, Security, Clerical, Materials Management, Emergency Preparedness, Nuclear Information Services, Engineering and Work Control);
- ◆ **GROUP D**—Entergy's logistical and strategic plans to ensure (1) unimpeded access of personnel to the plant; (2) unimpeded access of emergency services; (3) unencumbered delivery of support goods to the site; and (4) unencumbered offsite shipment of radioactive materials.
- ◆ **GROUP E**—Entergy's plans for site security, particularly mitigating possible threats to the site, including violent strikers;
- ◆ **GROUP F**—Entergy's plans to ensure that necessary equipment and systems remain available so as to permit continued operation of Vermont Yankee; and
- ◆ **GROUP G**—Entergy's plans to ensure requirements for necessary programmatic areas, such as training, are met so as to permit continued operation at Vermont Yankee.

This information is not available through public sources, nor could it be gathered from other sources. Members of Entergy management authored individual sections of the MAP at considerable cost. Specifically, authors included the director of engineering; the director of nuclear safety assurance; the general manager of plant operations; the training manager; the licensing manager; the emergency planning manager; and plant production managers. These individuals, each having several years of nuclear industry experience, spent *hundreds* of hours developing the MAP.

II. Entergy Voluntarily Provides Confidential MAP to the NRC As A Means of Cooperation

The MAP constitutes the most essential component of the Company's confidential strategy for addressing potential labor disputes. Therefore, to protect the MAP against unauthorized disclosure, Entergy has carefully guarded its disclosure within the corporate structure. Entergy has limited the distribution of the document within the Company to employees on a need-to-know basis. Entergy has never disclosed it to the public-at-large.

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Moreover, Entergy has never shared the MAP with competitors in the industry or union representatives.

Entergy has voluntarily transmitted the MAP to the NRC in connection with an oversight inspection. Entergy provided the document to the NRC in confidence and marked it "Confidential." Entergy voluntarily submitted the confidential and proprietary MAP to the NRC for its use as a resource for understanding the Company's strike contingency plan as it relates to its role in protecting the public health and safety.

APPLICABLE LEGAL PRINCIPLES

FOIA requires that all federal agencies disclose their records to any person requesting them *unless* those records contain information specifically exempted by one of nine stated exemptions.¹ Exemption 4 of FOIA—the exemption at issue in this matter—protects from disclosure "commercial or financial information obtained from a person [that is] privileged or confidential."² Exemption 4's purpose "is to protect persons who submit confidential financial or commercial data from competitive disadvantages that would result from disclosure."³

The NRC has implemented Exemption 4 in its procedural regulation, 10 C.F.R. § 2.390(a)(4). Section 2.390(b)(4) sets forth five factors for the NRC to consider when determining whether information at issue is confidential or privileged commercial or financial information under (a)(4).⁴

In the Commission's view, § 2.390 "embodies" the standards of Exemption 4 under FOIA.⁵ The NRC has "produced "scant jurisprudence" applying Section 2.390; therefore, the

¹ 5 U.S.C. § 552(a).

² 5 U.S.C. § 552(b)(4).

³ See, e.g., *Greenberg v. FDA*, 803 F.2d 1213, 1216 (D.C. Cir. 1986) (citing *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 768 (D.C. Cir. 1974)).

⁴ These five factors are as follows: (1) whether information has been held in confidence by its owner; (2) whether 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; (3) whether information was transmitted to and received by the Commission in confidence by its owner; (4) whether information is available in public sources; and (5) whether public disclosure of information sought to be withheld is likely to cause substantial harm to the competitive position of the owner, considering 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. 10 C.F.R. § 2.390(b)(4).

⁵ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-01, 2005 WL 4131551, *3 (NRC Jan. 5, 2005).

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Commission “look[s] for guidance to the plentiful federal case law” on Exemption 4.⁶ Accordingly, in addressing whether § 2.390(a)(4) applies in this case, Entergy turns to federal case law for guidance on Exemption 4.

As explained in further detail below, federal courts apply a more protective standard under Exemption 4 when the submitter has voluntarily provided information to the government, requiring only a showing that the information at issue is of a kind not customarily made available to the public. As the affidavit of Ted Sullivan clearly demonstrates, the MAP information that Entergy seeks to withhold under Exemption 4 is not customarily made available to the public and, therefore, must be withheld from public disclosure.

I. Exemption 4 Shields the MAP’s Proprietary Information from Public Disclosure

As noted above, Exemption 4 protects submitters from public disclosure of information that is “(1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential.”⁷ Here, the NRC does not dispute that the MAP is commercial information⁸ obtained from a person.⁹ Therefore, the only question is whether the MAP meets the “confidential” requirement under Exemption 4.

Whether information qualifies as “confidential” under Exemption 4 involves a multipart question. The U.S. Court of Appeals for the District of Columbia Circuit applies one test for confidentiality when the government *required* the information’s submission and applies a

⁶ *Id.*

⁷ See, e.g., *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing *Nat’l Parks*, 498 F.2d at 768); see also 5 U.S.C. § 552(b)(4) (stating that Exemption 4 protects “commercial or financial information obtained from a person [that is] privileged or confidential”).

⁸ For Exemption 4 purposes, federal courts construe the term “commercial” broadly to include information in which the submitting party has a “commercial interest” in the information submitted to the agency. *Pub. Citizen*, 704 F.2d at 1290. For example, in *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 830 F.2d 278, 281 (D.C. Cir. 1987), *rev’d on other grounds*, 975 F.2d 871 (D.C. Cir. 1992), the court found that a non-profit organization’s reports describing the operations of its members’ nuclear power plants contained “commercial” information. *Id.* Continuing, the court stated that “commercial fortunes” of member utilities “could be materially affected by the disclosure of health and safety problems experienced during the operation of nuclear power facilities.” *Id.* Similarly, Entergy’s strike contingency plan constitutes commercial information. Entergy’s “commercial fortunes” could be materially affected by disclosing the MAP because it pertains to the Company’s mode of operations, work force, policies and procedures, and employment practices.

⁹ For Exemption 4 purposes, the term “person” in the requirement “obtained by a person” is interpreted broadly and includes corporations. See *Critical Mass*, 830 F.2d at 281 n.15 (citing 5 U.S.C. § 551(2), which provides that records are considered “obtained from a person” so long as they were submitted by a “partnership, corporation, association, or public or private organization other than an agency”).

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different test when submission was *voluntary*. Information that a party furnishes *involuntarily* is governed by the test of *National Parks & Conservation Ass'n v. Morton*.¹⁰ Under *National Parks*, information “that a person is obliged to furnish to the Government” is confidential if disclosure of the information would likely cause substantial harm to the competitive position of the person from whom the information was obtained.¹¹ This standard requires “both a showing of actual competition and a likelihood of substantial competitive injury.”¹²

By contrast, a submitter is afforded greater protection from public disclosure and a lesser standard is required to be met by the submitter if the information was *voluntarily* submitted to the government. In *Critical Mass Energy Project v. Nuclear Reg. Comm'n*,¹³ the D.C. Circuit concluded that when information is submitted to the government voluntarily, “it will be treated as confidential under Exemption 4 if it is of a kind that the provider would not customarily make available to the public.”¹⁴ Reasoning that “persons whose confidences have been betrayed will, in all likelihood, refuse further cooperation[.]” the court established a more protective standard for voluntarily provided materials.¹⁵ The D.C. Circuit established this test in 1992 and it has since been consistently followed in that circuit.¹⁶ As the Commission has recognized, the D.C. Circuit decisions carry particular weight regarding FOIA issues because it oversees the United States District Court for the District of Columbia, which is the court of universal venue for FOIA cases.¹⁷

In its correspondence, the NRC overlooks this distinction between information voluntarily furnished to the government, versus information that the government required from a party. For example, in its March 26th letter, the NRC argues that Entergy failed to show substantial competitive injury from disclosure, referring only to the *National Parks* definition of

¹⁰ 498 F.2d 765 (D.C. Cir. 1974).

¹¹ *Id.* at 770. In *National Parks*, the court also held that involuntarily submitted information is deemed confidential if it is likely to impair the government’s ability to obtain necessary information in the future. *Id.* Entergy does not claim confidentiality under this prong of *National Parks*.

¹² See, e.g., *Gilda Indus., Inc. v. U.S. Customs & Border Prot. Bureau*, 457 F. Supp. 2d 6, 9 (D.D.C. 2006) (quoting *CNA Fin. Corp v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987) (internal quotations omitted)).

¹³ 975 F.2d 871 (D.C. Cir. 1992) (en banc), *cert. denied*, 507 U.S. 984 (1993).

¹⁴ *Id.* at 872 (emphasis added).

¹⁵ *Id.* at 878–79.

¹⁶ See, e.g., *Baker & Hostetler LLP v. U.S. Dep’t of Commerce*, 473 F.3d 312, 320 (D.C. Cir. 2006) (applying voluntary/involuntary dichotomy); *NYC Apparel FZE v. U.S. Customs & Border Prot.*, 484 F. Supp. 2d 77, 93–97 (D.D.C. 2007) (same).

¹⁷ *Private Fuel Storage, L.L.C.*, CLI-05-01, 2005 WL 4131551 at *8 n.65 (citing 5 U.S.C. § 552(a)(4)(B)).

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“confidential” and assuming, without discussion, that this was the proper test.¹⁸ But this argument misses the mark, because it addresses *only* the legal standard that applies to information submitted involuntarily. As explained below, Entergy submitted the MAP voluntarily to the NRC. Therefore, the NRC should apply the more protective standard set forth in *Critical Mass* and conclude that Exemption 4 protects the MAP from disclosure. Under this standard, based on the information set forth in the affidavit of Ted Sullivan, the MAP information that Entergy seeks to withhold from public disclosure is clearly not “customarily [made] available to the public” and, accordingly, must be withheld from public disclosure.

A. Voluntarily Submitted Information

As noted above, when a party *voluntarily* provides documents to the government, information contained in those documents is confidential if it is of the kind that the party would not customarily disclose to the public.

Here, Entergy voluntarily produced the MAP to the NRC in connection with an NRC oversight inspection. Entergy submitted this information freely in an effort to provide full and complete cooperation to the NRC in connection with the informal inquiry. The NRC did not compel Entergy to produce the MAP, nor did the NRC subpoena it.¹⁹ Accordingly, Entergy submitted this information on a voluntary basis for the purpose of Exemption 4.

¹⁸ Letter from Russell A. Nichols, NRC FOIA and Privacy Act Officer, to Charles C. Thebaud, Morgan Lewis & Bockius, LLP 1 (Mar. 26, 2008).

¹⁹ Assuming the NRC had issued a subpoena for the MAP—which it did not—some courts have recognized that information is *voluntarily* given to federal agencies during investigations *even* if the federal agency had subpoenaed the information. For example, in *McDonnell Douglas Corp. v. EEOC*, 922 F. Supp. 235, 242 (E.D. Mo. 1996), *appeal dismissed*, No. 96-2662 (8th Cir. Aug. 29, 1996), McDonnell Douglas sought to enjoin EEOC from releasing privileged information under FOIA that had been produced during a discrimination investigation. The court held that this information was voluntarily given to EEOC *notwithstanding that EEOC had subpoenaed the information*. Relying on *Critical Mass*, the court observed:

The mere existence of agency subpoena power cannot . . . mean that any document that is produced pursuant to subpoena is “required.” The EEOC’s arguments in this regard appears to be that because employers are required to cooperate in its investigations, and because the EEOC has administrative subpoena powers, no company may refuse to produce any requested document, ever, on any grounds. This conclusion ignores the fact that subpoenaed parties may challenge, both administratively and through objections to enforcement proceedings, the Commission’s subpoenas. It simply is not correct that *everything* the EEOC might ask for qualifies as “required” under the *Critical Mass* test.

Id. (emphasis in original).

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Because the MAP was submitted voluntarily, its proprietary portions should be exempt from public disclosure if it contains the kind of information that would not customarily be released to the public. In making this determination, courts look to the submitter's customary treatment of the information—not how the industry as a whole treats it.²⁰ In this regard, Entergy provided its strike contingency plan to the NRC with an expectation that it would be kept confidential as it contains material that Entergy does not disclose to the public-at-large, including the Company's mode of operations, business strategies, staffing needs and employment practices. Entergy has never publicly disclosed the MAP and has carefully guarded its disclosure even within its corporate structure, limiting internal dissemination to those employees on a need-to-know basis.

Finally, as noted above, the D.C. Circuit established a more protective standard for voluntary information to encourage cooperation with the government by persons having information useful to officials and to ensure the continued availability of such information. Publicly disclosing the proprietary portions of the MAP that Entergy voluntarily provided to the NRC would not only frustrate this legitimate purpose but would also "chill" licensees and regulated entities in disclosing such documents. Indeed, publicly disclosing information of the type Entergy seeks to withhold would go against the NRC's interest in fostering an environment of voluntary disclosure and cooperation.

Accordingly, because the NRC voluntarily transmitted the MAP to the NRC and because the information at issue is of a kind that Entergy does not customarily disclose to the public, the NRC should withhold it from public disclosure under Exemption 4 and *Critical Mass*.

B. Involuntarily Submitted Information

Even assuming that the NRC required Entergy to produce the MAP, Entergy nevertheless meets the *National Parks* test for involuntary disclosure. As stated above, under *National Parks*, information is considered "confidential" if its disclosure would likely cause substantial harm to the submitter's competitive position. In determining whether Entergy has shown substantial competitive injury, the NRC "need not conduct a sophisticated economic analysis as to the likely effects of disclosure."²¹ Moreover, Entergy need not show *actual* economic harm, that is, harm directly caused by disclosure of information to a company's competition.²² Rather, Exemption 4 requires only a showing that a company faces actual competition and a likelihood of substantial

²⁰ *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 148 (D.C. Cir. 2001).

²¹ *Public Citizen*, 704 F.2d at 1291.

²² *See, e.g., Private Fuel Storage*, CLI-05-01, 2005 WL 4131551 at *8 (relying on federal case law).

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competitive injury.²³ As explained below, publicly disclosing the MAP would create substantial harm to Entergy's competitive position in two distinct manners.

1. *Substantial Competitive Injury as it Pertains to Industry Competitors*

First, publicly disclosing the MAP would create substantial harm to Entergy's competitive position vis-à-vis industry competitors. As a preliminary matter, the NRC agrees that competition in the industry constitutes "actual competition" in the context of Exemption 4. Instead, the NRC questions how releasing the MAP would cause a substantial injury with respect to industry competitors. The following addresses this issue.

Entergy developed the strike contingency plan internally and it is the result of a substantial investment in time and resources and is, therefore, highly proprietary. As mentioned above, Entergy estimates that members of its management team expended hundreds of hours developing the information sought to be withheld. The information contained in the MAP is not available through public sources, nor could it be gathered from other sources. Releasing this information to the public would provide Entergy's competitors in the industry with valuable proprietary information that would have been otherwise unavailable or would have had to be developed by such competitors at their own considerable cost. Disclosing this information would permit industry competitors to "piggyback" the MAP's information for their own uses. This would result in a distinct advantage to Entergy's competition because they could avoid the considerable cost and manpower required to design their own strike contingency plan. Put simply, the MAP represents extremely valuable work product that Entergy developed and is entitled to retain in confidence and should not be required to give away to its competitors for free. On this basis alone, the NRC should withhold the MAP from public disclosure.

2. *Substantial Competitive Injury as it Pertains to Unions*

Second, publicly disclosing the MAP would create substantial harm to Entergy's competitive position vis-à-vis various labor unions at Vermont Yankee and at Entergy's other nuclear sites where collective bargaining agreements exist. As a threshold matter, the NRC questions in its March 26th letter whether "competitive harm" under Exemption 4 may come from sources other than direct competitors:

It is unclear how a disadvantage during union negotiations would constitute competitive harm in the context of Freedom of Information Act Exemption 4. This exemption usually rests on a

²³ *Gilda Indus.*, 457 F. Supp. 2d at 9.

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showing of competitive harm among other competitors within the industry.²⁴

The federal courts have addressed this precise issue. As the Commission observed in *Private Fuel Storage, L.L.C.*, federal cases from the D.C., Tenth and Second Circuits have ruled “competitive harm” under Exemption 4 may come from sources *other* than direct competitors:

In *McDonnell Douglas Corp. v. NASA*, the D.C. Circuit found in an Exemption 4 context that disclosure of government contract prices would harm the submitter of that information by permitting its “commercial customers to bargain down (‘ratchet down’) its prices more effectively.” In approving the rejection of a petition for rehearing *en banc*, Judge Silberman explained in a concurring opinion that, “other than in a monopoly situation, anything that undermines a supplier’s relationship with its customers must necessarily aid its competitors.”

....

The D.C. Circuit is *not* the only court to conclude that “competitive harm” under Exemption 4 may come from sources other than direct competitors. The Tenth Circuit . . . has ruled that such injury may come from the use of the confidential information “by suppliers, contractors, *labor organizations*, creditors, and customers [T]he Second Circuit ruled that “the fact that the harm would result from active hindrance by an opposing citizens group rather than directly by potential competitors does not affect the fairness considerations that underlie Exemption Four.”²⁵

In a case with a set of facts similar to this matter, the Second Circuit has concluded that information about a labor union’s recruitment efforts was exempt from public disclosure under Exemption 4. In determining whether this information, if disclosed, would cause substantial harm to the union’s competitive position, the court remarked:

It seems apparent that the disclosure of this information which was supplied on a confidential basis would adversely affect the union’s

²⁴ Letter from R. Nichols at 1, *supra* note 18.

²⁵ *Private Fuel Storage L.L.C.*, CLI-05-01, 2005 WL 4131551 at *8 (brackets, emphasis, and footnotes in the original omitted; emphasis added). The Commission, did recognize, however, that there may exist a split of authority as to whether competitive harm must flow from use of information directly by competitors. *Id.*

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competitive position vis-à-vis both other unions *and the employer itself*.

Not only does the union supply this information in reliance upon the promise in the regulations that the [government] will keep the information confidential, a promise perhaps not binding upon the courts in their construction of the FOIA, although certainly entitled to the court's careful consideration, but the information relates to the *very delicate area of labor relations* which . . . we [have] pointed out . . . and the Supreme Court [has] pointed out . . . , the courts should be *very hesitant to interfere*.²⁶

This reasoning should be applied similarly in this case—just as the Second Circuit recognized that information about a union's efforts could be used by an employer to gain an unfair advantage on a union, so too could a union's use of Entergy's strike contingency plan be used to gain an unfair advantage over the Company, for example, in preparing for a strike or during bargaining negotiations.

Next, the NRC challenges Entergy's assertion of confidentiality on the ground that Entergy has not shown the requisite likelihood of harm to Entergy as it pertains to unions. The NRC criticizes Entergy for *not* submitting "further specific and credible reasons why the disclosure of the redacted information would *actually* cause substantial competitive injury."²⁷ However, *National Parks* standard requires only that the substantial harm be "*likely*."

In any case, Entergy has shown a *likelihood* of substantial harm. Disclosing any of the MAP's proprietary information would undeniably cause substantial harm to Entergy because release of this information would provide labor unions with an unfair, competitive advantage during collective bargaining negotiations if the unions decided to undertake a labor strike. Significantly, unions generally strike for the purpose of bringing economic pressure to bear in support of the union's bargaining position. By allowing unions to freely access Entergy's plans and strategies for mitigating the effects of such a strike, the NRC would provide the unions with an unfair advantage in preparing for and executing a work stoppage.

The analogy to a playbook is quite apt in this instance, and by releasing the proprietary portions of the MAP, the unions will come into possession of that playbook. From the nature of the document, the unions can understand each of the Company's plays and therefore, can take

²⁶ *Am. Airlines, Inc. v. Nat'l Mediation Bd.*, 588 F.2d 863, 871 (2d Cir. 1978) (citation omitted) (emphasis added).

²⁷ Letter from R. Nichols at 1, *supra* note 18.

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action to alter and negate the effect of those plays. The following offers some specific examples of the substantial harm that Entergy likely would suffer if the NRC decides to publicly disclose the MAP:

- ◆ Disclosing the MAP unfairly allows unions—even before collective bargaining negotiations begin—to prepare for its strike and evaluate the degree of economic pressure a strike would have on Entergy;
- ◆ Disclosing the MAP allows unions to unfairly gain knowledge of Entergy's assumptions and expectations, including the behavior of striking employees. For example, the MAP assumes that unions will provide a minimum number of hours notice before employees strike. With this knowledge, the unions can easily modify their plans for a strike, making it more difficult for the Company to respond.
- ◆ Disclosing the MAP allows unions to unfairly gain knowledge of Entergy's plans to ensure access to the site for personnel, emergency response services and delivery of support goods. The MAP also details alternative entries for gaining access to the site. With this knowledge, unions can coordinate efforts to thwart or block these services' access to the site. Of course, if personnel, emergency response services and delivery services cannot access the site, the Vermont Yankee plant cannot remain operational.
- ◆ Disclosing the MAP allows unions to unfairly gain insight into Entergy's security measures taken *before* a strike occurs as well as *during* a work stoppage. These measures include preventing violent or otherwise unlawful strike activity. Furthermore, the MAP outlines plans to ensure striking employees cannot gain access to the site during a work stoppage. With this knowledge, unions gain a tactical advantage in negating the security personnel's efforts to monitor and prevent access to striking employees.
- ◆ Disclosing the MAP allows unions to unfairly gain knowledge of Entergy's plans for replacement staffing for eleven different departments. With this knowledge, the unions can identify the minimum staffing requirements for the plant to remain operational. If the unions can prevent Entergy from fully staffing any of these departments, the union likely can force the Company to stop operations.

Unions bear a risk in deciding whether to undertake a work stoppage. For a work stoppage to have its intended effect, it must exert economic pressure on the Company. To exert this pressure on the Company, the strike must disrupt operations or cause the plant to stop operations entirely. Yet, if the Company can continue safe operations despite the strike (based on its contingency plan), the strike will be considered ineffective and the union's bargaining

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position is diminished. Allowing the unions to access *any* of the MAP's proprietary information significantly increases the likelihood that the strike will be successful.

In short, publicly disclosing Entergy's strike contingency plan would substantially harm the Company. Allowing the unions to gain access to the MAP would put them at a great advantage in the event of a strike and would destroy the relative balance of economic tools available that the National Labor Relations Act was intended to create. Surely the unions would object to disclosing their work stoppage strategy and planned strike activities. For exactly the same reason, allowing the unions to use the NRC FOIA rules in this manner would damage the balance created by the National Labor Relations Act without advancing any interest protected under the Atomic Energy Act or FOIA.

Based upon these facts, publicly disclosing the MAP would substantially harm Entergy as it pertains to its competitive relationships with the unions and wholly undermine Exemption 4, which prevents competitors from gaining an unfair advantage over another party by learning the strategies and tactics of that party.

II. The Trade Secrets Act Protects the MAP's Proprietary Information from Public Disclosure

The Trade Secrets Act further prohibits the NRC from releasing the confidential and commercially sensitive information set forth in the MAP.²⁸ The Trade Secrets Act provides a criminal penalty for anyone who publishes, divulges, discloses, or makes known in any manner or extent not authorized by law any information coming to him in the course of his employment or official duties, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount, or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation or association.²⁹ The D.C. Circuit has recognized that "[a]lthough the proprietor of commercial information does not have a private right of action to enforce § 1905 [of the Trade Secrets Act], it may seek review of an agency action that violates the Trade Secrets Act on the ground it is 'contrary to law,' per § 10 of the Administrative Procedures Act."³⁰

The D.C. Circuit has clearly confirmed that "the scope of the Trade Secrets Act 'is at least co-extensive with that of Exemption 4 of FOIA.' Consequently, whenever a party succeeds in demonstrating that its materials fall within Exemption 4, the government is precluded from

²⁸ See 18 U.S.C. § 1905.

²⁹ *Id.*

³⁰ *McDonnell Douglas Corp. v. Dep't of Air Force*, 375 F.3d 1182, 1186 n.1 (D.C. Cir. 2004) (citations omitted).

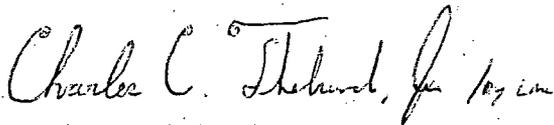
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releasing the information by virtue of the Trade Secrets Act.”³¹ When, as here, the proprietary portions of the MAP fall within Exemption 4 of FOIA, the government is precluded from releasing it under the Trade Secrets Act.³² “Exemption 4 marks the outer boundaries of the government’s FOIA privileges by identifying materials that a person making a FOIA request has no right to force the government to divulge, whereas the Trade Secrets Act establishes a private right against unauthorized governmental publications of confidential information.”³³ Consequently, when information falls within Exemption 4, the Trade Secrets Act “affirmatively preclude[s] defendant from disclosing information that is protected by Exemption 4 of FOIA.”³⁴

CONCLUSION

For these reasons, Entergy requests that the NRC withhold from public disclosure those portions of the MAP previously redacted.

Sincerely,



Charles C. Thebaud, Jr.

³¹ *Canadian Commercial Corp. v. Dep't of Air Force*, 442 F. Supp. 2d 15, 39 (D.D.C. 2006) (citations omitted).

³² *McDonnell Douglas Corp v. NASA*, 180 F.3d 303, 305 (D.C. Cir. 1999).

³³ *McDonnell Douglas Corp v. Widnall*, 57 F.3d 1162, 1164 (D.C. Cir. 1995).

³⁴ *Canadian Commercial*, 442 F. Supp. 2d at 40 (citation omitted).