September 8, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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| In the Matter of: | ) | |
| | ) | |
| ENTERGY NUCLEAR OPERATIONS, INC. | ) | Docket Nos. 50-247-LR and 50-286-LR |
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| | ) | |
| (Indian Point Nuclear Generating Units 2 and 3) | ) | |
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*AMICUS CURIAE* BRIEF OF WESTINGHOUSE ELECTRIC COMPANY OPPOSING NEW YORK PETITION FOR INTERLOCUTORY REVIEW


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## I. INTRODUCTION

Westinghouse Electric Company LLC ("Westinghouse"), as *amicus curiae*, herein answers and opposes the petition for interlocutory review filed by the State of New York ("State") on August 14, 2015.[1] The State's Petition seeks review and reversal of the Atomic Safety and Licensing Board Order of July 20, 2015,[2] denying the State's motion to withdraw Westinghouse's proprietary designation for five documents. The Licensing Board determined that there would be no benefit to the proceeding or the public from release of one of documents, and that the other four documents summarizing calculations prepared by Westinghouse are confidential commercial information entitled to protection under 10 C.F.R. § 2.390(b)(4). The Petition does not meet the standards for interlocutory Commission review under 10 C.F.R.

[1] "State of New York Petition Pursuant to 10 C.F.R. § 2.341 for Commission Interlocutory Review of the July 20, 2015 Atomic Safety and Licensing Board Order Denying New York's Motion to Withdraw Proprietary Designations," dated August 14, 2015 ("Petition").

[2] "Order (Denying New York Motion to Withdraw Proprietary Designation)," dated July 20, 2015 ("Order").

§ 2.341(f)(2) and does not raise a substantial question that merits Commission review in accordance with 10 C.F.R. § 2.341(b)(4).

## II. STATEMENT OF THE CASE

In a Motion dated April 9, 2015, the State requested that the Licensing Board overturn Westinghouse's proprietary designation for five documents.[3] The documents at issue are: four notes of proprietary calculations completed by Westinghouse for Entergy Nuclear Operations, Inc. ("Entergy") in connection with Indian Point license renewal;[4] and one internal memorandum prepared by the Pressurized Water Reactor Owners Group ("PWROG") addressing technical and regulatory issues related to the resolution of an NRC Staff Branch Technical Position ("BTP").[5] The Calculation Notes and the PWROG Memo were disclosed by Entergy to the State through the mandatory disclosure process in this proceeding, as potentially relevant to admitted contentions. Given the proprietary designation made by Westinghouse, Entergy disclosed the documents subject to the terms of a Protective Order.[6] While the State has been free to use the documents in the proceeding under the Protective Order, it sought the ability to publicly disclose the documents (or the content of the documents) as well.

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3 "State of New York Motion to Withdraw the Proprietary Designation of Various Pressurized Water Reactor Owners' Group and Westinghouse Documents," dated April 9, 2015 ("Motion").

4 Westinghouse, CN-PAFM-09-77, Indian Point Units 2 & 3 Accumulator Nozzle Environmental Fatigue Evaluation (2010); Westinghouse PAFM-12-35, Indian Point Unit 2 and Unit 3 EAF Screening Evaluations (2012); Westinghouse, CN-PAFM-13-32, Indian Point Unit 2 (IP2) and Unit 3 (IP3) Refined EAF Analyses and EAF Screening Evaluations (2013); CN-PAFM-13-40, Indian Point Unit 2 Pressurizer Spray Nozzle Transfer Function Database Development and Environmental Fatigue Evaluations (2013) (collectively, "Calculation Notes").

5 PWROG, BTP 5-3 Industry Issue; Executive Review (Oct. 28, 2014) ("PWROG Memo").

6 Licensing Board Protective Order (Sept. 4, 2009) (unpublished) ("Protective Order").

Entergy responded to the Motion on April 20, 2015, opposing the State's request.[7] Entergy's Answer included two affidavits and one declaration on behalf of Westinghouse and the PWROG explaining the proprietary designations and asserting the substantial competitive harm that would likely be caused to Westinghouse and the PWROG by public disclosure of the documents.

On April 22, 2015, the State filed a motion for leave to reply to the Entergy Answer. The Licensing Board granted that motion and the State filed its reply on May 1, 2015. In parallel to the motion and the reply, Westinghouse began to prepare a motion to make a special appearance in the proceeding to protect its interest in its confidential commercial information. Westinghouse filed the Motion to Appear on May 5, 2015.[8] As is clear on the face of the Motion to Appear, Westinghouse did not seek to intervene as a party in this proceeding, nor did it seek any role other than to appear specially to respond to the State's Motion.[9]

On that same date, May 5, without reference to Westinghouse's Motion to Appear, the Licensing Board issued an Order setting an oral argument on the State's Motion. Given that the harm asserted in connection with the release of the documents "would fundamentally impact Westinghouse," the Licensing Board stated that it would allow counsel for Westinghouse to participate in the oral argument of May 14, 2015.[10] Counsel for Westinghouse

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7 "Entergy's Answer Opposing New York State's Motion to Strike Proprietary designations," dated April 20, 2015 ("Entergy's Answer").

8 "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," dated May 5, 2015 ) ("Motion to Appear").

9 *Id.* at 4 (unnumbered).

10 Order (Setting Oral Argument on Proprietary Designation of Documents), dated May 5, 2015, at 3.

appeared and participated in the argument. At the conclusion of the argument, responding to Westinghouse's request to submit a brief, the Licensing Board allowed Entergy and Westinghouse to file a joint brief on the issue of Westinghouse's proprietary designations.[11]

Entergy and Westinghouse submitted the Joint Brief on June 4, 2015, providing additional explanation of the bases for the proprietary designations for the documents (including two additional declarations from Westinghouse personnel and a letter from the Chairman of the PWROG) and addressing the legal standards for public release of proprietary documents.[12] The parties were allowed an opportunity to respond to the Joint Brief, and the State did file a reply on June 18, 2015. Westinghouse has had no other role in this proceeding.

On July 20, 2015, the Licensing Board issued its Order denying the State's Motion. The Licensing Board determined that "the documents in question contain confidential and trade secret information within the purview of 10 C.F.R. § 2.390(a)(4), and therefore should remain non-public subject to the Protective Order."[13] The Licensing Board additionally found there would be no public interest in the release of the PWROG Memo.[14]

The State in its Petition is seeking Commission review of three purported errors in the Licensing Board Order:

- The Board's "failure to rule on whether Westinghouse is a proper participant in this proceeding."

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11 Official Transcript of Proceedings, Indian Point Nuclear Generating Units 2 & 3 at 4709: 20-25 (May 14, 2015) ("May 14 2015 Tr.").

12 "Joint Brief of Entergy and Westinghouse Regarding Proprietary Documents," June 4, 2015 ("Joint Brief").

13 Order at 7.

14 *Id.* at 6.

- The Board's "*sua sponte*" ruling that the PWROG memorandum is inadmissible; and

- The Board's determination that the five documents should not be publicly disclosed.

Westinghouse supports the Licensing Board's decision and opposes the State's Petition for interlocutory review of all three issues.

## III. ARGUMENT

### A. Legal Standards

Under 10 C.F.R. § 2.341(c) a petition for review of a licensing board decision must ordinarily await a full or partial initial decision, such as a decision on the merits of an admitted contention. The Commission may grant review of interlocutory decisions, such as the Order here, only upon a showing that the issue for which the party seeks interlocutory review:

> (i) threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or
>
> (ii) affects the basic structure of the proceeding in a pervasive or unusual manner.

10 C.F.R. § 2.341(f)(2). There is a long line of Commission precedent reflecting the Commission's disfavor of granting interlocutory review barring "extraordinary circumstances." *See, e.g., NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-13-3, 77 NRC 51, 54-55 (2013) ("These criteria, as well as Commission precedent, reflect disfavor of piecemeal review of licensing board rulings during ongoing proceedings. We will address such rulings after a licensing board has issued a final decision in a case, barring 'extraordinary circumstances.'"); *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant, Units 1 & 2), CLI-

12-13, 75 NRC 681, 687 (2012) ("We grant interlocutory review only upon a showing of 'extraordinary circumstances.'").[15]

Even if the Licensing Board's Order could be reviewed at this time, review is not a matter of right. Under 10 C.F.R. § 2.341(b)(4), a petition for review may be granted "in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:"

> (i) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
>
> (ii) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
>
> (iii) a substantial and important question of law, policy, or discretion has been raised;
>
> (iv) the conduct of the proceeding involved a prejudicial procedural error; or
>
> (v) any other consideration which the Commission may deem to be in the public interest.

The Petition fails to demonstrate any substantial question, much less one that must be considered by the Commission now.

B. Westinghouse's Participation is Limited and Appropriate

The State first asserts error by the Licensing Board in allowing Westinghouse to participate in the proceeding, without determining that Westinghouse's participation was timely

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[15] *See also Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 35 (2008) ("The mere potential for legal error does not justify interlocutory review — the party seeking review must show grounds for interlocutory review under 10 C.F.R. § 2.341(f)(2)."") (citations omitted). The Commission has emphasized the point in this proceeding. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-12-18, 76 NRC 371, 373-76 (2012) (denying Entergy's petition for interlocutory review of an order granting, in part, the State's motion for cross-examination of witnesses at hearing).

and without defining Westinghouse's role in the proceeding going forward.[16] The State asserts that the Licensing Board "has failed to follow NRC regulations and leaves the current status of Westinghouse's role in the proceeding unclear."[17] This issue certainly does not merit interlocutory review. Moreover, the Licensing Board did not fail to follow regulations; Westinghouse acted in a timely fashion; and there is no lack of clarity regarding Westinghouse's future role in this proceeding.

Westinghouse's Motion to Appear was limited by its terms to the specific issue of the proprietary designations that the State was seeking to strike. Westinghouse did not seek party status in the proceeding, nor did it seek any ongoing role other than to protect its proprietary information in connection with the Motion. The Licensing Board allowed Westinghouse to participate in an oral argument and to file a Joint Brief with Entergy – both limited to the issues raised by the Motion. That is all. Westinghouse's limited participation does not threaten the State with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of a final decision. Nor does it affect the basic structure of the proceeding in a pervasive or unusual manner.

First, Westinghouse has made its appearance with respect to the Motion. That bell cannot be unrung. But the State does not suffer any irreparable harm going forward. The State continues to have access to the five documents under the Protective Order. The State remains free to offer the Calculation Notes in the non-public proceeding. The State seeks public release of the five proprietary documents. That remedy, if appropriate, will still be available upon review (assuming a sufficient basis for discretionary review) after a partial or final initial

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16 Petition at 14.

17 *Id.*

decision. In applying the regulations on disclosure previously, the Commission emphasized that "[t]he public interest to be weighed . . . has been narrowly defined as an interest in determining the bases for and results of agency action (*i.e.*, determining what the government is up to)," and that in this context, the public interest "does *not* include incidental benefits from disclosure that may be enjoyed by members of the public." *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-05-01, 61 NRC 160, 179-80 (2005) (quoting Final Rule, Availability of Official Records, 68 Fed. Reg. 18,836, 18,837 (Apr. 17, 2003) (emphasis added).[18] This is a determination better made in the context of a final decision. In contrast to a decision to release confidential commercial information, a delay in review of the issue, and in any release of the documents, is not irreparable harm.[19]

Second, the State's assertions regarding Westinghouse's role and the structure of the proceeding are simply unfounded. The State suggests that it must prepare for hearing "without knowing whether or how Westinghouse will seek to participate in or comment upon the proceeding"[20] and alludes to "the sudden presence of a second industry party."[21] But Westinghouse is not a party; has not asked to be a party; and was allowed only an opportunity to appear to protect its commercial interests with respect to a specific Motion filed by the State

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[18] *See also id.* at 169 ("The purpose of FOIA—and section [2.390]—is not fostered by disclosure of information about private citizens . . . that reveals little or nothing about an agency's own conduct.") (internal quotation marks and citations omitted).

[19] In contrast, an interlocutory order granting immediate release of confidential commercial information would constitute irreparable harm. *Compare Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 71 (2004) (interlocutory review was proper for a licensing board order granting access to safeguards information).

[20] Petition at 16.

[21] *Id.* at 16-17.

challenging those interests. This limited role does not impact the basic structure of the proceeding going forward.

With respect to Commission review more generally under 10 C.F.R. § 2.341(b), the State asserts that Westinghouse's Motion to Appear was untimely, and that this is "a substantial and important issue" that merits review.[22] The State broadly asserts that "[i]f industry parties can appear in NRC proceedings at any time to defend interests that may be affected by the proceeding, then similar solicitude should be extended to States whose interests are clearly affected by decisions relating to nuclear plant operations."[23] But the State reads far too much into Westinghouse's special appearance and inaccurately equates Westinghouse with its limited role in this proceeding to a person seeking to intervene as a full party to participate on specific contentions in the proceeding. The Licensing Board acted well within its discretion in allowing Westinghouse's appearance.

First, allowing an appearance by a vendor with respect to confidential commercial information would fall under the Licensing Board's broad authorities to manage a proceeding, as provided in 10 C.F.R. §§ 2.319(g) and (s). Moreover, Westinghouse's participation would appear to fall comfortably within the ambit of limited appearances under 10 C.F.R. § 2.315(a).[24] Westinghouse appeared to make oral and written statements on a limited issue, with no intention to "otherwise participate in the proceeding." The Appeal Board, in *Kansas Gas & Elec. Co. &*

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22 *Id.* at 16.

23 *Id.*

24 While the term "limited appearance" has come to connote a certain type of public statement made in connection with NRC hearings, the regulation itself does not appear to be quite so limited with respect to the timing or manner of a limited appearance. Consistent with the regulation, Westinghouse did not offer "evidence" in the proceeding on the admitted contentions.

*Kansas City Power & Light Co.* (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-311, 3 NRC 85, 87 (1976), found that Westinghouse, a non-party, would suffer an adverse impact if a contract was disclosed. The Appeal Board observed that "we see no reason why, upon its being advised of the endeavors of the intervenors to obtain unrestricted disclosure of the contract through a discovery request made of the applicants, Westinghouse would not have been entitled to enter a special appearance in the proceeding for the limited purpose of asserting its claim that any disclosure should be made subject to a protective order."[25] Indeed, in that case, Westinghouse had not entered a special appearance, and the Appeal Board suggested that Westinghouse could not later enter the proceeding on appeal. Consistent with that precedent, Westinghouse acted in the present case in an appropriate manner to protect its interests.

Second, with respect to timeliness, this specific legal dispute did not come before the Licensing Board until the State filed its Motion on April 9, 2015. Westinghouse diligently worked with Entergy to provide appropriate information in support of Entergy's Answer to the Motion, including two affidavits and a declaration. The State filed its motion for leave for reply on April 22, 2015. At that point Westinghouse began to prepare a motion to appear specially in the proceeding in connection with this matter. Westinghouse filed its Motion to Appear on May 5, 2015. This occurred essentially in parallel to the Licensing Board's order on the same

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[25] ALAB-311, 3 NRC at 87-88. Similar accommodation to appear to protect proprietary information has been allowed in federal court cases. In *W. Res., Inc. v. Union Pac. R. Co.,* No. 00-2043-CM, 2001 WL 1718370, at *1 (D. Kan. Sept. 12, 2001), non-parties sought permission to intervene "for the limited purpose of protecting their respective proprietary and confidentiality interests in certain contracts sought by Plaintiff through the discovery process." Movants "assert that their interest in protection of confidential and proprietary documents will be irrevocably impaired if such documents are not protected from disclosure in response to Plaintiff's discovery request." *Id*. at *4. The Court granted the intervention and found that "Movants' ability to protect their interest may be impaired by excluding them from determination of this issue within the case." *Id.*

date inviting Westinghouse's participation. This occurred less than 30 days after the State filed its Motion.

In arguing a lack of timeliness, the State would apply the general motions regulation, 10 C.F.R. § 2.323(a)(2), as establishing a 10-day limit.[26] But the State cites no precedent applying such a timeliness standard to facts similar to the current circumstances. And, in any event, that standard leaves open the question of the date of the "occurrence or circumstance from which the motion arises." Westinghouse's Motion to Appear was filed within 5 days of the State's reply to the Entergy Answer. Ultimately, a ruling on a procedural matter such as timeliness is a matter of discretion for a presiding officer and unworthy of Commission review. *See, e.g., Louisiana Energy Servs., L.P.* (Nat'l Enrichment Facility), CLI-05-21, 62 NRC 538, 539-40 (2005) (in which the Commission decided not to accept a board's referral of timeliness (and other) rulings related to late-filed contentions, noting that "[b]y their nature, the timeliness of late-filed contentions turns on fact-specific considerations, such as when new documents or information first became available and how promptly intervenors reacted.").

Finally, the State suggests that the Licensing Board's decision, particularly because it does not address timeliness, raises the specter of future, spontaneous industry appearances. And the State suggests that other interested persons could/should be able to invoke a similar approach in this or other proceedings.[27] The former concern is sheer speculation. The latter argument ignores that members of the public seeking to participate in a proceeding in the manner the State describes have a clear opportunity and defined regulatory processes in which to do so (*see, e.g.,* 10 C.F.R. §§ 2.309 and 2.315). Westinghouse's limited participation to protect

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[26] Petition at 15.

[27] *Id.* at 16 n.17.

its proprietary documents does no violence to those regulations, nor does it establish a precedent to somehow alter or expand the regulations.

C. The Licensing Board's Decision on the PWROG Memorandum Was Well Within its Discretion

The State next seeks interlocutory review of the Licensing Board's "preemptive ruling on the admissibility" of the PWROG Memo.[28] The State argues the relevance and probative value of the document.[29] Westinghouse is not a party in the proceeding and is not positioned to comment on evidentiary matters. Suffice it to say, however, an admissibility decision is always "preemptive." And a procedural ruling on the admissibility of evidence would not merit interlocutory review.[30]

The State further argues that the Licensing Board improperly required that the State, in seeking public disclosure of a document, "must first establish that the document is admissible evidence."[31] Assuming that this purported error is somehow reviewable as an interlocutory matter, the State has not raised a substantial question. In the Joint Brief, Westinghouse provided sworn declarations on the functioning of the PWROG, the confidential commercial nature of the document, and the competitive harm that would be caused to

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28 *Id*. at 17.

29 *Id.* at 19.

30 *Hydro Res., Inc*., CLI-98-8, 47 NRC 314, 324 (1998) ("[P]rocedural rulings involving discovery and admissibility of evidence or the scheduling of hearings rarely meet the standard for interlocutory review . . ."); *Houston Lighting & Power Co*. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-630, 13 NRC 84, 85 (1981) ("Appeal boards are disinclined to assume 'the role of a day-to-day monitor' of the 'numerous determinations' which must be made by licensing boards 'respecting what evidence is permissible and in what procedural framework it may be adduced.'").

31 Petition at 19.

Westinghouse, the PWROG, and the PWROG members by public release of the document.[32] The PWROG Memo was not submitted on the Indian Point license renewal docket and has not been relied upon as part of a merits decision by the Licensing Board. In this context, the Licensing Board acted well within its discretion to determine whether the document would have any evidentiary value in the proceeding, and therefore whether there would be any reason to compel public disclosure of the document.

The State consistently ignores the strong policy that is reflected in both the Trade Secrets Act and the Freedom of Information Act ("FOIA"), Exemption 4, in favor of protecting confidential commercial information. The Commission in *Private Fuel Storage* specifically recognized the "strong legislative policy against disclosure of proprietary information." *Private Fuel Storage*, CLI-05-01, 61 NRC at 180 (quoting *Westinghouse Elec. Corp. v. NRC*, 555 F.2d 82, 87, 90-91 (3rd Cir. 1977)). Although Westinghouse disputes that the regulation is consistent with federal law,[33] 10 C.F.R. § 2.390(b)(5) specifically allows a presiding officer to determine, in assessing the proper scope of proprietary information under a protective order, whether a public interest in disclosure of the "bases for and effects of a proposed action" outweighs the interest in protection of the information owner's competitive position. The State cannot seriously argue that there is a public interest in the disclosure of the PWR Memo to reveal the "bases for or effect of" an NRC decision. The NRC has not yet issued any decision on the merits. Further, the Licensing Board's assessment of the lack of probative value of the PWROG Memo provides a sound basis for its decision that Westinghouse's confidential commercial information should not be released because the memorandum will disclose nothing regarding the ultimate decision.

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32 *See* Joint Brief at 17-22, and attached Declaration W. Anthony Nowinowski.

33 *See* Joint Brief at 5-10, 22.

D. The Documents Are Confidential Commercial Information Entitled to Protection

The State's third issue for review is its claim that the Licensing Board erred on the merits of its Motion; *i.e.,* that the Board would not strike the proprietary designation from either the PWROG Memo or the Calculation Notes. The State claims that Westinghouse has failed to demonstrate that the PWROG Memo should be considered proprietary;[34] that Westinghouse employees have publicly disclosed information in the Calculation Notes in a paper presented at a 2014 American Society of Mechanical Engineers ("ASME") conference;[35] and that, applying 10 C.F.R. § 2.390(b)(5), the rights of the public to be apprised of information in the Calculation Notes outweighs Westinghouse's rights with respect to protection of confidential commercial information.[36]

As discussed above, this claim does not meet the standard for interlocutory review. The State faces no irreparable harm from the Licensing Board's decision declining to release the documents. Again, the NRC has not yet issued any decision on the merits of the relevant contentions. The State's arguments for release of the documents can be addressed, in context, on review of a partial or final decision. Any public right to be apprised of the bases for or effects of a decision can be addressed (and can be remedied) at that time. Meanwhile the State has access to the documents under the Protective Order and can introduce the Calculation Notes as appropriate in the proceeding.

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34 Petition at 21.

35 *Id.* at 22.

36 *Id*. at 23-24.

The State suggests that the Protective Order imposes an administrative burden.[37] But any such burden is a necessary consequence of the applicable laws and policies that clearly favor protection of commercial information. The Court of Appeals has recognized that "not only as a matter of fairness, but as a matter of right, and as a matter basic to our free enterprise system, private business information should be afforded appropriate protection, at least from competitors." *Nat'l Parks & Conservation Ass'n. v. Morton,* 498 F.2d 765, 769 (D.C. Cir. 1974). And, more to the point of the availability of interlocutory review, an administrative burden would not constitute irreparable harm or a pervasive impact on the structure of the proceeding.[38]

Assuming this issue could be reviewed at this time, there is still no substantial question – no error of law or fact, no departure from governing precedent, no decision without governing precedent, no prejudicial procedural error, and no other consideration – meriting Commission discretionary review. Westinghouse has provided ample information, first in declarations and affidavits supporting the Entergy Answer, and then in the Joint Brief and supporting declarations, to establish: (a) the confidential nature of the documents; (b) the existence of competition in global and domestic markets for nuclear plant designs and nuclear engineering services; (c) the existence of competition in deregulated electricity generation

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37 *Id*. at 24.

38 As a comparison, the Commission found that the requirement to research, identify, and disclose thousands of documents was not an irreparable injury. *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), CLI-09-6, 69 NRC 128, 135-36 (2009) ("we have found *no instance* in this agency's jurisprudence where either we or our boards have ruled that expenses of any kind constituted 'irreparable injury.' This issue arises most frequently in situations where, as here, a movant for a stay or interlocutory review claims 'irreparable injury' based on excessive or unnecessary litigation expenses. We have uniformly rejected such arguments."). *See also F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 244 (1980) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.").

markets; and (d) the likelihood of substantial competitive harm to the owners of the information at issue[39] that is likely to result if the documents are released from the Protective Order. Accordingly, the documents constitute "confidential commercial information" under the Trade Secrets Act and FOIA Exemption 4 and should be protected.

The State's assertion that Westinghouse has already released the information in the Calculation Notes in an ASME presentation and EPRI paper does not support the claim that the Calculation Notes themselves should now be released. In his sworn declaration submitted with the Joint Brief, Mark Gray of Westinghouse attested to the confidential nature of the commercial information in the Calculation Notes. In doing so, he was fully aware of and considered what had been released in the ASME conference presentation and EPRI paper (in fact, he was one of the ASME presenters). For its part, the NRC Staff concurred that Westinghouse had provided sufficient information to support the proprietary designation.[40] The informed and considered judgments of Mr. Gray and the NRC Staff on these fact-specific matters are entitled to deference. Discretionary Commission review is not warranted.

Under the Exemption 4 test adopted in *Critical Mass Energy Project v. NRC*, if confidential commercial information is submitted to the government voluntarily, it will be protected categorically under Exemption 4 so long as it is the kind of information "that would customarily not be released to the public by the person from whom it was obtained." *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (*en banc*), *cert. denied*, 507 U.S. 984 (1993). In the present case, Westinghouse and the PWROG were not required by

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[39] The parties in interest are Westinghouse, Entergy, and the members of the PWROG. Chairman of the PWROG.

[40] "NRC Staff's Response to Joint Brief of Entergy and Westinghouse Regarding Proprietary Documents," dated June 25, 2015.

statute, regulation, or any other mandate to submit the documents at issue to the NRC. Nor was Entergy required to submit the documents on the license renewal review docket. Rather, Entergy submitted the documents to New York State (not the NRC) under the rules of procedure and made the Calculation Notes available for NRC Staff inspection or review. Accordingly, under *Critical Mass,* the documents are protected categorically. The affidavits and declarations submitted with the Joint Brief and Entergy's Answer establish that the documents have been held in confidence by their owner and are of a type customarily held in confidence by their owner.[41] No further inquiry is required.

Alternatively, under the standard for Exemption 4 adopted by the D.C. Circuit Court of Appeals in *National Parks and Conservation Assoc. v. Morton,* and clarified in *Critical Mass*, commercial information supplied to the government "pursuant to statute, regulation or some less formal mandate" is "confidential" if disclosure is likely to either:

- Impair the government's ability to obtain necessary information in the future; or
- Cause substantial harm to the competitive position of the person from whom the information was obtained.[42]

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41 *See Pub. Emps. for Envtl. Responsibility v. Office of Science and Tech. Policy*, 881 F. Supp. 2d 8, 15 (D.D.C. 2012) (quoting *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 148–49 (D.C. Cir. 2001) (". . . the standard for assessing confidentiality is 'how the particular party customarily treats the information' and not how the plaintiff or other parties might view the information."). *See also Soghoian v. OMB,* 932 F. Supp. 2d 167, 176 (D.D.C. 2013) (stating that the relevant assessment "requires courts to evaluate how the *particular party* customarily treats the information, not how the industry as a whole treats the information") (internal quotation marks and citation omitted) (emphasis added).

42 *Nat'l Parks & Conservation Ass'n v.*, 498 F.2d at 766, 770; *see also New Hampshire Right to Life v. HHS,* 778 F.3d 43, 49 (1st Cir. 2015). Referencing *McDonnell Douglas Corp. v. NASA*, 180 F.3d 303, 305 (D.C. Cir. 1999), the Commission in *Private Fuel Storage*, CLI-05-01, 61 NRC at 163-64, accepted the *National Parks* definition of "confidential," adding that the definition also encompasses information whose disclosure

Both prongs of the test are satisfied here.

First, protection of documents made available to the NRC for use in regulatory processes (including licensing, inspection, and administrative hearings) enhances those processes. Nuclear vendors such as Westinghouse have a history of cooperation with the NRC to enhance the safety and reliability of nuclear operations. The incentives to provide information beyond the bare minimum necessary would be undermined if the regulatory process leads to information becoming openly available to competitors. "This would, in turn, hinder the fulfillment of [the NRC's] statutory mandate to protect the public health and safety." *Private Fuel Storage*, CLI-05-01, 61 NRC at 168.[43]

Second, under 10 C.F.R. § 2.390(b)(4)(v), mirroring the second prong of the *National Parks* test, the NRC utilizes the specific test of whether release of information is likely to cause substantial harm to the owner's competitive position, "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." Based on the information provided by Westinghouse and the PWROG, the documents at issue meet the *National Parks* and the regulatory "substantial harm" test.

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is likely to impair government interests such as compliance, program efficiency and effectiveness, and the fulfillment of the agency's statutory mandate.

[43] The Commission in that case cited *9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 7-10 (1st Cir. 1983); *Pub. Citizen Health Research Grp. v. NIH*, 209 F. Supp. 2d 37, 53 (D.D.C. 2002); and *Nadler v. Fed. Deposit Ins. Corp.*, 899 F. Supp. 158, 162-63 (S.D.N.Y. 1995), *aff'd,* 92 F.3d 93 (2d Cir. 1996).

Accordingly, whether the *Critical Mass* or *National Parks* test applies, the Licensing Board was correct in denying the Motion to release the documents. Commission review is not warranted.

## IV. CONCLUSION

For the reasons discussed above, Westinghouse respectfully requests that the Commission deny the State's petition for interlocutory review.

Respectfully submitted,

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