UNITED STATES
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In re:	Docket Nos. 50-247-LR; 50-286-LR
License Renewal Application Submitted by	ASLBP No. 07-858-03-LR-BD01
Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	June 18, 2015

STATE OF NEW YORK REPLY TO JOINT BRIEF OF ENTERGY AND WESTINGHOUSE REGARDING PROPRIETARY DOCUMENTS

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Pursuant to the Atomic Safety and Licensing Board's (Board's) July 1, 2010 Scheduling Order[1] and the Board's oral instructions given during May 14, 2015 oral arguments, the State of New York (the State) submits this Reply to the "Joint Brief of Entergy and Westinghouse Regarding Proprietary Documents" (Joint Industry Brief), filed June 4, 2015. Despite the repeated failure of Westinghouse and Entergy to comply with NRC regulations or the Board's September 4, 2009 Protective Order,[3] they have been given yet another opportunity to bolster their designation of five documents as proprietary in full. Nonetheless, they have still not shown why the documents – which are directly relevant to whether the Indian Point facility should be relicensed for an additional 20 years of operation – should be considered proprietary in their entirety and thus withheld from any public scrutiny.

BACKGROUND

This dispute concerns the State's efforts to remove the proprietary designation of five documents (collectively, the documents): (1) four calculation notes (the calculation notes) prepared by Westinghouse Electric Company LLC (Westinghouse), and (2) a memorandum entitled "BTP 5-3 Industry Issue: Executive Review" (the PWROG Memo) created by the Pressurized Water Reactor Owners Group (PWROG). In early February 2015, the State asked Entergy if the State could refer to results of cumulative usage factors adjusted for environmental effects (CUF_{en}) reported in the calculation notes, which had been disclosed as proprietary documents subject to the Board's Protective Order. *See* E-mail Chain Between New York State Assistant Attorney General (AAG) John Sipos and Attorney Paul Bessette, NRC Staff Counsel Sherwin Turk, *et al*., dated February 4 to 10, 2015 (Attachment 1 to NYS Reply). Entergy

[1] *See Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), Scheduling Order (July 1, 2010) (unpublished).

[redacted]

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

responded that it would have to consult with Westinghouse. Thereafter, on February 10, 2015, Entergy indicated that it had informed Westinghouse of the State's request, that it consulted with Westinghouse, and that Westinghouse's position was that the CUF_{en} output values were proprietary, except to the extent they had been reported in Entergy's license renewal application (LRA) or its public supplements. *Id.* at 1. Neither Westinghouse nor Entergy offered any explanation for its treatment of the bare CUF_{en} output values as proprietary information.

On March 9, 2015, following the procedure set forth in the Board's Protective Order, the State filed a Notice of Objection with Entergy, formally objecting to the proprietary designation of the documents, and requested that Entergy or its vendor specify what portions of the documents were considered proprietary, the basis for that claim, and the harm that would result from disclosure. NYS Objection, Attachment 1 to NYS Motion. During subsequent verbal consultations, counsel for Entergy suggested that Westinghouse might be more inclined to consider disclosure if the State narrowed its request to particular portions of the calculation notes. Accordingly, on March 19, 2015, the State sent an e-mail to Entergy identifying specific portions of the calculation notes that the State believed were both particularly relevant and non-proprietary. *See* March 9-30, 2015 E-mail Thread between AAG Lisa Kwong and Attorney Raphael Kuyler (E-mail Thread), Attachment 7 to NYS Motion, at 2-3. After further consultations with Westinghouse, Entergy reiterated Westinghouse's generic and unsupported position that no part of any of the documents could be publicly disclosed. *Id.* at 2.

The State, continuing along the procedural path set forth in the Protective Order for disputes over proprietary designations, filed its "Motion to Withdraw the Proprietary Designation of Various Pressurized Water Reactors Owners' Group and Westinghouse Documents" (NYS

Motion) on April 9, 2015.[4] The State fully briefed the history of the dispute, and set forth the relevant legal standards, which place the burden of establishing the proprietary status of the documents on the initial holder of the documents. NYS Motion, at 1-2; *see* Protective Order, at ¶ D.

NRC Staff filed an answer that neither supported nor opposed the NYS Motion, but set forth some legal standards. NRC Staff's Answer to State of New York Motion to Withdraw the Proprietary Designation of Various Pressurized Water Reactor Owners' Group and Westinghouse Documents (April 20, 2015; corrected April 21, 2015). Entergy opposed the motion in its "Answer Opposing New York State's Motion to Strike Proprietary Designations" (Entergy's Answer), filed on April 20, 2015. In support of its opposition, Entergy submitted two affidavits and a declaration from three Westinghouse employees. *See* Entergy's Answer, attachments 1-3. Although the affidavits and declaration were prepared in direct response to the State's Motion, they contained skeletal, *pro forma* arguments and conclusory allegations in support of the continued proprietary designation of each document in its entirety. *Id.* Notably, Entergy's counsel – supported by the affidavits and declaration from Westinghouse employees – argued that the documents should not be publicly disclosed, because disclosure would result in "substantial competitive harm" to Westinghouse. *Id.*, at 2, 8-11; attachments 1-3. The State then sought and obtained – over Entergy's objection – permission from the Board[5] to file a "Reply in Support of Motion to Withdraw Proprietary Designations" (NYS Reply), which it submitted on

[4] [redacted]
However, the Protective Order *requires* that an objection to a proprietary designation be "submitted no later than sixty (60) days before the first scheduled day of hearing." Protective Order, ¶ D.

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

May 1, 2015. The State's reply reiterated that Entergy, with the support of Westinghouse employees, had failed to meet its burden to establish that each document was proprietary in full. NYS Reply, at 5-10.

The Board, observing that "the burden is on Entergy to demonstrate that the five documents – in their entirety – are entitled to protection" and noting that Entergy has failed to offer "an explanation as to *how* disclosure of these documents—many pages of which contain summary results, void of methodology, complex formula, or inputs—would result" in competitive harm to Westinghouse, ordered oral arguments on the State's motion for the week of May 11, 2015. *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), Order (Setting Oral Argument on Proprietary Designation of Documents) (May 5, 2015) (unpublished), at 2-3. The Board asked the parties to be prepared to discuss (1) "*section by section*, the contents of the documents in dispute, and specifically how competitive injury could follow [from public disclosure], and the likelihood thereof;" and (2) "the public interest, or lack thereof, in disclosure of the information." *Id.* at 3. The Board also offered counsel for Westinghouse the opportunity to participate in the oral arguments. *Id.*

After the State submitted its Reply, and nearly three months after Entergy represents that it first consulted with Westinghouse regarding the dispute over the CUF_{en} output values, Westinghouse moved for permission to "appear specially" in order to defend the proprietary designation of the documents. Motion of Westinghouse Electric Company LLC to Appear Specially in Connection with State of New York Motion to Strike Proprietary Designations of Westinghouse and PWROG Proprietary Documents (May 5, 2015) (ML15126A341) (Westinghouse Motion). Westinghouse did not identify any NRC regulation or Board order permitting it to "specially appear" in connection with a fully-briefed motion. Westinghouse tied

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

The State opposed Westinghouse's Motion to "appear specially." State of New York Answer Opposing Motion of Westinghouse Electric Company LLC to Appear Specially in Connection with the State's Motion to Withdraw Proprietary Designations of Westinghouse and PWROG Documents (May 6, 2015) (ML15126A578). The State first argued that Westinghouse had failed to identify any authority permitting it to "appear specially" in connection with an already fully-briefed motion. *Id.* at 5-7. Relatedly, the State argued that Westinghouse's motion was untimely under 10 C.F.R. § 2.323(a)(2), because Westinghouse failed to move to appear within 10 days of the April 9, 2015 NYS Motion to remove the proprietary designation of the documents. *Id.* at 7-9. The Board scheduled oral argument on the proprietary designation of the documents for May 14, 2015 and held Westinghouse's motion "in abeyance until after the telephonic oral argument." *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), Order (Scheduling Oral Argument), at 2 (May 8, 2015) (ML15128A360).

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

[redacted]

[redacted]

[redacted]

Notably, the Joint Industry Brief was filed using the non-public EIE platform and served on a limited number of hearing participants. *See* E-mail from Hearing Docket re: limited access protected document (June 4, 2015) (Lusignan Declaration, attachment 5). However, the Joint Industry Brief did not include the markings required by 10 C.F.R. § 2.390 and the Board's Protective Order ¶¶ A and K to designate a submission as containing proprietary information. Furthermore, the Certificate of Service attached to the Joint Industry Brief indicated that it had been served via the "Electronic Information Exchange" (EIE) on "those on the EIE Service List for the captioned proceeding." After the State became aware of this discrepancy, it notified counsel for Westinghouse and Entergy of the inconsistency and requested that the brief be re-filed on the public EIE exchange. *See* E-mail from Brian Lusignan, AAG, to David Repka, Westinghouse, et al. (June 15, 2015) (Lusignan Declaration, attachment 6). Thereafter, Westinghouse informed the Board that it had intended the Joint Industry Brief to be non-public, and refiled a version of the Joint Industry Brief that included a cover page and headers indicating that the brief contained proprietary information. *See* Letter from David Repka to ASLB (June

17, 2015). To date, Westinghouse and Entergy have not filed a redacted public version of the brief.

LEGAL STANDARDS

NRC regulations establish a presumption that documents submitted to the agency should be made available for public inspection and copying. 10 C.F.R. § 2.390(a). Under these regulations, "disclosure of information in NRC files shall be the rule, and nondisclosure the exception." *Westinghouse Electric Corp. v. United States Nuclear Regulatory Commn.*, 555 F.2d 82, 87 (3d Cir. 1977). One such exception permits nondisclosure of "[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential." *Id.*, § 2.390(a)(4). The regulations set forth "procedures" that "must be followed by anyone submitting a document to the NRC who seeks to have the document, or a portion of it, withheld from public disclosure because it contains trade secrets, privileged, or confidential commercial or financial information." *Id.* § 2.390(b). Among other things, the submitter must mark the documents as containing confidential information. *Id.*, § 2.390(b)(1)(i). The Commission makes the ultimate determination on "whether information sought to be withheld from public disclosure . . . (i) Is a trade secret or confidential or privileged commercial or financial information; and (ii) If so, should be withheld from public disclosure." *Id.* § 2.390(b)(3). In making this determination, the Commission considers the following factors:

> (i) Whether the information has been held in confidence by its owner; (ii) Whether the information is of a type customarily held in confidence by its owner and, except for voluntarily submitted information, whether there is a rational basis therefor; (iii) Whether the information was transmitted to and received by the Commission in confidence; (iv) Whether the information is available in public sources; (v) Whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the

> amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. § 2.390(b)(4). Even if a document contains confidential commercial information, the Commission must "determine whether the right of the public to be fully apprised as to the bases for and effects of the proposed action outweighs the demonstrated concern for protection of a competitive position, and whether the information should be withheld from public disclosure under this paragraph." *Id.*, § 2.390(b)(5).

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

FOIA Exemption 4, like 10 C.F.R. § 2.390(a)(4), exempts from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential[.]" "Commercial" is not defined in 10 C.F.R. Part 2 or in FOIA. However, "not every bit of information submitted to the government by a commercial entity" is considered commercial or financial information; rather, "the terms 'commercial' and 'financial' in the

exemption should be given their ordinary meanings." *Public Citizen Health Research Group v. Food and Drug Administration*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). Accordingly, information is "commercial" under Exemption 4 "if, 'in and of itself,' it serves a 'commercial function' or is of a 'commercial nature.'" *National Assoc. of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002), quoting *Am. Airlines, Inc. v. Nat'l Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978). Information may also be considered commercial "when the provider of the information has a commercial interest in the information submitted to the agency." *Baker & Hostetler, LLP v. United States Dept. of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006).

Commercial or financial information is only considered confidential "if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks and Conservation Assoc. v Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted). The D.C. Circuit has also held that in certain situations where a private entity has voluntarily submitted allegedly exempt information to a government situations, such information will be considered "'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc), *cert denied* 507 U.S. 984 (1993). Notably, however, the *Critical Mass* test for "voluntary" submissions has not been adopted by the Supreme Court or the majority of Circuit Courts. *See Dow Jones Co. v. Federal Energy Regulatory Commn.*, 219 F.R.D. 167, 177-178 (C.D. Ca. 2002) ("Although defendant urges this Court to adopt *Critical Mass*, the Court believes that the holding therein is not consistent with Ninth Circuit jurisprudence, nor with the

purposes of Congress in enacting FOIA, which mandates the courts to favor disclosure to serve the public interest. The Court also notes that the test set forth in *Critical Mass* has not been adopted by any Circuit other than the District of Columbia Circuit and has been the subject of criticism by some courts."); *see, e.g., New Hampshire Right to Life v. United States Dept. of Health and Human Servs.*, 778 F.3d 43, 52 n 8 (1st Cir. 2015), *cert. filed* April 21, 2015 (declining to adopt *Critical Mass* test); *American Management Servs. v. Department of the Army*, 703 F.3d 724, 731 (4th Cir. 2013) (same); *Inner City Press/Community on the Move v. Board of Governors of the Fed. Reserve System*, 2006 U.S. App. LEXIS 28730, at 13 (2d Cir. 2006) (same); *Frazee v. United States Forest Serv.*, 97 F.3d 367, 371-372 (9th Cir. 1996) (same).

[redacted] The Trade Secrets Act provides for criminal punishment of government employees who disclose confidential business information. 18 U.S.C. § 1905. The Trade Secrets Act has been interpreted to be co-extensive with FOIA Exemption 4. *See McDonnell Douglas Corp. v. United States Dept. of the Air Force*, 375 F.3d 1182, 1185-1186 (D.C. Cir. 2004). However, information is not shielded by the Trade Secrets Act "merely because the information was labeled 'confidential' by the submitter." *Venetian Casino Resort, LLC v. Equal Employment Opportunity Commission*, 530 F.3d 925, 932 (D.C. Cir. 2008). Rather, "[i]nformation is protected by the [Trade Secrets Act] only if its disclosure would 'cause substantial harm to the competitive position of the person from whom the information was obtained.'" *Id.*, quoting *National Parks*, 498 F.2d at 770.

In this proceeding, requests for nondisclosure of allegedly proprietary information are governed by the Board's September 4, 2009 Protective Order. The Protective Order imposes certain obligations on the "Initial Holders" of any allegedly proprietary information. Protective

Order, at 2-3. The "Initial Holder" is any "Participant in this proceeding" who wishes to designate documents in its possession as "proprietary." *Id.* at 2. Among other things, "if the Initial Holder of proprietary information or its counsel has a good faith belief that a document or portion thereof contains information that qualifies as a trade secret and/or commercial or financial information that is privileged or confidential under 10 C.F.R. §§ 2.390(a)(4) and (b)(4)(i)-(v), the Initial Holder or its counsel may designate such document on its proprietary log as a 'proprietary document,' and it shall be protected in accordance with the terms and conditions of this Protective Order." Protective Order, ¶ A. The Initial Holder also must prominently mark the allegedly proprietary document to indicate that it has been designated as including proprietary information. *Id.* The Protective Order further authorizes a party that has received a document designated as containing proprietary information to challenge that designation and seek the removal of that designation. *Id.*, at ¶ D. The Protective Order sets forth a procedure by which a party seeking public disclosure of an allegedly proprietary document must first consult with the Initial Holder, then file a motion for with the Board. *Id.* In this situation,

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

Id. In short, the Protective Order clearly contemplates that a party which has received allegedly proprietary information in the course of monthly disclosures may seek a Board order for public disclosure of that information.[6]

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

ARGUMENT

I. Westinghouse Is Not a Proper Participant in This Proceeding

As an initial matter, the State renews its objection to Westinghouse's participation in this proceeding. An agency must comply with its own regulations, even if the results are undesired or inconvenient. *See Service v. Dulles*, 354 U.S. 363, 388 (1957); *Environmental LLC v. Federal Communications Commn.*, 661 F.3d 80, 85 (D.C. Cir. 2011); *Panhandle Eastern Pipe Line Co. v. Federal Energy Regulatory Commn.*, 613 F.2d 1120, 1135 (D.C. Cir. 1979). Under 10 C.F.R. § 2.323 (a) (2), "*All motions* must be made no later than ten (10) days after the occurrence or circumstances from which the motion arises" (emphasis added). [redacted] Nonetheless, Westinghouse did not move to specially appear until May 5, 2015. *See* Westinghouse Motion to Appear Specially, at 1. Accordingly, the motion was untimely.

[redacted][7]

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

[redacted] The State observes that, throughout this proceeding, it has been "representing" the interests of millions of its citizens and governmental subdivisions directly affected by the proposed relicensing of Indian Point. If the industry is permitted to circumvent regulatory deadlines based on Westinghouse's "represented interest" theory, so too should the State and nonprofit participants in NRC proceedings.

II. Westinghouse and Entergy Must Show That Substantial Competitive Harm Would Result from Public Disclosure of the Documents

[redacted] In its initial opposition to the NYS Motion, Entergy's counsel – supported by the affidavits and declaration from Westinghouse employees – argued the *National Parks* test should apply, including the requirement to show that public disclosure of the documents would result in "substantial competitive harm" to Westinghouse. Entergy Answer, at 2, 5, 8-11; attachments 1-3. Entergy was clearly aware of the *Critical Mass* decision, as it cited that case in a footnote, but said nothing to indicate that the relaxed test described therein should apply. *Id.* at 5 n. 21. Thereafter, in opposing the State's motion to file a reply, Entergy criticized the State for failing to anticipate allegations of substantial competitive harm, noting that "[t]he likelihood of

competitive harm associated with public disclosure of the information in question *is a principal consideration* in determining whether that information constitutes a trade secret or confidential commercial information that should be withheld from public disclosure." Entergy Answer Opposing NYS Motion for Leave to File a Reply, at 5 (April 23, 2015) (emphasis added); *see also id.* (stating that "New York could not have been surprised when the PWROG and Westinghouse responded by supplying affidavits that explain the bases for their positions that disclosure of the Documents would substantially harm their competitive position."). [redacted] Moreover, [redacted] the Board's Order setting oral arguments [redacted] make clear its expectation that the industry would be required to show a likelihood of substantial competitive injury. *See Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), Order (Setting Oral Argument on Proprietary Designation of Documents) (May 5, 2015) (unpublished) (ordering industry to be prepared to discuss "*section by section*, the contents of the documents in dispute, and specifically how competitive injury could follow [from public disclosure], and the likelihood thereof"); [redacted] Considering that this dispute has been fully briefed and argued from the beginning under the assumption that industry would be required to show a likelihood of substantial competitive harm, the new argument raised for the first time in the Joint Industry Brief should be rejected.

Additionally, as described above, the *Critical Mass* decision represents the D.C. Circuit's interpretation of FOIA Exemption 4, and has not been adopted by the Supreme Court or majority

of other circuits. Moreover, notwithstanding the 1993 holding in *Critical Mass*, the NRC's regulations still require the Commission to consider "[w]hether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information . . . ." 10 C.F.R. § 2.390(b)(4). In light of this specific regulatory requirement, the general language regarding FOIA Exemption 4 set forth by the D.C. Circuit in *Critical Mass* should not apply in this proceeding. *See* 10 C.F.R. § 2.335 (a) (barring challenges to the rules or regulations of the Commission in an adjudicatory proceeding, unless a specific waiver has first been sought).

Finally, the policy justifications underlying the *Critical Mass* decision do not apply here. The Court in *Critical Mass* recognized that private entities who voluntarily submit confidential commercial information to the government should have some assurance that the information will not be disclosed to competitors, lest they refuse to voluntarily submit similar information in the future. *See Critical Mass*, 975 F.2d at 878. The Court observed that this concern does not apply where disclosure of information is compelled, because the private party has no choice in whether or not to submit the information. *Id.* Here, neither Westinghouse nor Entergy "voluntarily" submitted the documents to the NRC. Rather, Entergy obtained the documents from Westinghouse and disclosed them to the State pursuant to its mandatory disclosure obligations. Entergy also disclosed calculation notes to NRC Staff during a 2013 inspection of IP2, conducted as part of the Staff's regulatory functions. *See* License Renewal Team Inspection Report 05000247/2013010 (Sept. 19, 2013) (ML13263A0202013) (Lusignan Declaration, attachment 3). Thus, there should be no concern that public disclosure of the documents would chill the industry's desire to submit similar information in the future.

III. Westinghouse and Entergy Have Not Established That the Calculation Notes Are Proprietary in Their Entirety

A. Westinghouse and Entergy have Not Established That Public Disclosure of Calculation Notes Is Likely To Cause Substantial Competitive Injury

Westinghouse and Entergy claim that the Calculation Notes contain confidential commercial information exempt from disclosure under the Commission's regulations. 10 C.F.R. § 2.390(b)(4).[8] According to Westinghouse and Entergy, the notes reveal Westinghouse's methodology for performing environmentally-assisted fatigue screening and refined fatigue analyses. However, there is little that is "secret" about Westinghouse's methodology for screening EAF and calculating cumulative usage factors. [redacted] Westinghouse and Entergy cannot now claim that public disclosure of documents reflecting the application of this methodology will cause it substantial competitive harm.

[redacted] a paper entitled "License Renewal Environmental Fatigue Screening Application," PVP2014-29093, which was presented at the 2014 American Society of Mechanical Engineers (ASME) Pressure Vessels and Piping Conference in Anaheim, California (Lusignan Declaration, attachment 1). In that paper, Mr. Gray and his co-author, Christopher Kupper, publicly describe Westinghouse's methodology for performing environmentally-assisted fatigue screening analyses in support of license renewal applications. A section of the paper entitled "Method Overview" provides a summary of the process elements

[8] [redacted]

of the overall screening method. ASME Paper, at 2. Each of these process elements is explored in greater depth in subsequent sections entitled "Data Collection," "Transient Sections," "Screening Fen Application," "Stress Basis Comparison," "Leading Location Identification," "Application of Methodology," and "Phase 2 EAF Screening." *Id.*, at 3-7.

[redacted] in his publicly available ASME paper, Mr. Gray has presented a veritable "roadmap" for performing an EAF screening evaluation such as that performed for Indian Point. The ASME paper does not specifically identify the plant to which Westinghouse's EAF screening methodology was applied for illustration purposes; however, the State notes a number of striking similarities between circumstances described in the ASME paper [redacted] (*compare* ASME Paper at 5, Figure 1, "Safety Injection/Accumulator-Transient Sections" [redacted]

In the ASME paper, Mr. Gray provides even further insight into Westinghouse's methodology when he states that it is similar to the methodology set forth in EPRI Report 1024995 ("EAF Screening: Process and Technical Basis for Identifying EAF Limiting Locations" [August 2012] [Lusignan Declaration, attachment 2]) and that "the only fundamental difference" between the proposed EPRI method and the method described in Gray's 2014 paper is in the comparison of component fatigue usage on a common basis with respect to the stress analysis methods. ASME Paper, at 2. According to the ASME paper, Westinghouse's approach utilizes a large database of component fatigue evaluations and related experience to establish the

analysis method basis of comparison. *Id.* Because the EPRI Report is a publicly available document, it would take little effort for a competitor to identify the basic elements of Westinghouse's EAF screening strategy and technique.

Simply put, publicly disclosed commercial information is not entitled to confidential treatment. Here, Westinghouse published its methodology for performing EAF screening. It presumably did so to publicize its fatigue evaluation services and to generate additional business opportunities in this area. Now that Westinghouse has applied that methodology to produce fatigue analyses in support of Entergy's relicensing application, Westinghouse should not be permitted to claim confidential treatment for that information.

[redacted] Westinghouse's position would essentially invest the industry with complete discretion to designate what documents are confidential commercial information. [redacted] 10 C.F.R. § 2.390 and FOIA Exemption 4 do not require a party seeking disclosure of documents to retain an expert witness, especially when the documents contain information that is clearly not confidential. *See, e.g.*, *Boeing Co. v U.S. Dept. of the Air Force*, 616 F. Supp. 2d 40, 45 (D.D.C. 2009) (noting that,

[redacted]

under FOIA Exemption 4, "[c]ourts may not impose a *per se* rule" regarding disclosure and that "the set of facts in each case must be evaluated independently to determine whether the particular information at issue could cause substantial competitive harm if it were released.").

B. The Public's Right to Know the Basis for NRC Decisionmaking Outweighs Any Potential Competitive Harm to Westinghouse

Even assuming the calculation notes contain confidential commercial or financial information – which the State disputes – the "right of the public to be fully apprised as to the bases for and effects of the proposed action outweighs the demonstrated concern for protection of a competitive position." 10 C.F.R. 2.390(b)(5).[10] In this proceeding Entergy is relying on Westinghouse's fatigue analyses of various components to support Entergy's license renewal applications for IP2 and IP3.[11] [redacted] Entergy, in turn, "made the Calculation Notes available for NRC Staff inspection or review." *See, e.g.*, NRC Staff's License Renewal Team Inspection Report 05000247/2013010 (Lusignan Declaration, attachment 3); [redacted]

The CUF_{en} values are particularly relevant to this proceeding, since "crack initiation is assumed to have started in a structural component when the fatigue usage factor at the point of the component reaches the value of 1, the design limit on fatigue." Generic Aging Lessons Learned (GALL) Report, NUREG-1801, Rev. 2 (2010), X.M1-1. Under Entergy's Fatigue

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[10] [redacted] However, this argument constitutes an impermissible attack on the NRC's regulations and therefore violates 10 C.F.R. § 2.335(a).

[11] [redacted] the State argued in its initial motion that the calculation notes "address important industry and plant-specific technical issues directly pertinent to NRC's evaluation of Entergy's [LRA] for IP2 and IP3" and "identify issues relevant to NRC's assessment of Entergy's compliance with its current operating licenses." NYS Motion, at 13. The State reiterated in its reply that the calculation notes offered important insights into Entergy's compliance with its LRA commitments related to CUF_{en} evaluations. NYS Reply, at 9.

Monitoring Program, components with CUF_{en} values of more than 1.0 require corrective action. *See* LRA Commitment 49, Attachment 1 to Letter from Fred Dacimo to USNRC Document Control Desk, NL-13-052 (May 7, 2013), at 9 (ML13142A202); LRA Commitment 33, Attachment 2 to NL-13-052, at 15. Commitment 43 provides that "Indian Point Energy Center will review design basis ASME Code, Class 1 fatigue evaluations to determine whether the NUREG/CR-6260 locations that have been evaluated for the effects of the reactor coolant environment on fatigue usage are the limiting locations for the Unit 2 and Unit 3 configurations. If more limiting locations are identified, the most limiting location will be evaluated for the effects of the reactor coolant environment on fatigue usage. Indian Point Energy Center will use the NUREG/CR-6909 methodology in the evaluation of the limiting locations consisting of nickel alloy, if any." In short, the Calculation Notes were created by Westinghouse to meet Entergy's LRA Commitments 43 and 49 to the federal regulator to locate limiting external and internal locations and to ensure that the CUF_{en} values at those locations do not exceed 1.0.

[redacted] However, NRC records clearly reflect that NRC Staff has reviewed and relied upon the calculation notes. NRC Staff, while claiming that it never had the Calculation Notes "in its possession," NRC Staff Answer, at 5, has nonetheless certified that Commitments 43 and 49 have been "completed" for IP2. Safety Evaluation Report Related to the License Renewal of Indian Point Nuclear Generating Unit Nos. 2 and 3, Supplement 2, NUREG-1930, at A-14 to A-15 (November 2014) (ML14310A803). Indeed, NRC's September

19, 2013 License Renewal Team Inspection Report establishes that NRC Staff considered at least some of the calculation notes, and that the information contained in those notes became the basis for Staff's determination that Entergy had fulfilled Commitment 43, Entergy's commitment to identify more limiting locations and to perform EAF analyses for such locations. Lusignan Declaration, attachment 3. With respect to Commitment 43, NRC Staff noted in its public September 19, 2013 License Renewal Inspection Team Report:

> During this inspection the inspectors reviewed calculation CN-PAFM-13-32, Revision 0 "Indian Point Unit 2 (IP2) and Unit 3 (IP3) Refined EAF Analyses and EAF Screening Evaluations." This calculation was the evaluation of locations previously screened by calculation CN-PAFM-12-35, Revision 1, "Indian Point Unit 2 and Unit 3 EAF Screening Evaluations," that could be more limiting than the locations identified in NUREG CR-6260, "Application of NUREG CR-5999 interim Fatigue Curves to Selected Nuclear Power Plants Components." The inspectors noted the CUF_{en} result for the pressurizer nozzle was 0.999 at 60 years. Entergy was aware that accumulation of cycles at a rate greater than assumed in the calculation would require a more refined analysis, application of a non-destructive monitoring technique, or replacement of the pressurizer nozzle.

Id. at 7 (publicly available).[12] NRC Staff identified "no findings" and concluded that Commitment 43 had been "appropriately implemented". *Id.*, at 1. Thus, it is clear that Entergy offered, and NRC staff accepted, Westinghouse's calculation notes CN-PAFM-13-32 and CN-PAFM-12-35 in satisfaction of Entergy's commitment to identify the most limiting locations for EAF analyses, and to demonstrate that its time-limited aging analyses for those locations remained valid through the period of extended operations. [redacted]

[redacted]

[redacted] NRC Staff's determination regarding Commitment 43 therefore includes consideration of [redacted]

The public's right to know the factual basis for NRC Staff's determination that Entergy had fulfilled its obligations under Commitments 43 and 49 does not depend on whether the three calculations notes (CN-PAFM-12-35, 13-32 and 13-40) were formally mailed by Entergy to NRC's offices or shown to, and shared with, NRC Staff at Entergy offices. The determining factor is whether NRC Staff considered information based on the calculation notes. In this case, NRC Staff plainly considered the calculation notes in their license renewal inspection. The public is therefore entitled to know the substance of what was considered.

Notably, during NRC Staff's license renewal inspection, neither Entergy nor NRC viewed the calculation notes as containing proprietary information. NRC staff made direct references to two calculation notes in the report yet concluded that that "no proprietary information was documented in this report." 2013 NRC Staff Inspection Report, at 8. Entergy staff were presented with the inspection results, which presumably included references to the calculation notes, but they did not raise any issue regarding the notes' alleged proprietary nature. There is no basis for Entergy or Westinghouse to raise that concern now. Westinghouse and Entergy should not be permitted to affirmatively use the Calculation Notes to support license renewal while at the same time shielding from public scrutiny the information contained in those documents.

The refusal to release CUF_{en} results also runs against prior practice in this proceeding. Entergy included CUF_{en} results for a variety of components in Tables 4.3-13 and 4.3-14 of its initial LRA. Thereafter, Entergy hired Westinghouse to recalculate those CUF_{en} values and publically submitted tables including those recalculated values to the ASLB. *See* Letter from

Kathryn Sutton and Paul Bessette, Counsel for Entergy, to ASLB, NL-10-082, Attachment 1 (Aug. 9, 2010) (Exh. NYS000352) (ML102360321). Westinghouse and Entergy suddenly changed course when the State asked to use the CUF_{en} values in the more recent calculation notes, notwithstanding their direct relevance to the LRA commitments.[13] Refusing to publically release the CUF_{en} values while claiming that they do not exceed 1.0 is akin to a police officer refusing to release the results of a breathalyzer test or speed gun, but assuring a judge or jury that the results exceeded the legal limit. Even accepting Entergy's representations that no CUF_{en} values exceeds 1.0, the public has an interest in knowing how close the values are to 1.0, and how many times the results had to be re-calculated before they came out to less than 1.0.[14]

IV. Westinghouse and Entergy Have Not Established That the PWROG Memo is Proprietary in Its Entirety

A. The PWROG Memo Is Not Commercial Information

As an initial matter, the PWROG Memo does not contain commercial information subject to protection under 10 C.F.R. § 2.390(a)(4). The various statements made in the PWROG Memo are not "commercial" in any plain meaning of that word. *See National Assoc. of Home Builders*, 309 F.3d at 38. [redacted]

[13] Disclosure of fatigue analyses performed for Indian Point is a part of license renewal. *See Racal-Milgo Gov't Systems, Inc. v. Small Business Admin.*, 559 F. Supp. 4 (D.D.C) (1981) (Contract pricing required to be disclosed since disclosure of prices charged the government is "a cost of doing business with the Government").

[redacted]

[redacted] *See Public Citizen v. U.S. Dept. of Health and Human Servs.*, 975 F. Supp. 2d 81, 100 (D.D.C. 2013) (characterizing as "plainly incorrect" the claim that "a company has a 'commercial interest in all records that relate to every aspect of the company's trade or business.'").

B. Westinghouse and Entergy Have Not Established That Disclosure of the PWROG Memo Is Likely to Result in Substantial Competitive Injury

Westinghouse and Entergy have also failed to establish that disclosure of any section of the PWROG Memo is likely to result in competitive harm to Westinghouse.[15] [redacted] Accordingly, there is simply no basis for the continued withholding of the remainder of those two pages from public disclosure.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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17 [redacted] Indeed, at a February 19, 2015 public hearing attended by counsel for the State, NRC Staff refused to answer questions regarding the identity of the plant expected to exceed pressure thermal shock (PTS) screening criteria as a result of the BTP 5-3 non-conservatism. *See* Lusignan Declaration, ¶¶ 5-6. NRC Staff was willing to concede that the plant was not located in the State of Michigan. *Id.*, at ¶6.

[redacted] *see* Letter from Pedro Salas, Regulatory Affairs Director, to U.S. Nuclear Regulatory Commission, "Potential Non-Conservatism in NRC Branch Technical Position 5-3" (Jan. 30, 2015) (ML14038A265); Troyer, et al., An Assessment of Branch Technical Position 5-3 to Determine Unirradiated RT_{NDT} for SA-508 CL. 2 Forgings, Presented at the Proceedings of the ASME 2014 Pressure Vessels and Piping Conference (July 20-24, 2014) (copyrighted) (available at http://proceedings.asmedigitalcollection.asme.org/ proceeding.aspx?articleid=1937910).[18] [redacted] while a slideshow – developed and submitted by PWROG – describing the results of the material flaw orientation analyses is available online and was presented at a public meeting. *See* PWROG, Slides, Material Orientation Toughness Assessment (MOTA) for the Purpose of Mitigating Branch Technical Position (BTP) 5-3 Uncertainties (Feb. 19, 2015) (ML15061A095). [redacted]

[18] Both documents were also submitted to the Board in this proceeding, as attachments 1 and 2 to the Declaration of AAG Lisa Kwong in support of the State's Motion to Supplement Contention NYS-25, on February 13, 2015.

[redacted] As the State has previously argued, there is no "deliberative process" privilege for industry documents. NYS Reply, at 6; *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51 (1975) (deliberative process privilege applies only to governmental decisionmaking). Rather, 10 C.F.R. § 2.390(b)(3) exempts "trade secrets or confidential or privileged commercial or financial information" from disclosure and embodies FOIA exemption 4, *see Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-05-08, 61 N.R.C. 129, 163 (March 16, 2005), while the deliberative process privilege falls under FOIA exemption 5, *see, e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 150. Accordingly, the fact that [redacted] is irrelevant to whether it is entitled to nondisclosure.

[redacted] In *Munger, Tolles & Olson v. Dept. of the Army*, the Court upheld the withholding of specific information made by the Department of Army of records relating to a joint venture between two private companies to develop and manage certain family housing complexes for the Army. 2014 U.S. Dist. LEXIS 158097 (C.D. Ca., Nov. 6, 2014). The agency had redacted or otherwise withheld particularly sensitive information such as "technical drawings, scheduling plans, and financial information[.]" *Id.*, at 15. The Court observed that most of the redacted information was properly withheld because it "consist[ed] of information showing how [the private contractor] organizes and phases the construction of new housing, how it reacts to unanticipated market conditions, how it approaches financing, and how it breaks down costs and spending to get the

job done." *Id.*, at 21-22. However, the Court specifically ordered the release of some of the redacted information, noting that "[s]ome sentences describing overall shifts in costs and income streams, general market conditions, or changes in government policies, for example, are not confidential commercial information and will be released." *Id.*, at 23. In short, *Munger, Tolles & Olson* highlights the importance of redaction of documents that contain both proprietary and non-proprietary information, and the necessity of a "sentence-by-sentence" approach to ascertaining competitive harm. [redacted]

In *Public Citizen v. U.S. Department of Health and Human Services*, the District Court for the District of Columbia considered a FOIA request for annual reports submitted by two pharmaceutical companies in connection with a settlement agreement with a government agency. 2014 U.S. Dist. LEXIS 123925 (D.D.C. Sept. 5, 2014). Among other records, the Court considered the plaintiff's requested disclosure of certain "Reportable Event and Disclosure Log summaries," which included information regarding what the companies "have determined is a legally and, presumably, profitable, compliant manner of operating and what these companies have determined is illegal, particularly where the line between lawfulness and unlawfulness is not clearly drawn." *Id.*, at *29-30 (internal quotation marks omitted). The Court held that the documents were properly withheld, reasoning that "they are, in a sense, a free roadmap as to what works in pharmaceutical marketing without violating the legal framework of regulatory enforcement and laws that govern the industry, and what activities to avoid, and release of this roadmap would allow competitors to avoid incurring the experiential or monitoring costs [the

companies] did in gaining the information." *Id.*, at *29-30. Unlike the Reportable Event and Disclosure Log summaries at issue in *Public Citizen*, the PWROG Memo does not set forth a "roadmap" for competitors to follow. [redacted]

CONCLUSION

Fatigue Calculation Notes. Entergy has applied NRC to authorize the operation of two reactors at Indian Point for an additional 20 years beyond the 40-year term authorized in the facilities' initial operation licenses. Those two reactors were designed and constructed by Westinghouse in the 1960s and 1970s. The application involves, among other things, an evaluation of the metal fatigue of various reactor components (or CUF_{en} values). Entergy's initial application publicly reported fatigue values that exceeded the 1.0 fatigue metric used by NRC. Entergy then hired Westinghouse to conduct refined analyses of the reactors' primary side components. In 2010, Entergy publicly informed the Board and the parties of refined metal fatigue results that were close to the 1.0 metric. Entergy subsequently committed to NRC that it would conduct fatigue examinations of other limiting locations, and Entergy again hired Westinghouse to conduct the fatigue analyses. During an official NRC inspection related to the applications to renew the Indian Point operating licenses, Entergy shared various fatigue analyses, limiting locations, and results with NRC Staff. Moreover, Westinghouse has publicly discussed the methodology it developed and uses to conduct fatigue analyses, and it has stated that its methodology follows a methodology set out in a publicly available document.

Nonetheless, Westinghouse and Entergy refuse to publicly disclose the limiting location or the CUF_{en} fatigue results from the recent analyses.

Despite the fact that fatigue analyses were shared with the federal regulator and that Westinghouse disclosed and promoted details of its methodology at a public meeting, Westinghouse now asks the Board to adopt the absolutist position that none of the information in four calculation notes may publicly disclosed or discussed in this proceeding – including (1) the identity of the limiting locations examined at the Indian Point Unit 2 and Indian Point Unit 3 reactors, (2) the CUF_{en} screening values for those limiting locations, (3) the refined CUF_{en} values for those limiting locations. Westinghouse and Entergy should not have it both ways. Having shared fatigue analyses with the federal regulator as part of this proceeding, and having publicly promoted its methodology, Westinghouse and Entergy should not be permitted by the Board to continue to prevent the public disclosure of the calculation notes and fatigue analyses results.

BTP-5-3 Memorandum. Last year, NRC Staff were informed that one of the tests, known as BTP-5-3, used by Staff to determine component integrity was not conservative or protective. Since then, the owners of pressurized water reactors, trade associations, and the federal regulator have been attempting to chart a path forward. PWROG, a Westinghouse-controlled trade organization prepared a short memorandum [redacted] Because the memo does not contain any trade secret or process or contain confidential information the Board should release the memo in its entirety.

* * *

In 1957, the Atomic Energy Act was amended to provide for, among other things, an insurance program and public adjudicatory hearings on licensing applications and decisions.

One of the sponsors of the legislation, Senator Anderson, stated his position that the federal regulator should conduct its licensing actions "out of doors" in a transparent manner. 1957 Congressional Record 4093-94 (Mar. 21, 1957). That public policy of transparency remains applicable to the current licensing proceeding.

For the reasons set forth above, Westinghouse and Entergy have failed to establish that the documents are proprietary in their entirety. Accordingly, the Board should strike the proprietary designation of the documents.

Respectfully submitted,

Signed (electronically) by

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