August 24, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S ANSWER TO JOINT MOTION FOR ENTRY OF A PROTECTIVE ORDER

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby files its answer to the "Joint Motion for Entry of A Protective Order" ("Joint Motion"), filed on August 14, 2009, by Entergy Nuclear Operations, Inc ("Entergy"), New York State ("NYS"), Riverkeeper, Inc ("Riverkeeper"), and Hudson River Sloop Clearwater ("Clearwater"). As recited in the Joint Motion, the Staff supports the entry of a Protective Order ("Order"), but opposes certain provisions of the Order proposed by the other parties in this proceeding. Joint Motion, at 1. The Staff would not oppose the entry of that Order if modified in the manner set forth in Attachment 1 hereto, for the reasons discussed below.

DISCUSSION

In their Joint Motion, Entergy and the Intervenors propose the entry of a protective order to govern the disclosure of proprietary information by the parties in this proceeding. The Staff supports the entry of such a protective order, as an appropriate mechanism to facilitate the disclosure and sharing of confidential proprietary information by the parties, while assuring the

protection of that information from unauthorized disclosure. Indeed, the entry of such a protective order is consistent with long-standing NRC practice. *See, e.g., Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-01, 61 NRC 160, 179-81 (2005). The Staff respectfully submits, however, that certain aspects of the Order proposed by the other parties should be modified, insofar as the proposed Order appears to require the Staff to execute a "Nondisclosure Agreement and Acknowledgement" prior to being afforded access to proprietary information. Further, the Staff believes that certain minor clarifications should be made to the language of the proposed Order in the event that it is adopted by the Board.

A. The NRC Staff Should Be Afforded Access to Proprietary Documents Without Being Required to Execute A Non-Disclosure Agreement.

The protective order proposed by the other parties appears to require that NRC Staff employees and counsel be denied access to any proprietary documents that are disclosed pursuant to the Order, unless those persons execute the Non-Disclosure Agreement which the other parties are obliged to execute. Thus, the Order states:

> The provisions of this Protective Order apply to NRC counsel, witnesses, employees, consultants, and others representing the NRC Staff with respect to documents containing protected material that NRC receives solely pursuant to 10 C.F.R. § 2.336 and this Protective Order.

Order, at 1 n.1. Further, the Order states:

> Pursuant to this Protective Order, counsel, witnesses, employees, members, officers, consultants, and others representing a party or interested governmental entity in this proceeding (all of whom are referred to herein, collectively, as "Participants") shall be permitted access to proprietary documents held by another Participant in this proceeding ("Initial Holders") otherwise required to be disclosed in accordance with 10 C.F.R. § 2.336(a) upon the conditions set forth herein.

Id. at 2; emphasis added. The Order then states that "persons who (1) are qualified pursuant to paragraph F of this Protective Order; and (2) have executed a Nondisclosure Agreement and

Acknowledgment in the form included as Attachment A" will be afforded access to proprietary information. Paragraph F, in turn, states:

> Only individual counsel, consultants, witnesses, employees, members, officers, and others representing a Participant, listed in Attachment C who have executed the attached Nondisclosure Agreement and Acknowledgment, and persons identified in Paragraph H, will be afforded access to proprietary information.

Finally, Attachment C states that "[f]or NRC representatives executing this Nondisclosure Agreement," their agreement will be modified to include an "additional" sentence: 'My agreement and acknowledgment, however, are not binding on the [NRC's] fulfillment of its obligations under the Freedom of Information Act.'" *Id.*, Attachment C.

The Staff respectfully submits that there is no reason to require the execution of a nondisclosure agreement by NRC Staff employees and counsel here, inasmuch as the Staff – like the Board and other NRC employees and officials – are required to protect proprietary information by the Trade Secrets Act ("TSA"), 18 U.S.C. § 1905 (2008), and applicable NRC regulations. Further, the imposition of such a requirement would unduly hinder the Staff in the performance of its regulatory functions.

First, requiring the Staff to sign a nondisclosure agreement is unnecessary, given the protection afforded by the TSA. Thus, the Staff is subject to potential criminal proceedings under the TSA for the unauthorized disclosure of proprietary information. The TSA provides:

> Whoever, being an officer or employee of the United States or of any department or agency thereof . . . publishes, divulges, discloses, or makes known in any manner or to any 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; . . . shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

Id. As this statutory language makes clear, under the TSA, NRC employees are subject to fine, imprisonment, and loss of employment for the unauthorized release of proprietary information. These are significantly more stringent sanctions than those provided in the proposed protective order here, which contemplates the imposition of Board sanctions, injunctive relief, and the referral of a violator to the appropriate bar association and/or other disciplinary authority. *See* Order at 9, ¶ O; Attachment C at 1-2. Requiring the Staff to sign a nondisclosure agreement in this matter is thus unnecessary.

Further, the NRC's regulatory scheme governing the treatment of proprietary information does not contemplate that the Staff would be required to sign a nondisclosure agreement to gain access to proprietary documents in an adjudicatory proceeding. Rather, the agency's regulatory scheme explicitly removes NRC employees from the reach of protective orders. In this regard, consistent with the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4), the Commission's regulations in 10 C.F.R. § 2.390(a)(4) provide an exemption from disclosure under FOIA of "[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential." The regulations then provide a mechanism for the entry of a protective order to permit limited disclosure to parties in an NRC adjudicatory proceeding – and indicate that such an order is inapplicable to NRC employees:

> Withholding from public inspection does not affect the right, if any, of persons properly and directly concerned to inspect the documents. Either before a decision of the Commission on the matter of whether the information should be made publicly available or after a decision has been made that the information should be withheld from public disclosure, the Commission may require information claimed to be a trade secret or privileged or confidential commercial or financial information to be subject to inspection under a protective agreement by contractor personnel or government officials <u>other than NRC officials,</u> by the presiding officer in a proceeding, and under protective order by the parties to a proceeding. . . .

10 C.F.R. § 2.390(b)(6); emphasis added.

The regulation thus contemplates that parties to a proceeding may be required to inspect documents asserted to be proprietary under a protective agreement, but it imposes no such restriction on the Staff, the Presiding Officer, or other Commission employees.[1] Indeed, NRC Staff employees routinely receive and protect proprietary information in accordance with the Commission's regulations under FOIA, with no requirement that they execute a nondisclosure agreement. Moreover, the Commission and Boards in other proceedings have often allowed the Staff and Staff counsel to obtain proprietary information in adjudicatory proceedings without requiring them to execute a nondisclosure agreement. *See, e.g., Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), Docket Nos. 50-282-LR/50-306-LR, "Protective Order (Governing Non-Disclosure of Certain Documents Claimed to be Proprietary)" (March 24, 2009), slip op. at 3-5 (¶¶2, 5 and n.8) (ADAMS Accession No. ML090830525); *Sequoyah Fuel Corp. and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-95-05, 41 NRC 253; 268-69 (¶¶ 3-5), *rev'd in part on other grounds*, CLI-95-16, 42 NRC 221 (1995).[2]

Further, the imposition of a requirement that Staff employees and consultants must execute a nondisclosure agreement prior to gaining access to proprietary information would unduly hinder the Staff in the performance of its regulatory functions. During the course of this

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[1] In addition, under the NRC's regulations that implement FOIA, 10 C.F.R. Part 9, Subpart A, proprietary information may be disclosed in response to a FOIA request under certain circumstances. 10 C.F.R. § 9.25. The execution of a nondisclosure agreement by Staff employees or counsel thus could not bind the Commission to a document release or withholding determination, inasmuch as the Commission is subject to federal law and its own regulations.

[2] *Cf. Shaw Areva MOX Services* (Mixed Oxide Fuel Fabrication Facility), "Order (Adopting Protective Order)" (Dec. 31, 2008), "Controlled Information Nondisclosure Declaration," at 2 (¶1(e) (ADAMS Accession No. ML08366130) (defining an "authorized person" to include "an employee, consultant, or contractor of the NRC entitled to access to the Controlled Information," without requiring those persons to execute a nondisclosure agreement). The Staff notes that the Presiding Officer in the instant proceeding was a member of the Board that issued the *MOX* decision.

proceeding, the Staff may find it necessary to share proprietary information which it obtains through its participation in the proceeding with numerous individuals and their supervisors, in order to facilitate the Staff's assessment of the information and its consideration of how that information affects its safety and environmental impact determinations. To require that all such persons execute a nondisclosure agreement in order to view or discuss the information would unduly hinder the Staff in the performance of its regulatory functions – and as discussed above, is altogether unnecessary, given the statutory and regulatory provisions governing the agency's protection of proprietary information.[3]

B. Additional Clarifying Changes Should Be Made.

Based upon its review of the proposed protective order, the staff believes that certain clarifying language changes should be made, in order to more correctly reflect the intent of the order. For example, (1) the introductory paragraph's general reference to "commercial or financial" information should specify that only "privileged" information is intended to be included;

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[3] The Staff notes that it had initially objected to the omission of any "need to know" provision in Paragraph H of the proposed protective order, in contrast to the inclusion of such a provision in the protective orders issued in numerous other NRC proceedings -- including many proceedings in which Entergy has been a party. *See, e.g., Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399; 420 (2007) ("Model Confidentiality and Non-Disclosure Agreement"); *Prairie Island, supra*, "Protective Order (Governing Non-Disclosure of Certain Documents Claimed to be Proprietary)," slip op. at 5 (¶5)); *Entergy Nuclear Vermont Yankee, L.L.C.* (Vermont Yankee Nuclear Power Station), 2007 NRC LEXIS 13 (Jan. 12, 2007); *Entergy Nuclear Vermont Yankee L.L.C.* (Vermont Yankee Nuclear Power Station), 2005 NRC LEXIS 29 (Mar. 1, 2005); *Louisiana Energy Services, L.P.* (National Enrichment Facility), 2004 NRC LEXIS 106 (May 21, 2004); *Nuclear Fuel Services, Inc.* (Erwin, Tennessee), 2004 NRC LEXIS 126 (May 18, 2004); Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), 2004 NRC LEXIS 65 (April 8, 2004); *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), 2002 NRC LEXIS 121 (June 19, 2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), 2001 NRC LEXIS 105 (June 29, 2001). Indeed, a "need to know" provision was contained in an earlier version of the proposed Order that was circulated among the parties in this proceeding (which the Staff had substantially accepted), but was deleted by the other parties following discussions between Entergy and the Intervenors. The Staff hereby withdraws its objection to that deletion, based on its re-reading of Paragraph H, the comments it has received from the Intervenors expressing the view that a "need to know" requirement is unnecessary and burdensome, and Entergy's agreement to delete that requirement.

(2) a provision in footnote 1 that refers to the Staff "or Nuclear Regulatory Commissioners" is incomplete (and unnecessary); (3) a provision in Paragraph A for the designation of privileged information should include a reference to the parties' privilege logs; (4) a description in Paragraph F of persons to whom disclosure may be made should be revised to include persons authorized by Paragraph H other than Participant representatives who sign nondisclosure agreements; and (5) references in Paragraph H to "the Board" should be revised, as appropriate, to include other NRC officials and employees such as the Office of the Secretary, the Commission, and their respective staffs. The Staff believes that its suggested revisions would improve the clarity of the proposed order, are self-explanatory and need no further discussion here.

CONCLUSION

For the reasons stated above, the Staff objects to the proposed protective order submitted by Entergy, New York State, Riverkeeper and Clearwater, to the extent and for the reasons set forth above. The Staff respectfully submits that the proposed protective order should be modified in the manner set forth in the Attachment hereto.

Respectfully submitted,

Sherwin E Turk

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 24th day of August 2009

ATTACHMENT TO
"NRC STAFF'S ANSWER TO JOINT MOTION FOR ENTRY OF A PROTECTIVE ORDER"

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence G. McDade, Chairman
Dr. Kaye D. Lathrop
Dr. Richard E. Wardwell

In the Matter of	)	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	ASLBP No. 07-858-03-LR-BD01
(Indian Point Nuclear Generating Units 2 and 3)	)	_____, 2009

PROTECTIVE ORDER

This Protective Order governs the disclosure and use in this proceeding of certain documents that applicant Entergy Nuclear Operations, Inc. ("Entergy"), or any other Participant in this proceeding, claims contain proprietary trade secrets and/or privileged commercial or financial information.[1] For purposes of this Protective Order, the term "documents" means any audio or video tape recording or written matter of any kind, whether produced, reproduced, or stored on paper, cards, tapes, ribbons, disks, belts, charts, film, computer files, computer disks or

[1] The provisions of this Protective Order do not restrict the use by U.S. Nuclear Regulatory Commission Staff counsel, witnesses, employees, consultants, and others representing the NRC Staff ("NRC Staff") of documents containing protected material that NRC has received or may receive apart from its role as a litigant in this proceeding (e.g., documents containing information required to be submitted to the NRC by statute, regulation, or license condition, or information submitted to, or acquired by, the NRC in support of a requested licensing action or in fulfillment of its regulatory responsibilities). Instead, NRC Staff use and disclosure of such documents is governed by 10 C.F.R. §§ 2.390, 9.17, and 9.25, and NRC Management Directive 12.6, "NRC Sensitive Unclassified Information Security Program." The provisions of this Protective Order apply to NRC counsel, witnesses, employees, consultants, and others representing the NRC Staff with respect to documents containing protected material that NRC receives solely pursuant to 10 C.F.R. § 2.336 and this Protective Order, except that such persons are not required to execute a Nondisclosure Agreement and Acknowledgement form.

Deleted: or Nuclear Regulatory Commissioners

diskettes, computer storage devices, or any other medium, and includes, without limitation, books, reports, studies, statements, speeches, notebooks, calendars, working papers, manuals, memoranda, notes, instructions, directions, records, correspondence, diaries, diagrams, drawings, lists, telephone logs, minutes, and photographs, and also includes, without limitation, originals, copies (with or without notes or changes thereon), and drafts. Pursuant to this Protective Order, counsel, witnesses, employees, members, officers, consultants, and others representing a party or interested governmental entity in this proceeding (all of whom are referred to herein, collectively, as "Participants") shall be permitted access to proprietary documents held by another Participant in this proceeding ("Initial Holders") otherwise required to be disclosed in accordance with 10 C.F.R. § 2.336(a) upon the conditions set forth herein. Except as otherwise expressly set forth herein, this Protective Order shall remain in effect until specifically modified or terminated by the Atomic Safety and Licensing Board ("Board") or the U.S. Nuclear Regulatory Commission ("Commission").

Those persons who (1) are qualified pursuant to paragraph F of this Protective Order; and (2) have executed a Nondisclosure Agreement and Acknowledgment in the form included as Attachment A to this Protective Order, the terms of which are hereby incorporated herein, shall be permitted access to proprietary information that is subject to this Protective Order and relevant to an admitted contention in this proceeding under the following conditions:

A. 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), then the Initial Holder or its counsel may designate such document on its privilege log as a "proprietary document," and it shall be protected in

accordance with the terms and conditions of this Protective Order. Such designation shall take place as follows: the Initial Holder shall (1) prominently mark with a conspicuous "Contains [insert owner's name] Designated Proprietary Information" label each proprietary document on the first page and on each other page of the document; and (2) on or before the later of (a) thirty (30) days after the date of this Protective Order, or (b) thirty (30) days after the date a Participant requests a copy of the proprietary document, produce a copy of the document with the proprietary information unredacted by providing it to the duly authorized representatives of the Participant requesting the proprietary document (as defined in paragraph F below), provided each such representative has signed a Nondisclosure Agreement and Acknowledgment. Upon the request of NRC Staff counsel, the party claiming protected status for a Proprietary Document shall provide an unredacted copy of such document to NRC Staff counsel.

B. Documents that are designated in accordance with paragraph A shall be held in strict confidence pursuant to 10 C.F.R. § 2.390(a)(4) and this Protective Order. This Protective Order, and the good faith representation and designation of documents as proprietary documents by the Initial Holder thereof, serves in lieu of the requirement for an affidavit under 10 C.F.R. § 2.390(b) and allows the NRC Staff to receive proprietary documents and to protect their confidentiality under the Freedom of Information Act. Nothing in this Protective Order shall be interpreted to prevent the NRC from discharging its obligation to release or retain documents in its possession and control in accordance with, and only to the extent required by, federal regulations or statute.

C. Prior to presenting any dispute arising under this Protective Order to the Board, the parties to the dispute shall consult and endeavor to resolve such dispute, including, but not limited to, the use of redaction. The Board shall resolve any disputes arising under this

Protective Order not previously resolved, including those relating to the public release of information in a proprietary document otherwise designated as subject to nondisclosure.

D. Any Participant that objects to the designation of a document as proprietary shall provide a notice of objection to the Initial Holder stating the Participant's objection, and specifying the portions of the document that should be disclosed. Any such objections shall be submitted no later than sixty (60) days before the first scheduled day of hearing. However, in no case may an Intervenor submit such an objection with respect to a document that is not relevant to that Intervenor's own admitted or adopted contention(s). Upon such objection, the parties shall have 20 days (the "Consultation Period") to engage in good faith efforts to resolve the matter. The objecting party may file a motion with the Board within ten (10) days of the expiration of the consultation period, or earlier. 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.

E. If a Participant files a motion for disclosure under paragraph D above, pending a ruling by the Board, the proprietary document in question shall continue to be held in confidence. If the Board rules that a document does not qualify for the asserted protection, or that, on balance, the document should be disclosed without the restrictions of this Protective Order, then the unrestricted use of such documents may begin fifteen (15) days after the Board's decision. If, during such time, the party that asserted protected status of the document files an interlocutory appeal or request that the issue be certified to the Commission, such period of time

shall be extended until such time as the Board or the Commission rules on the appeal or request for certification.

F. Only individual counsel, consultants, witnesses, employees, members, officers, and others representing a Participant, listed in Attachment C who have executed the attached Nondisclosure Agreement and Acknowledgment, and other persons identified in Paragraph H, will be afforded access to proprietary information. Participants may have an additional or substitute person(s) necessary for the preparation of materials for this proceeding be authorized to receive proprietary documents. Participants must advise the Initial Holder by electronic mail of the names of any additional or substitute person(s) for whom access to proprietary information is sought. The notification must certify that the individual to be authorized is either: (a) legal counsel to a Participant; (b) an employee, member, officer, or representative of a Participant; or (c) a consultant, witness, or another individual whose review thereof is necessary for the preparation of materials for this proceeding. If the Initial Holder agrees to disclose to the additional or substitute designee, the Initial Holder will so notify the Participant, and the individual must execute and serve the attached Nondisclosure Agreement and Acknowledgment prior to receipt of proprietary information. If the Initial Holder declines to disclose to the applicable designee, then the Participant may seek approval from the Board by filing a motion stating that such agreement was sought and declined, and the basis for its belief that such information should be disclosed to the proposed designee. The Initial Holder may challenge such a motion within ten (10) days of receipt of the Participant's filing and the Board will determine the designation of such additional or substitute recipients by further order. Only after the approval of the requested designation by the Board and the individual's execution and filing

of the attached Nondisclosure Agreement and Acknowledgment, may such person(s) be granted access to any proprietary information.

G. Each executed Nondisclosure Agreement and Acknowledgment shall be filed with the Board and served on the other Participants. This service on the Participants shall be accomplished solely through the use of electronic mail.

H. A proprietary document disclosed pursuant to this Protective Order shall only be used as necessary for the conduct of this proceeding and any further Commission or judicial proceedings in this matter, by approved designees. A proprietary document subject to this Protective Order shall not be disclosed in any manner to any person except (1) the Commission, the Office of the Secretary, the Board, and their respective staffs, (2) the NRC Staff, its counsel, and contractors or consultants employed by the U.S. government, and (3) those persons engaged in the conduct of this proceeding who have executed a Nondisclosure Agreement and Acknowledgment. An individual with access to proprietary documents may make copies of and take notes on the confidential information contained in the documents, but such copies and notes become proprietary documents subject to the terms of this Protective Order.

Deleted: the Board and its staff;

Deleted: (2)

I. Counsel, consultants, witnesses, employees, members, officers, and others representing a Participant who receive documents subject to the terms of this Protective Order shall maintain the confidentiality of the information contained therein as required in the attached Nondisclosure Agreement and Acknowledgment, the terms of which are incorporated herein. Even if no longer engaged in this proceeding, every person who has executed a Nondisclosure Agreement and Acknowledgment shall continue to be bound by the provisions of this Protective Order and the attached Nondisclosure Agreement and Acknowledgment.

J. Counsel and others representing a Participant shall take all precautions necessary to assure that proprietary documents and proprietary information are not distributed to unauthorized persons. Counsel and others representing a Participant are responsible for ensuring that persons under their supervision or control comply with this Protective Order.

K. All pleadings, issuances, testimony, exhibits, and correspondence in this proceeding that contain proprietary information shall be treated as confidential, marked in accordance with paragraph A above, and, if served, shall:

1. Be served by electronic mail, with an additional paper copy served by U.S. first class, registered, express, or certified mail, internal NRC mail, messenger-courier, or overnight delivery service in a sealed envelope;

2. Include an attached cover sheet bearing prominent markings indicating the attached document contains "Confidential Proprietary Information Subject to Nondisclosure Agreement," and a cover letter that describes the contents of the pleading or correspondence without reference to such information, and, in the subject line of the electronic filing e-mail, a statement that the electronic filing contains proprietary information; and

3. Be served only on the individual members of this Board and its law clerks, the Office of the Secretary, counsel for the Initial Holder, and representatives of Participants that are authorized to receive such information pursuant to this Protective Order.

L. At any hearing or conference in this proceeding in which a statement is made by a representative of a Participant, or a witness is questioned, concerning a proprietary document or information contained therein, the statement or testimony shall be given in camera or under other suitable conditions as the Board may establish, and the record of that portion of the hearing and any transcript thereof, shall be withheld from distribution to the public and may only be distributed to persons who are authorized to receive such information pursuant to this Protective Order. It shall be the duty of the presenting Participant to notify the Board and the Initial Holder

Deleted: individual members of this Board and its law clerks, the Office of the Secretary, counsel for the Initial Holder, and representatives of Participants that

that such testimony or statement will contain proprietary information, prior to the testimony or statement being made.

M. Proprietary documents shall remain available for the purposes of this proceeding until the date that an order terminating this proceeding is no longer subject to judicial review (the "Proceeding Termination Date"). The Participants shall, within forty-five (45) days of the Proceeding Termination Date, return all proprietary documents in their possession, or in the possession of their counsel, consultants, employees, members, officers, and agents, to the Initial Holder's counsel or shall destroy that material, except that copies of filings, issuances, transcripts, and exhibits in this proceeding that contain such information and notes taken by persons reviewing proprietary material, may be retained if they are maintained in a secure place such that no distribution or disclosure of the information to unauthorized individuals will occur. Within such time period, each Participant receiving proprietary documents under this Protective Order shall submit to the Initial Holder's counsel an affidavit stating that, to the best of his/her knowledge, all proprietary documents have been returned or destroyed, or, in the case of filings, issuances, transcripts, exhibits, or notes in this proceeding, that such documents will be maintained in a secure place such that no distribution or disclosure of the information to unauthorized individuals will occur. To the extent that such filings, issuances, transcripts, exhibits, and notes are not returned or destroyed, they shall remain subject to the provisions of this Protective Order.

N. Counsel, consultants, employees, members, officers, or any other individuals representing a Participant who have reason to believe that proprietary documents may have been lost or misplaced or may have otherwise become available to unauthorized persons during the

pendency or following the completion of this proceeding shall notify the Board and the Initial Holder's counsel promptly of such belief and the reasons for it.

O. Any violation of the terms of this Protective Order or a Nondisclosure Agreement and Acknowledgment executed in furtherance of this Protective Order may result in the imposition of such sanctions as the Board may deem appropriate including, but not limited to, referral of the violation to appropriate bar associations and/or other disciplinary authorities.

P. Nothing in this Protective Order precludes any Participant(s) in this proceeding from seeking changes in this Protective Order from the Board, the Commission, or a court as future circumstances warrant.

Q. Nothing in this Protective Order shall be deemed to preclude any Participant from independently seeking, through discovery in any other administrative or judicial proceeding, any proprietary document or information produced in this proceeding under this Protective Order. In addition, if a document or information identified in this proceeding as proprietary comes into the possession of, or is known by any Participant independently of a proprietary document produced in this proceeding, and such knowledge was acquired without violation of law or other requirement applicable to such Participant directing the Participant to keep such information confidential, use of that document or information in this proceeding, without compliance with the terms of this Protective Order, shall not be a violation of the terms of this Protective Order. The Participant asserting independent knowledge of the contents of a proprietary document or independent access to such a document shall have the burden of proving that such information was independently obtained if the Initial Holder asserts that disclosure of such information or document was a violation of this Protective Order.

_____R. In addition, if a document designated as a proprietary document is ruled in another proceeding not to be proprietary or confidential, or if the Initial Holder discloses a document designated as a proprietary document in another action without such a designation, then any Participant objecting to the continued designation of such document as a proprietary document in this proceeding shall consult with the Initial Holder in accordance with paragraphs C and D of this Protective Order regarding whether such document should continue to be subject to the terms of this Protective Order. If counsel or others representing a Participant in this proceeding becomes aware that a document designated as a proprietary document in this proceeding is ruled by another Board, the Commission, or a court in another proceeding not to be proprietary or confidential, then that Participant shall inform all parties of that ruling.

S. The Board may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding.

T. The additional provisions set forth in Appendix B apply to Participants receiving proprietary documents designated as containing "Vendor Proprietary Information" (i.e., documents containing information proprietary to vendors and contractors such as Westinghouse Electric Company LLC and Enercon Services, Inc.) from any other Participant in this proceeding or its vendors or contractors.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

_____
Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
_____, 2009

ATTACHMENT A

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence G. McDade, Chairman
Dr. Kaye D. Lathrop
Dr. Richard E. Wardwell

In the Matter of	)	Docket Nos. 50-247-LR and 50-286-LR
	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	
	)	ASLBP No. 07-858-03-LR-BD01
(Indian Point Nuclear Generating Units 2 and 3)	)	
	)	

NONDISCLOSURE AGREEMENT AND ACKNOWLEDGMENT

Under penalty of perjury, I hereby agree and acknowledge that (i) access to "proprietary documents," as that term is defined in the Atomic Safety and Licensing Board's Protective Order dated _____, 2009 issued in Docket Nos. 50-247-LR and 50-286-LR ("Protective Order"), may be provided to me pursuant to the terms and restrictions of the Protective Order; (ii) I have been given a copy and have read the Protective Order; and (iii) I agree to be bound by the terms of the Protective Order. I understand and agree that proprietary documents, their contents, or any notes or other memoranda summarizing or otherwise describing their contents, or any form of information that derives from the proprietary documents and copies or discloses the contents of the proprietary documents, shall be held in strict confidence and shall not be disclosed to anyone except in accordance with that Protective Order, and shall be used only for purposes of this proceeding. I acknowledge that a violation of this Nondisclosure Agreement and Acknowledgment or the Protective Order, which incorporates the terms of this Nondisclosure

Agreement and Acknowledgment, constitutes a violation of an order of the U.S. Nuclear Regulatory Commission and may result in the imposition of such sanctions as the Atomic Safety and Licensing Board or the U.S. Nuclear Regulatory Commission may deem to be appropriate. I also acknowledge that a violation of this Nondisclosure Agreement and Acknowledgment or the Protective Order shall entitle the Initial Holder or owner of the proprietary document(s) or proprietary information contained therein to seek immediate injunctive relief prohibiting such violation.

WHEREFORE, I do solemnly agree to protect such proprietary documents, and their contents, as may be disclosed to me in this proceeding, in accordance with the terms of the attached Protective Order and this Nondisclosure Agreement and Acknowledgment.

Name (printed): _____

Title: _____

Employed by or Representing: _____

Signature: _____

Executed on (date): _____

Deleted: [Note: For NRC representatives executing this Nondisclosure Agreement, an executed agreement will be modified to contain the following additional sentence: "My agreement and acknowledgment, however, are not binding on the U.S. Nuclear Regulatory Commission's fulfillment of its obligations under the Freedom of Information Act."]¶
¶

ATTACHMENT B

Additional Provisions Applicable to Vendor Proprietary Information

A. The following additional provisions apply to Participants receiving proprietary documents designated as containing "Vendor Proprietary Information":

1. The direct or indirect receipt and use of Vendor Proprietary Information by a Participant, as defined in the attached Protective Order, shall not be for the purpose of producing a product or service either by a Participant, its parent corporation, subsidiaries, officers, directors, contractors, consultants, counsel, witnesses, employees, or any other person, for transfer to third parties.

2. Vendors make no warranty or representation whatsoever to Participants as to the sufficiency or accuracy of the Vendor Proprietary Information provided pursuant to this Protective Order.

3. Vendors and their suppliers and subcontractors of any tier shall not be liable to Participants with respect to or resulting from the use (or the results of such use) or misuse by Participants or others of any Vendor Proprietary Information furnished pursuant to this Protective Order.

4. Participants shall not, at any time, without the prior written approval of the appropriate vendor, file, cause or authorize the filing of any patent application in any country in respect of any invention derived from the Vendor Proprietary Information supplied pursuant to this Protective Order.

5. Participants shall not disclose any Vendor Proprietary Information received in this proceeding, or any product of such Vendor Proprietary Information, directly or indirectly, without the prior written permission of the appropriate vendor, to any of the countries designated in the United States Government regulations as issued from time to time relating to the exportation of technical data, including any computer programs. Participants shall fully comply with all regulations with regard to the Vendor Proprietary Information transmitted pursuant to this Protective Order.

ATTACHMENT C

Individuals Approved to Receive Proprietary Documents Upon Execution of Nondisclosure Agreement and Acknowledgment

Entergy

Kathryn M. Sutton (Morgan, Lewis & Bockius LLP – Counsel for Entergy)
Paul M. Bessette (Morgan, Lewis & Bockius LLP – Counsel for Entergy)
Martin J. O'Neill (Morgan, Lewis & Bockius LLP – Counsel for Entergy)
Jonathan M. Rund (Morgan, Lewis & Bockius LLP – Counsel for Entergy)
Esther Park (Morgan, Lewis & Bockius LLP – Counsel for Entergy)
William C. Dennis (Entergy Nuclear Operations, Inc. – Counsel for Entergy)
Edwin P. Villarico (Morgan, Lewis & Bockius LLP – Paralegal)

New York State

Mylan Denerstein (Executive Deputy Attorney General – Counsel for New York State)
Katherine Kennedy (Special Deputy Attorney General – Counsel for New York State)
John Sipos (Special Deputy Attorney General – Counsel for New York State)
Janice Dean (Assistant Attorney General – Counsel for New York State)
Lisa Feiner (Assistant Attorney General – Counsel for New York State)
Anthony Roisman (Assistant Attorney General – Counsel for New York State)
Paul Blanch (Expert witness for New York State)
Bruce Egan (Expert witness for New York State)
Richard Lahey (Expert witness for New York State)
David Schlissel (Expert witness for New York State)
Rudy Hausler (Expert witness for New York State)

Riverkeeper

Phillip Musegass (Hudson River Program Director, Riverkeeper, Inc. – Counsel for Riverkeeper)
Deborah Brancato (Staff Attorney, Riverkeeper, Inc. – Counsel for Riverkeeper)
Dr. Joram Hopenfeld (Expert witness for Riverkeeper)

Clearwater

Manna Jo Greene (Clearwater Environmental Director – Representative for Clearwater)
Ross Gould (Clearwater Member– Representative for Clearwater)
Stephen Filler (Clearwater Director and Member– Representative for Clearwater)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO JOINT MOTION FOR ENTRY OF A PROTECTIVE ORDER" dated August 24, 2009, have been served upon the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 24th day of August, 2009:

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