

**UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

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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, DPR-26, DPR-64
Entergy Nuclear Indian Point 3, LLC, and
Entergy Nuclear Operations, Inc. April 9, 2015
-----x

**STATE OF NEW YORK
MOTION**

PUBLIC & REDACTED VERSION

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

**UNITED STATES
NUCLEAR REGULATORY COMMISSION
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Entergy Nuclear Indian Point 2, LLC, DPR-26, DPR-64
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**STATE OF NEW YORK
MOTION
TO WITHDRAW THE PROPRIETARY DESIGNATION OF VARIOUS PRESSURIZED
WATER REACTOR OWNERS' GROUP AND WESTINGHOUSE DOCUMENTS**

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

The State of New York brings this motion pursuant to Paragraph D of the Atomic Safety and Licensing Board's September 4, 2009 Protective Order ("Protective Order") to challenge the proprietary designation of five documents relating to contentions NYS-25 and NYS-38/RK-TC-5 which were produced by Entergy as part of its mandatory disclosures. The documents consist of a memorandum prepared by a trade association of which Entergy is a member, the Pressurized Water Reactor Owners Group ("PWROG"), and four calculation notes prepared by Entergy's vendor, Westinghouse. When Entergy produced the documents they were marked as containing PWROG- or Westinghouse- designated proprietary information and therefore are subject to the parties' non-disclosure agreement. The State hereby seeks an order striking those proprietary designations.

BACKGROUND

The Protective Order and 10 C.F.R. § 2.390

Under the Protective Order a party seeking to restrict the disclosure of relevant information always retains the burden of proving that the information is confidential business information. *Entergy Nuclear Operations, Inc.*, (Indian Point Nuclear Generating Units 2 and 3), Protective Order (unpublished) at ¶ D (Sept. 4, 2009) (ML092470105). Paragraph A of the Protective Order provides that, "[I]f the Initial Holder of proprietary information or its counsel has a good faith belief that a document or portion thereof contains information that qualifies as a trade secret and/or commercial or financial information that is privileged or confidential under 10 C.F.R. §§ 2.390(a)(4) and (b)(4)(i)-(v), the Initial Holder or its counsel may designate such document on its proprietary log as a 'proprietary document,' and it shall be protected in accordance with the terms and conditions of this Protective Order." The Protective Order further authorizes a party that received information designated as proprietary to challenge that designation and seek the removal of that designation. *Id.* at ¶ D. As noted, the Protective Order

confirms that the Initial Holder shall have the burden of establishing that the information sought to be protected from public disclosure is privileged or confidential so that the Board can then determine whether, on balance, non-disclosure is warranted under 10 C.F.R. § 2.390. *Id.* at ¶ D.

Pursuant to 10 C.F.R. §2.390(b)(i)-(v), considerations relevant to the Commission's determination as to whether information constitutes a trade secret or confidential or privileged commercial or financial information that may be withheld from public disclosure include:

- (i) Whether the information has been held in confidence by its owner;
- (ii) Whether the information is of a type customarily held in confidence by its owner and, except for voluntarily submitted information, whether there is a rational basis therefor;
- (iii) Whether the information was transmitted to and received by the Commission in confidence;
- (iv) Whether the information is available in public sources;
- (v) Whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.

In the event of a dispute over a proprietary designation, Paragraph C of the Protective Order provides that “[P]rior 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. *Id.* at ¶ C.

Indian Point Unit 2 and Unit 3

Indian Point Unit 2 (IP2) and Indian Point Unit 3 (IP3) each contain a four-loop Westinghouse pressurized water reactor. According to Atomic Energy Commission and NRC documents, the Consolidated Edison Company (“ConEd”) received the following construction

permits and operating licenses for IP2 and IP3 on the following dates:

	CONSTRUCTION PERMIT ISSUED	OPERATING LICENSE ISSUED
IP Unit 2	October 14, 1966	September 28, 1973
IP Unit 3	August 13, 1969	December 12, 1975

Source: Federal Register and NRC Information Digest.¹

Given the regulatory history, it appears that various reactor components were fabricated and installed between 1966 and 1973 for IP2 and 1969 and 1975 for IP3.

NRC Branch Technical Position 5-3

In early 2014, NRC was alerted to a potential non-conservatism in certain methodologies prescribed in NUREG-0800 Branch Technical Position (BTP) 5-3 for estimating the initial fracture toughness of reactor vessel materials. See Letter from P. Salas (Areva) to NRC dated January 30, 2014 (ML14038A265). BTP 5-3 was relied upon by various nuclear plants that received their construction permits before August 1973 to estimate reference temperature (RT_{NDT}) and upper shelf energy (USE) values and thereby demonstrate compliance with ASME Code and USNRC margins for reactor pressure vessel integrity. Because these baseline values are used for determining pressure-temperature (PT) heatup /cooldown curves, and other operational aspects of nuclear facilities, NRC and industry have recently examined the issue of BTP 5-3’s non-conservatism and explored the potential consequences of this information. See Kirk, M. and Sheng, S., NRC Presentation “Assessment of BTP 5-3 Protocols to Estimate $RT_{NDT(u)}$ and USE” (2014)(ML14163A524); Lubinski, J., NRC Memorandum “Summary of February 19, 2015, Public Meeting to Discuss Reactor Pressure Vessel Issues” (2015) (ML15096A128).

¹ See 31 Fed. Reg. 13,616-17 (Oct. 21, 1966); 34 Fed. Reg. 13,437 (Aug. 20, 1969); NUREG-1350, Volume 20, 2008 - 2009 Information Digest, at 103, 113 (Aug. 2008).

BTP 5-3 may have been used for determining baseline fracture toughness values for IP2 and IP3, as the permits for their construction were issued prior to 1973. On January 5, 2015, Entergy identified on its Privilege Log a PWROG memorandum dated October 28, 2014 entitled “BTP 5-3 Industry Issue, Executive Review.” The document was produced to the State on January 14, 2015.

Westinghouse’s Environmental Assisted Fatigue Analyses for IP2 and IP3

As part of Entergy’s License Renewal Applications (LRAs) for IP2 and IP3, Entergy committed to “update the fatigue usage calculations using refined fatigue analyses to determine valid [cumulative usage factors] CUFs less than 1.0 when accounting for the effects of reactor water environment.” *See* LRA, Commitment 33. Entergy further committed, in LRA Commitment 49, to “[r]ecalculate each of the limiting CUFs in Section 4.3 of the LRA for the reactor vessel internals to include the reactor coolant environment effects (F_{en}).” Under Entergy’s Fatigue Monitoring Program, corrective actions could include further re-analysis prior to the environmental assisted cumulative usage factors (CUF_{en}) reaching 1.0. *Id.* To satisfy these commitments, Entergy retained Westinghouse to perform on its behalf updated and refined environmental assisted fatigue analyses for various IP2 and IP3 components. As indicated by the documents’ own titles, Westinghouse published the results of its EAF analyses for the accumulator nozzles for IP2 and IP3 (CN-PAFM-09-77), EAF analyses for the pressurizer spray nozzle for IP2 (CN-PAFM-13-40), EAF screening evaluations for IP2 and IP3 (CN-PAFM-12-35) and refined EAF screening evaluations for IP2 and IP3 (CN-PAFM-13-32) in four separate reports, also referred to as “calculation notes.” These calculation notes were also identified on Entergy’s Proprietary Logs and produced to the State.

The State's Notice of Objection

In early 2015, in preparation for the submission of supplemental contentions, the State initiated informal discussions with Entergy about the public reference to results contained in various Westinghouse authored documents. Entergy responded that Westinghouse did not agree to the disclosure of any results that had not previously been provided to NRC Staff. Kwong Declaration, ¶ 2.

Pursuant to the Protective Order, on March 9, 2015, the State provided Entergy with a Notice of Objection to the continued proprietary designation and confidential treatment of five documents. *See* Attachment 1 to Declaration of Lisa S. Kwong dated April 9, 2015. The documents include the PWROG memorandum relating to BTP 5-3 and the four calculation notes containing the results of Westinghouse's EAF analyses performed in support of Entergy's license renewal applications for IP2 and IP3. *See* Attachments 2-6 to Kwong Declaration.

DECLARATION ATTACHMENT NO.	DOCUMENT TITLE AND DESCRIPTION/DATE/PAGES	PRIVILEGE LOG DATE/ NUMBER	DATE PRODUCED	DOCUMENT ID NO.
2	Pressurized Water Reactor Owners Group, BTP 5-3 Industry Issue, Executive Review (October 28, 2014). 6 pages.	1/5/15 #758	1/14/15	IPECPROP00081155-81160
3	Westinghouse Proprietary Report, Class 2, Indian Point Units 2 & 3 Accumulator Nozzle Environmental Fatigue Evaluation, CN-PAFM-09-77 (2010). 93 pages.	12/1/10 #559	1/7/11	IPECPROP00057823-57916
4	Westinghouse Proprietary Report, Class-2, Indian Point Unit 2 and Unit 3 EAF Screening Evaluations, CN-PAFM-12-35, Rev. 1 (2012). 83 pages.	12/5/12 #667	12/17/12 1/7/13 [color version]	IPECPROP00072778-72861
5	Westinghouse Proprietary Report, Class-2, Indian Point Unit 2 (IP2) and Unit 3 (IP3), Refined EAF Analyses and EAF Screening Evaluations, CN-PAFM-13-32 (2013). 88 pages.	11/4/13 #710	11/11/13	IPECPROP00078338-78425
6	Westinghouse Proprietary Report, Class-2, Indian Point Unit 2 Pressurizer Spray Nozzle Transfer Function Database Development and Environmental Fatigue Evaluations, CN-PAFM-13-40 (2013). 122 pages.	12/4/13 #738	12/12/13	IPECPROP00079751-79873

The State's Notice included a proposed resolution, including a request for Entergy to identify with specificity the portions of the documents it or its vendor/trade association claimed to be proprietary and confidential, the basis for such claims, and the harm that would result from disclosure. At Entergy's request and in an effort to resolve the issue without litigation, on March 19, 2015 the State proposed to modify the scope of its challenge in order to facilitate Entergy's discussions with Westinghouse. *See* Attachment 7 (March 9-30, 2015 email thread between L. Kwong and R. Kuyler) to Kwong Declaration.

Westinghouse rejected the State's request and continued to assert that each and every page of the five documents constituted proprietary information. On March 27, 2015 Entergy advised the State that Westinghouse's proprietary claim extended to the documents in their entirety and that Westinghouse was unwilling to allow any portion of the calculation notes to be made public. Thereafter, on March 30, 2015, Entergy advised that Westinghouse coordinated the activities of the PWROG and that it was Westinghouse's position that the PWROG memo contained confidential commercial information belonging to its members and that the entire memo should remain subject to the Protective Order. No particularized statements or affidavits were offered in support of Westinghouse's position. *Id.*

The parties have been unable to resolve their dispute despite their efforts to do so during the Consultation Period. The State therefore seeks an Order striking Westinghouse's proprietary designations because neither Entergy nor Westinghouse have shown that the documents at issue contain a trade secret or confidential commercial/financial commercial within the scope of the Protective Order or 10 C.F.R § 2.390.

ARGUMENT

I. **ENTERGY AND WESTINGHOUSE HAVE FAILED TO SHOW THAT THE DOCUMENTS AT ISSUE CONTAIN TRADE SECRETS OR CONFIDENTIAL COMMERCIAL/FINANCIAL INFORMATION WITHIN THE SCOPE OF THE PROTECTIVE ORDER AND THE COMMISSION'S PUBLIC ACCESS TO INFORMATION REGULATIONS SET FORTH AT 10 C.F.R. § 2.390.**

The Board should issue an order striking Westinghouse's proprietary designation for the PWROG memo and four Westinghouse calculation notes because Westinghouse and Entergy have failed to show that the documents contain trade secrets or confidential commercial/financial information within the scope of the Protective Order and the Commission's public access to information regulations set forth at 10 C.F.R. § 2.390. Despite being asked to do so in the State's Notice of Objection, and paragraph C of the Protective Order, neither Westinghouse nor Entergy have articulated with specificity the basis for the proprietary claims. Rather than offering an affidavit addressing the considerations set forth in 10 C.F.R. § 2.390(b)(4), the companies rely on mere conclusory allegations regarding the confidential or proprietary nature of the information contained in the documents. Significantly, Westinghouse has not asserted – nor could it assert – that release of the documents will cause Westinghouse substantial competitive harm. Thus, Entergy and Westinghouse's assertions that the documents constitute, in their entirety, proprietary information exempt from public disclosure is completely unsupported. A review of the standards for public disclosure of NRC documents reveals that the documents at issue are simply not entitled to confidential treatment.

- A. The Commission's policies and regulations regarding public access to information related to agency decision-making require disclosure of the Westinghouse documents.

Westinghouse's (and Entergy's) proprietary claim to the documents should be rejected based on the Commission's policies and regulations supporting public access to information related to agency decision-making. 10 C.F.R. §2.390; 5 U.S.C. § 552(a)(2). As a general rule,

NRC regulations require disclosure of records and documents relating to issues of licensing, compliance, standard design approval or rulemaking. 10 C.F.R. § 2.390(a). Exceptions to this rule include potential non-disclosure for “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 10 C.F.R. § 2.390(a)(4). Thus, it has been observed that, “disclosure of information in NRC files [is] the rule, and nondisclosure the exception.” *Westinghouse Electric Co. v. U.S. Nuclear Regulatory Commission*, 555 F.2d 82, 87 (3rd Cir. 1977). The Commission may, even with respect to information determined to be proprietary, authorize public disclosure if it determines that such disclosure is warranted. 10 C.F.R. § 2.390(b)(5). *See Westinghouse*, 555 F.2d at 92 (“Disclosure of proprietary information forming the bases of a decision on a licensing matter may facilitate both informed administrative action and intelligent judicial review.”).

Since 10 C.F.R. § 2.390 is part of the NRC’s regulatory framework for implementing the Freedom of Information Act’s (“FOIA”) (5 U.S.C. § 552) requirements for ensuring public access to agency documents, judicial interpretations of FOIA’s disclosure requirements are instructive. *See Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-05-08, 61 N.R.C. 129 at 163 (Commission determined that 10 C.F.R. § 2.790 (now, § 2.390) embodied the standards of FOIA’s Exemption 4 for trade secrets and confidential commercial/financial information). Courts have defined “trade secret,” for FOIA purposes, as “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.” *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). In *Public Citizen*, a nonprofit organization engaged in research and consumer advocacy on health and safety matters sought access to the Food and Drug Administration’s raw data, data summaries, memoranda and

correspondence regarding adverse reactions associated with the use of intraocular lenses. *Id.* In reversing the lower court's overbroad construction of the term "trade secrets," the Circuit Court for the District of Columbia noted the distinction between data relating to processes and methods, which are the product of private innovation and deserve protection, and safety and efficacy data, which are in the public interest to disclose. *Id.* at 1289, n. 23. The court concluded that the information sought was, at best, tangentially related to the productive process and therefore did not fall within the ambit of "trade secrets" exempt from disclosure. *Id.* at 1290.

With respect to the second category of information potentially exempt from disclosure, courts have consistently held that commercial or financial information is confidential for purposes of FOIA's exemption if its disclosure would either (1) impair the government's ability to obtain necessary information in the future or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992) (affirming *National Parks'* two-part test for determining whether financial or commercial information that is required to be submitted to an agency should be treated as confidential under FOIA); *Public Citizen*, 704 F.2d at 1290-1291; *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). "The important point for competitive harm . . . is that it be limited to harm flowing from the affirmative use of proprietary information *by competitors.*" *Public Citizen*, 704 F.2d at 1291, n. 30.

In this regard, courts have also recognized that a document should not be withheld from disclosure just because it may be embarrassing to its owner. *General Electric Co. v. U.S. Nuclear Regulatory Commission*, 750 F.2d 1394, 1403-1404 (7th Cir. 1984); see also *Republic of the Philippines v. Westinghouse Electric Corp.*, 949 F.2d 653 (3rd Cir. 1991) (unsealing of court papers filed in action involving alleged bribery of public officials in connection with

nuclear reactor construction project was proper since company's concern over negative impact on company's public image was insufficient to rebut presumption of access to judicial records). For example, in *General Electric Co. v. U.S. Nuclear Regulatory Commission*, General Electric contested public access to a several hundred page report prepared by the company which contained self-critical remarks about the design and safety of its boiling water nuclear reactors. The report was submitted in confidence to the Atomic Safety and Licensing Board, and the company opposed its release on the basis that the report contained proprietary information. In response, the court noted that "the competitive harm that attends any embarrassing disclosure is not the sort of thing that triggers exemption 4 [proprietary status]. There must be substantial competitive harm to the firm that owns the information sought to be made public." The court further noted that "though any disparagement of nuclear power could harm General Electric vis-à-vis producers of competing systems for generating electricity, the harm likely to be done by a single document in this respect is too speculative" to provide the basis for a proprietary claim.

Id.

B. The PWROG memo and Westinghouse calculation notes do not contain trade secrets or confidential commercial information.

1. The PWROG Memo

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See Kirk and Sheng, NRC Presentation (2014); Lubinski, NRC Memo (2015) (ML15096A128). In fact, it appears that PWROG made a presentation of its understanding of the BTP 5-3 issue and its proposed mitigation strategy at NRC’s February 2015 public meeting on this topic. See PWROG Presentation (2015) (ML15061A095); Lubinski, NRC Memo (ML15096A128).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Both Westinghouse and PWROG have, in the past, released public documents discussing emerging technical issues affecting its vendees or members.² Westinghouse and PWROG should treat the PWROG BTP 5-3 issues memo no differently.

2. Westinghouse’s Calculation Notes and EAF Results

The four calculation notes containing the results of Westinghouse’s environmental assisted fatigue evaluations for various components at IP2 and IP3 do not appear to contain trade secrets or confidential commercial information. Like the adverse incidence data submitted to the FDA by intraocular lenses manufacturers determined not to be trade secrets in *Public Citizen* (704 F.2d at 1290), the IP2- and IP3-specific operational data and analyses contained in Westinghouse’s calculation notes bear no connection to a secret production process. Nor do the results of Westinghouse’s analyses reveal secret formulae or methodology. As the court in

² See PWROG-14001-NP, Rev. 1 “PRA Model for the Generation III Westinghouse Shutdown Seal,” Risk Management Committee, PA-RMSC-0499R2 (ML14190A332); PRWOG-14049-NP, Rev. 1, D.C. Cook Units 1 and 2 Summary Report for the Fuel Design/Fuel Management Assessments for Reactor Internals Aging Management MRP-227-A Applicability, ML14316A450; Westinghouse Nuclear Safety Advisory Letter Regarding Westinghouse LOCA Mass and Energy Release Calculation Issues, NSAL-11-5 (ML13239A479).

Public Citizen acknowledged, mere data, without more, does not rise to the level of a protected trade secret or confidential commercial information. The calculation notes report both the data Westinghouse used to calculate cumulative fatigue usage factors (CUF_{en}) for various IP2 and IP3 components and the results of its analyses. Some of the notes contain summaries of this information presented in table form. [REDACTED]

[REDACTED] While these tables reveal highly relevant information regarding the condition of components in Entergy's aging nuclear facilities, they reveal next to nothing about Westinghouse's analytical or manufacturing processes. Yet, Westinghouse has refused to release even these summary tables through the use of redaction. Equally surprising is Westinghouse's reluctance to disclose the documents' cover pages and sections that discuss background and purpose.

Significantly, the notes contain the results of tests Entergy was required to conduct in order to fulfill commitments under its license renewal applications. Under these circumstances, Westinghouse should not be permitted to keep confidential the information it agreed to produce for Entergy's relicensing proceeding. The CUF_{en} values have no intrinsic value for Westinghouse. It is difficult to imagine how disclosure of such information would have any impact at all on Westinghouse's competitiveness.

Indeed, even NRC staff have deemed information such as CUF_{en} values suitable for public consumption. For example, a publicly-available 2013 NRC inspection report for IP2 states that: "The inspectors noted the CUF_{en} result for the pressurized nozzle was 0.999 at 60 years." NRC License Renewal Team Inspection Report 05000247/2013010 at 7. ML13263A020. This is the same data taken from the same calculation note that Westinghouse contends has never been disclosed and is proprietary. Similarly, in *Entergy Nuclear Vermont Yankee, LLC*,

(Vermont Yankee Nuclear Power Station), LBP-08-25, 68 N.R.C. 763 (2008), the Board freely discussed Entergy's CUF_{en} analyses, comparing various CUF_{en} values presented during the relicensing proceeding. *Id.* at 818-819. It would defy reason for NRC to shelter from public scrutiny Westinghouse's CUF_{en} analyses while at the same time citing to the data contained in those analyses in its publicly-available documents. Finally, while Entergy states that "Westinghouse has never publically released a Calc Note, even in redacted form," a quick search of NRC's ADAMS database suggests otherwise.³

As demonstrated above, the five documents at issue in this motion simply do not rise to the level of being protectable trade secrets or confidential commercial information subject to non-disclosure. To the contrary, those documents address important industry and plant-specific technical issues directly pertinent to NRC's evaluation of Entergy's License Renewal Applications for IP2 and IP2. They also identify issues relevant to NRC's assessment of Entergy's compliance with its current operating licenses. Shielding such information from public view under the Protective Order's general cloak of secrecy is contrary to the NRC's regulations in favor of public disclosure of such information. 10 C.F.R. § 2.390. Westinghouse should be no more entitled to shield the results of its EAF analyses for IP2 and IP3 components than an industrial facility is entitled to withhold from public disclosure emissions or effluent data submitted to the U.S.E.P.A. (*see* 40 C.F.R. §§ 2.301 and 2.302). In fact, disclosure of a facility's otherwise confidential monthly production data has been required where such information was necessary to determine compliance with an applicable Clean Water Act standard. *See RSR Corp. v. Browner*, 924 F. Supp. 504 (S.D.N.Y. 1996) (EPA properly determined that monthly

³The State has identified on ADAMS a number of Westinghouse calculation notes in both un-redacted and redacted form. *See* Westinghouse CN-MRCDA-08-51, Rev. 1, License Amendment Request 265, Revision to the Reactor Vessel Head Drop Methodology Supplement 1, Point Beach Nuclear Plant, Units 1 and 2 (ML102030116); Westinghouse CN-RCDA-05-68, Rev. 1, Plastic Analysis of Point Beach Reactor Coolant Piping for Reactor Vessel Head Drop (ML060240364); Westinghouse Assessment of Basis for Aerosol Plugging in AP1000 Containment Leak Paths for Radiological Design Bases Accidents, APP-SSAR-GSC-642-NP (ML073030138).

production rate information designated as confidential by facility operator and submitted to the agency as part of semi-annual compliance report was “effluent data” ineligible for confidential treatment under FOIA’s exemption for trade secrets and confidential commercial/financial information). In this case, both the PWROG memo and Entergy’s EAF data bear on the issue of whether IP2 and IP3 can be safely operated during the period of extended operation, and should therefore be disclosed.

Finally, Westinghouse’s unwarranted use of the proprietary designation for its documents not only deprives the public of access to information relevant to NRC decision-making, it has also created an unnecessarily burdensome filing process for the parties to this litigation. For example, because of Westinghouse’s across-the-board designations, the State was required to file its February 13, 2015 Motions for Leave to Amend and March 17, 2015 Replies, which referenced the documents at issue here, in both public/redacted and non-public/un-redacted form.

CONCLUSION

Westinghouse and Entergy have failed to establish that the documents at issue contain trade secrets or confidential commercial/financial commercial within the scope of the Protective Order or 10 C.F.R § 2.390. The Board should therefore issue an order striking Westinghouse's proprietary designations for such documents. In the event that the Board affords Entergy or Westinghouse an opportunity to submit affidavits in support of Westinghouse's proprietary claim, the State respectfully reserves its right to file an appropriate motion or a reply.

Executed on April 9, 2015

Signed (electronically) by

Lisa S. Kwong
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10 C.F.R. § 2.323 Certification

Pursuant to 10 C.F.R. § 2.323(b) and the Board's July 1, 2010 Scheduling Order (at 8-9), I certify that I have made a sincere effort to contact counsel for Entergy in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful.

Signed (electronically) by

Lisa S. Kwong
Assistant Attorney General
State of New York

April 9, 2015

**UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

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In re: Docket Nos. 50-247-LR; 50-286-LR
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Entergy Nuclear Indian Point 3, LLC, and
Entergy Nuclear Operations, Inc. April 9, 2015
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DECLARATION OF LISA S. KWONG

Pursuant to 28 U.S.C. § 1746, Lisa S. Kwong hereby declares as follows:

1. I serve as an Assistant Attorney General for the State of New York, counsel for petitioner-intervenor State of New York in this proceeding.
2. In early 2015, in preparation for the submission of supplemental contentions, the State initiated informal discussions with Entergy about the public reference to results contained in various Westinghouse authored documents. Entergy responded that Westinghouse did not agree to the disclosure of any results that had not previously been provided to NRC Staff.
3. I submit this declaration and accompanying attachments in support of the State of New York's Motion Challenging the Proprietary Designation of Certain Pressurized Water Reactor Owners' Group and Westinghouse Documents dated April 9, 2015. The accompanying attachments are discussed in more detail in the State's Motion.
4. Attached to this declaration as Attachment 1 is a true and correct copy of the State's Notice of Objection to Continued Confidential Treatment of Certain Documents Relating to Contentions NYS-25 and NYS-38/RK-TC-5 dated March 9, 2015. Pursuant to Paragraph D of the Atomic Safety and Licensing Board's 2009 Protective Order, a copy of the Notice of Objection was sent by electronic mail to Entergy's counsel on March 9, 2015.

5. Attached to this declaration as Attachment 2 is a true and correct copy of the confidential proprietary document subject to the parties' nondisclosure agreement entitled Pressurized Water Reactor Owners Group, BTP 5-3 Industry Issue, Executive Review (October 28, 2014).

6. Attached to this declaration as Attachment 3 is a true and correct copy of the confidential proprietary document subject to the parties' nondisclosure agreement entitled Westinghouse Proprietary Report, Class 2, Indian Point Units 2 & 3 Accumulator Nozzle Environmental Fatigue Evaluation, CN-PAFM-09-77 (2010).

7. Attached to this declaration as Attachment 4 is a true and correct copy of the confidential proprietary document subject to the parties' nondisclosure agreement entitled Westinghouse Proprietary Report, Class-2, Indian Point Unit 2 and Unit 3 EAF Screening Evaluations, CN-PAFM-12-35, Rev. 1 (2012).

8. Attached to this declaration as Attachment 5 is a true and correct copy of the confidential proprietary document subject to the parties' nondisclosure agreement entitled Westinghouse Proprietary Report, Class-2, Indian Point Unit 2 (IP2) and Unit 3 (IP3), Refined EAF Analyses and EAF Screening Evaluations, CN-PAFM-13-32 (2013).

9. Attached to this declaration as Attachment 6 is a true and correct copy of the confidential proprietary document subject to the parties' nondisclosure agreement entitled Westinghouse Proprietary Report, Class-2, Indian Point Unit 2 Pressurizer Spray Nozzle Transfer Function Database Development and Environmental Fatigue Evaluations, CN-PAFM-13-40 (2013).

10. Attached to this declaration as Attachment 7 is a true and correct copy of the email correspondence between me and Entergy counsel, P. Bessette and R. Kuyler, reflecting the parties' consultations regarding this dispute pursuant to the Protective Order, Paragraph C.

11. I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 9, 2015

Signed (electronically) by

Lisa S. Kwong
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Attachments 1 to 7
to the Declaration of Assistant Attorney General Lisa Kwong,
Dated April 9, 2015

**As Designated by PWOOG and Westinghouse
Attachments 2 to 6 Contain
Confidential Proprietary Information Subject to Nondisclosure Agreement**

and

Attachments 1 and 7 Concern the Parties' Discussions about the Documents' Designations

**and Therefore these 7 Documents are Not Attached to the
Public and Redacted Version of the April 9, 2015 Kwong Declaration**

Attachments 1 to 7

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

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In re: Docket Nos. 50-247-LR and 50-286-LR

License Renewal Application Submitted by ASLBP No. 07-858-03-LR-BD01

Entergy Nuclear Indian Point 2, LLC, DPR-26, DPR-64
Entergy Nuclear Indian Point 3, LLC, and
Entergy Nuclear Operations, Inc. April 9, 2015
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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2015, copies public, redacted version of the State of New York's motion to withdraw Westinghouse and PWORG's proprietary designation of certain documents were served electronically via the public submission portal of the NRC's Electronic Information Exchange on the following recipients:

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Dated at Albany, New York
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