UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Docket Nos. 50-247-LR and
	)	50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	
	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	
	)	September 8, 2015

ENTERGY'S ANSWER OPPOSING NEW YORK STATE'S PETITION FOR INTERLOCUTORY REVIEW OF JULY 20, 2015 LICENSING BOARD ORDER

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I. INTRODUCTION

In accordance with 10 C.F.R. § 2.341(b)(3) and (f)(2), Entergy Nuclear Operations, Inc. ("Entergy") files this Answer opposing New York State's ("New York" or "the State") August 14, 2015 Petition seeking interlocutory review of an Atomic Safety and Licensing Board ("Board") Order issued on July 20, 2015 in the above-captioned proceeding.[1] In that Order, the Board appropriately denied New York's April 9, 2015 Motion to withdraw the proprietary designation and compel the public disclosure of five documents produced by Entergy, pursuant to the Board's September 4, 2009 Protective Order, as part of its ongoing mandatory disclosures.[2] The five documents at issue are four Calculation Notes prepared by Westinghouse Electric Company LLC ("Westinghouse") in connection with the Indian Point license renewal application,[3] and one

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1 *See 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 Motion to Withdraw Proprietary Designations* (Aug. 14, 2015) ("Petition") (ADAMS Accession Nos. ML15226A564 (public) and ML15226A559 (non-public)); Licensing Board Order (Denying New York Motion to Withdraw Proprietary Designation) (July 20, 2015) (unpublished) ("July 2015 Order").

2 *See State of New York Motion to Withdraw the Proprietary Designation of Various Pressurized Water Reactor Owners' Group and Westinghouse Documents* (Apr. 9, 2015) ("April 2015 Motion" or "Motion") (ML15099A785 (public) and ML15099A784 (non-public)); Licensing Board Protective Order (Sept. 4, 2009) (unpublished) ("Protective Order").

3 Westinghouse, CN-PAFM-09-77, Indian Point Units 2 & 3 Accumulator Nozzle Environmental Fatigue Evaluation (2010); Westinghouse, CN-PAFM-12-35, Indian Point Unit 2 and Unit 3 EAF Screening Evaluations

memorandum prepared by the Pressurized Water Reactors Owners Group ("PWROG") discussing technical and strategic issues related to Nuclear Regulatory Commission ("NRC" or "Commission") Branch Technical Position ("BTP") 5-3.[4]

As demonstrated below, the Commission should deny the Petition in its entirety. The flaws in New York's Petition are many and varied, but they all converge on one fatal defect—New York's failure to satisfy the Commission's strict criteria for interlocutory review in 10 C.F.R. § 2.341(f)(2). That is, none of New York's arguments demonstrates (1) the threat of an immediate and serious irreparable impact that cannot be alleviated through a petition for review of the Board's final decision, or (2) a pervasive or unusual effect on the basic structure of this proceeding. For the most part, New York points to *alleged* errors in the Board's decision. But, as evidenced by earlier decisions in this proceeding, the Commission has uniformly rejected the notion that legal error alone is sufficient grounds for granting interlocutory review.

Several other points bear emphasis at the outset. First, insofar as New York's Petition centers on the purported harm caused by Westinghouse's limited and well-defined participation in the proceeding, the State's arguments are moot. Westinghouse's participation is not threatened—it already has occurred and resulted in the development of a robust record on which the Board appropriately relied. The Board's decision to allow Westinghouse to participate in the briefing on New York's April 2015 Motion is reasonable, well within the Board's authority, and consistent with the NRC's rules and practice. That said, Westinghouse has not participated—nor will it participate—as a full-fledged "party" to this proceeding, to the alleged detriment of New York.

(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"). The Calculation Notes are non-public proprietary documents.

[4] *See* PWROG, BTP 5-3 Industry Issue; Executive Review (Oct. 28, 2014) ("PWROG Memo") (non-public proprietary document); NUREG-0800, Rev. 2, Standard Review Plan, Branch Technical Position 5-3, "Fracture Toughness Requirements" (Mar. 2007) ("BTP 5-3") (ML070850035).

Second, the Board's determination that the PWROG Memo lacks probative value and thus fails to constitute admissible evidence does not result in any immediate and serious irreparable impact to New York or any pervasive or unusual effect on the structure of the proceeding. In its July 2015 Order, the Board explicitly identified an alternative means by which New York, through its experts, may address the issues and opinions contained in the PWROG Memo. In that regard, New York's argument is both premature and factually groundless. Regardless, as noted above, alleged legal error, by itself, is insufficient to trigger interlocutory review.

Finally, the Board acted fully consistent with NRC regulations, precedent, and the Protective Order in finding that the five contested documents should continue to be withheld from public disclosure. The Board did not, as New York erroneously claims, reallocate any legal burdens among the parties, rely on unsubstantiated assertions of confidentiality, or impose any undue administrative burdens on New York. To the contrary, Entergy and Westinghouse satisfied *their* burden under Section 2.390 and the Protective Order through the submittal of detailed briefs and supporting affidavits. The end result is consistent with the purpose and terms of the Protective Order—the need for and contents of which New York endorsed nearly six years ago. Thus, there is no need for immediate Commission review of the Board's ruling.

II. STATEMENT OF THE CASE

This proceeding began over eight years ago with Entergy's submittal of the license renewal application for Indian Point Units 2 and 3 in April 2007. In July 2008, the Board admitted New York as one of several parties to the proceeding.[5] The parties subsequently negotiated and drafted an agreed-upon Protective Order, which they jointly submitted to the Board for approval on

[5] *See generally Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC 43 (2008).

August 14, 2009.[6] On September 4, 2009, the Board issued the approved Protective Order that has since governed the disclosure and use of proprietary documents in this proceeding.[7]

Pursuant to the general discovery requirements of 10 C.F.R. § 2.336, and the agreement among the parties as submitted to the Board on January 13, 2009,[8] Entergy disclosed the existence of the four Calculation Notes and the PWROG Memo to the parties to this proceeding.[9] Based on the requirements of the Protective Order, and a good faith belief that these documents contain trade secrets or privileged or confidential commercial or financial information, Entergy disclosed the documents as "proprietary" on the relevant disclosure logs. Following requests for disclosure, Entergy timely produced each of these documents in their full, unredacted form.[10]

A. New York's April 9, 2015 Motion

In accordance with the procedures specified in the Protective Order, the parties engaged in consultations regarding the disputed proprietary status of the five documents at issue. After the parties were unable to reach an agreement, New York filed a Notice of Objection on March 9, 2015, followed by its Motion on April 9, 2015. In its Motion, New York challenged the proprietary designation of the Calculation Notes and PWROG Memo, and sought a Board order striking the proprietary designations of those documents.[11] New York argued that it should prevail on the Motion "because neither Entergy nor Westinghouse have shown that the documents at issue

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6 *See Joint Motion for Entry of a Protective Order* (Aug. 14, 2009) (ML092320636).

7 Although it was not necessary for the Board to hold any *in camera* hearing sessions for the Track 1 contentions, the Board did admit into evidence numerous documents that were withheld from public disclosure because they are proprietary and/or are subject to copyright protection. *See* Board Order (Issuing Appendix B to the Partial Initial Decision) (Nov. 27, 2013) & Appendix B (Track 1 Exhibit List). Entergy notes that there are numerous other Track 2 hearing exhibits that are proprietary documents but not subject to New York's April 2015 Motion.

8 Letter from Paul M. Bessette, Counsel for Entergy, to the Administrative Judges, Agreement of the Parties Regarding Mandatory Discovery Disclosures (Jan. 13, 2009) (ML090270876).

9 Entergy disclosed the four Calculation Notes between December 1, 2010 and December 4, 2013, and the PWROG Memo on January 5, 2015. *See Entergy's Answer Opposing New York State's Motion to Strike Proprietary Designations*, at 11 n.3 (Apr. 20, 2015) ("Entergy's April 2015 Answer") (ML15110A482).

10 The relevant Bates numbers are IPECPROP00081155-60; IPECPROP00057823-916; IPECPROP00072778-861; IPECPROP00078338-425; IPECPROP00079751-873.

11 *See* April 2015 Motion at 6.

contain" information within the scope of 10 C.F.R. § 2.390.[12] Notably, New York did not—nor could it—allege any problems related to access to the proprietary information that would hinder it in any way from effectively participating in this proceeding.[13] Instead, New York challenged application of the Protective Order as "contrary to the NRC's regulations."[14]

B. Entergy's and NRC Staff's Answers to the Motion and New York's Reply

On April 20, 2015, Entergy filed its Answer opposing New York's Motion.[15] Entergy included two affidavits and a declaration from Westinghouse employees with direct knowledge of the documents in support of its April 2015 Answer and proprietary designation of the five documents at issue.[16] Entergy explained in detail that all five documents contain valuable confidential commercial information, and that forced public disclosure of those documents is likely to cause substantial harm to the competitive positions of Westinghouse, the PWROG and its members. Entergy also asserted that New York failed to show that the public interest outweighs the substantial competitive and financial harm that would accrue to the PWROG and Westinghouse as a result of the forced public disclosure of the documents. Thus, Entergy demonstrated that continued protection of the documents from public disclosure is warranted under 10 C.F.R. § 2.390 and the Protective Order.

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12 *Id*.

13 Indeed, New York has full access to the five documents under the Board's September 2009 Protective Order in accordance with 10 C.F.R. § 2.390(b)(6). Thus, subject only to the non-disclosure and administrative provisions of that Protective Order and general evidence admissibility considerations, New York is free to use the documents as it sees fit in this proceeding in connection with its contentions.

14 April 2015 Motion at 13.

15 *See generally* Entergy's April 2015 Answer.

16 *See id.*, Attachment 1, Affidavit of W. Anthony Nowinowski, Manager, PWROG Project Management Office (April 20, 2015) ("Nowinowski Affidavit"); Attachment 2, Affidavit of James A. Gresham, Manager, Regulatory Compliance, Westinghouse Electric Company LLC (April 16, 2015) ("Gresham Affidavit"); and Attachment 3, Declaration of Mark A. Gray, Principal Engineer, Westinghouse Electric Company LLC (April 20, 2015) ("Gray Declaration I").

On April 20, 2015, the NRC Staff filed its Answer, in which it set out applicable legal principles but took no position on the Motion.[17] However, the Staff agreed that New York's Motion should be resolved in accordance with the criteria in 10 C.F.R. § 2.390(b).[18]

On April 22, 2015, New York sought leave to file a reply, which the Board granted.[19] New York filed its reply on May 1, 2015, again arguing that Entergy had not met its burden under the Protective Order, and accusing Entergy of "continued misuse of the Protective Order to shield broad swaths of non-proprietary information from public disclosure and review."[20]

C. Westinghouse's Motion to Appear Specially Regarding the April 2015 Motion

On May 5, 2015, Westinghouse filed a motion to appear specially in this proceeding for the specific and limited purpose of contesting New York's April 2015 Motion and protecting the proprietary designation of the five documents.[21] Westinghouse emphasized that, unlike the parties to this proceeding, it holds a unique commercial interest in the documents.[22] It further noted that

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17 *See 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"* (Apr. 20, 2015) (ML15111A260).

18 *Id.* at 6. The Staff further noted that NRC regulations provide means for hearing participants to obtain access to confidential proprietary documents under a protective order and to utilize the documents in *in camera* hearing sessions, and that "these measures assure that parties in NRC proceedings are able to make effective use of any documents that are withheld as proprietary." *Id.* at 3.

19 *See State of New York Motion for Leave to File Reply in Support of Motion to Withdraw Proprietary Designations* (Apr. 22, 2015) (ML15112A961); *Entergy's Answer Opposing New York State's Motion for Leave to File a Reply to Entergy's April 20, 2015 Answer* (Apr. 23, 2015) (ML15113A792); Licensing Board Order (Granting New York's Motion for Leave to File a Reply) (Apr. 24, 2015) (unpublished).

20 *State of New York Reply in Support of Motion to Withdraw Proprietary Designations*, at 5-11 (May 1, 2015) (ML15121A887 (public) and ML15121A892 (non-public)).

21 *See 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) ("Westinghouse Motion") (ML15132A518).

22 *See id.* at 2 ("[T]he Calculation Notes are Westinghouse documents, and the PWROG Memorandum is a document prepared by Westinghouse on behalf of the PWROG and contains Westinghouse proprietary information."). In this regard, Westinghouse cited relevant NRC adjudicatory precedent holding that a non-party is entitled to enter a special appearance in a proceeding for the limited purpose of asserting a claim that disclosure by a party to the proceeding of information claimed by the non-party to be proprietary in character should be made subject to a protective order. *See id.* at 3 (citing *Kan. Gas & Elec. Co. & Kan. City Power and Light Co.* (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-311, 3 NRC 85, 87-88 (1976)). It also noted multiple examples of NRC licensing proceedings in which the company has entered special appearances or otherwise participated to protect its proprietary interests. *See id.* at 4.

"[d]isposition of the New York Motion may, as a practical matter, impair the ability of Westinghouse to protect its interest in maintaining the [d]ocuments as proprietary."[23]

D. Oral Argument and Additional Briefing by the Parties

On May 5, 2015, the Board, in parallel with Westinghouse's filing of its motion to appear specially, issued an Order requesting a telephonic oral argument on the April 2015 Motion.[24] The Board cited its "duty to protect documents whose disclosure would cause substantial harm to the competitive position of the owner of the information, PWROG or Westinghouse."[25] Noting that such substantial harm would fundamentally affect Westinghouse, the Board stated that counsel for Westinghouse (acting on behalf of both Westinghouse and the PWROG) also could participate in the oral argument.[26] Importantly, Westinghouse did not seek, and the Board did not grant it, a broader role or "party" status in the Indian Point license renewal proceeding.

The Board held oral argument on New York's April 2015 Motion on May 14, 2015.[27] Counsel for New York, the NRC Staff, Entergy, and Westinghouse participated in the argument. At the end of oral argument, the Board directed Entergy and Westinghouse to submit a Joint Brief in support of their position that all five documents should remain marked as proprietary.[28]

Entergy and Westinghouse submitted their Joint Brief on June 4, 2015, in which they demonstrated that the companies appropriately have claimed protection of each of the documents at issue in accordance with 10 C.F.R. § 2.390(b)(4) and consistent with the Freedom of

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23 *Id.* at 2.

24 *See* Licensing Board Order (Setting Oral Argument on Proprietary Designation of Documents) (May 5, 2015) ("May 5, 2015 Order").

25 *Id.* at 3.

26 *Id.*

27 *See* Licensing Board Order (Scheduling Oral Argument) (May 8, 2015) (unpublished); Official Transcript of Proceedings, Indian Point Nuclear Generating Units 2 & 3 at 4639-4716 (May 14, 2015) ("May 14 2015 Tr."), (ML15138A455) (non-public).

28 *See* May 14 2015 Tr. at 4709, 4715.

Information Act ("FOIA") Exemption 4.[29] They explained that under the Exemption 4 test adopted in *Critical Mass Energy Project v. NRC*, if, as in this case, confidential commercial information is submitted to the government voluntarily,[30] then it will be protected categorically under Exemption 4 as 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."[31] Thus, given that the five documents have been held in confidence by Westinghouse and the PWROG, and are of a type customarily held in confidence by those entities, they are protected categorically under the *Critical Mass* test.[32]

Entergy and Westinghouse argued, in the alternative, that the five documents also would be protected from public disclosure under the standard for Exemption 4 adopted by the D.C. Circuit in *National Parks and Conservation Association v. Morton*, and clarified in *Critical Mass*, with respect to documents that are involuntarily submitted to the government pursuant to statute, regulation, or some less formal mandate.[33] Applying the two-pronged *National Parks* test, Entergy and Westinghouse demonstrated that release of the documents: (1) could adversely affect the ability of the NRC to obtain such information in the future, and (2) would likely lead to substantial competitive harm to Westinghouse and the PWROG.[34] In support of the latter showing, and to address the Board's specific request for a section-by-section discussion of the proprietary information contained in each of the five documents, Entergy and Westinghouse

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29 *See generally Joint Brief of Entergy and Westinghouse Regarding Proprietary Documents* (June 4, 2015) ("Joint Brief") (ML15155B518) (non-public); 5 U.S.C. § 552(b)(4).

30 The five documents at issue were not submitted on the Indian Point license renewal docket and have not been relied upon (to date) as part of a merits decision by the Board. Westinghouse did not choose to submit the documents to the NRC or the parties, and was not compelled to do so. Rather, Entergy disclosed the documents to the other parties as potentially relevant to admitted contentions, but only through the mandatory disclosure process in the proceeding and subject to the terms of the Board's Protective Order.

31 Joint Brief at 6 (quoting *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (*en banc*), *cert. denied*, 507 U.S. 984 (1993)).

32 *Id.*

33 *Id.* at 7-9 (citing and discussing *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 766, 770 (D.C. Cir. 1974)).

34 *See id.*

included the highly detailed supplemental Declarations of Mark A. Gray ("Gray Declaration II") and W. Anthony Nowinowski ("Nowinowski Declaration"), both dated May 29, 2015.

Per the Board's directions, New York and the NRC Staff filed responsive briefs on June 18 and 25, 2015, respectively.[35] New York objected to Westinghouse's participation in the proceeding as untimely and disputed whether the information fell under the *Critical Mass* legal standard.[36] It also argued that substantial competitive injury would not result from disclosure of the Calculation Notes because Westinghouse allegedly has publicized its methodology for performing environmentally-assisted fatigue screening analyses in industry publications and presentations.[37] Finally, New York claimed that the public's right to know the basis for NRC decision making outweighs any potential competitive harm to Westinghouse or the PWROG.[38]

The NRC Staff agreed with Entergy and Westinghouse that the four Calculation Notes should be withheld from public disclosure as confidential commercial information.[39] However, the Staff asserted that Entergy and Westinghouse did not sufficiently identify the portions of the PWROG Memo that contain confidential, proprietary information, the disclosure of which could adversely affect the PWROG's or its members' competitive or financial position.[40] Therefore, the Staff suggested that the Board should require Westinghouse to further specify the portions of the PWROG Memo that should be withheld as confidential, proprietary information.[41]

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35 *See State of New York Reply to Joint Brief of Entergy and Westinghouse Regarding Proprietary Documents* (June 18, 2015) ("New York Reply Brief") (ML15169B120 (public) and ML15169B124 (non-public)); *NRC Staff's Response to Joint Brief of Entergy and Westinghouse Regarding Proprietary Documents* (June 25, 2015) ("NRC Staff Reply Brief") (ML15176B272) (non-public).

36 *See* New York Reply Brief at 13-14.

37 *See id.* at 17-18.

38 *See id.* at 20-22.

39 *See* NRC Staff Reply Brief at 1, 8-9.

40 *See id.* at 1, 9-12.

41 *See id.* at 1, 12.

E. Summary of the Board's July 2015 Order Denying New York's April 2015 Motion

On July 20, 2015, the Board denied New York's April 2015 Motion. The Board found, based on the very substantial record developed for this matter, that the Calculation Notes contain confidential commercial information that is entitled to protection under Section 2.390(a)(4) because: (1) the Calculation Notes are treated confidentially by Westinghouse and contain information that, if released, likely would lead to substantial competitive harm to Westinghouse; (2) Westinghouse established that it has a substantial commercial interest in the engineering services market for nuclear power plants (including ASME Code fatigue screening evaluations); (3) the Calculation Notes contain data developed by Westinghouse in conducting ASME Code Section III evaluations; and (4) a competitor could undercut Westinghouse's market position by taking the information contained in the Calculation Notes "piece-by-piece or together."[42]

The Board also denied New York's April 2015 Motion with respect to the PWROG Memo, but on different grounds. Based on the information presented, the Board expressed doubt as to whether that document constitutes confidential commercial information.[43] Nevertheless, it found that "the presentation of more detail regarding the document would not be a useful expenditure of resources," and that there would be "no benefit to this proceeding, or to the public, by the public disclosure of the PWROG memo."[44] The Board found that the PWROG Memo, by itself, lacks probative value. However, the Board noted that New York still could proffer probative evidence in the form of its own experts' opinions, as supported by their qualifications and reasoning, on the issues presented in the PWROG Memo.[45]

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42 July 2015 Order at 6-7.

43 *See id.* at 6.

44 *Id.*

45 *Id.*

F. Summary of New York's August 14, 2015 Petition for Interlocutory Review

New York asserts that three issues warrant interlocutory Commission review of the Board's July 2015 Order. First, it asserts that the Order failed to address its objection to Westinghouse's participation in the proceeding, "implicitly allowing Westinghouse to enter and remain as a *party* without explaining the nature or extent of its rights or obligations in the proceeding."[46] Second, New York argues that the July 2015 Order reached beyond the scope of the State's Motion to issue a *sua sponte* ruling on the admissibility of the PWROG Memo.[47] Finally, New York claims that the Board erred in its application of NRC regulations and the Protective Order by purportedly shifting the burden to New York to show that each document, in its entirety, was not proprietary, and by allegedly ignoring many of the State's arguments.[48]

III. STANDARD OF REVIEW

As the Commission emphasized only a month ago, it "generally disfavor[s] interlocutory review."[49] Interlocutory review under 10 C.F.R. § 2.341(f)(2)—the regulation invoked by New York in its appeal—is discretionary, and the Commission will grant such review only upon a showing that the issue for which review is sought: (1) 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 (2) affects the *basic structure of the proceeding* in a pervasive or unusual manner.[50] Thus, the "mere potential

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46 Petition at 1 (emphasis added).

47 *See id.*

48 *See id.*

49 *Crow Butte Res., Inc.* (License Renewal for the *In Situ* Leach Facility, Crawford, Neb.), CLI-15-17, 82 NRC __, __, slip op. at 5 (Aug. 6, 2015) (citing *Entergy Nuclear Operations, Inc.* (Indian Point Units 2 and 3), CLI-11-14, 74 NRC 801, 811-12 (2011); *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994)) (denying three separate petitions for review of a licensing board's decisions in LBP-15-2 and LBP-15-11).

50 10 C.F.R. § 2.341(f)(2) (emphasis added). To be "irreparable," the harm must be of a kind that cannot be reversed on appeal. *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 35-36 (2008) (citing examples of Commission decisions finding potential for irreparable harm to a party).

for legal error"[51] or "[t]he possibility that an interlocutory ruling may be wrong does not in itself justify interlocutory review."[52] As the Commission noted in this proceeding, allowing litigants to successfully invoke interlocutory review based merely on assertions of legal error would "open[] the floodgates to a potential deluge of interlocutory appeals from any number of participants" and "eviscerate [its] longstanding policy disfavoring interlocutory appeals."[53]

The interlocutory review criteria in Section 2.341(f)(2) and Commission precedent applying them "reflect disfavor of piecemeal review of licensing board rulings during ongoing proceedings,"[54] and the Commission's strong preference to "address such rulings after a licensing board has issued a *final* decision in a case, barring *extraordinary circumstances*."[55] Indeed, in CLI-15-17, the Commission stated that it has "repeatedly rejected petitions for review challenging interlocutory Board rulings."[56] This fact is evidenced by the Commission's rejection of multiple Entergy and NRC Staff petitions for interlocutory review of previous Board rulings in this proceeding—all of which were vigorously opposed by New York or other intervenors.[57] As

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51 *Pilgrim*, CLI-08-2, 67 NRC at 35 ("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).

52 *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001) (citing *Sequoyah Fuels Corp. & Gen. Atomics* (Gore, Okla. Site), CLI-94-11, 40 NRC 55, 61 (1994)).

53 *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-09-6, 69 NRC 128, 137 (2009) (citations omitted).

54 *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-13-3, 77 NRC 51, 54 (2013) (citations omitted).

55 *Id.* at 55 (internal quotation marks and citations omitted; emphasis added). *See also Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), CLI-07-1, 65 NRC 1, 3 (2007) ("Our rules set a high bar for interlocutory review petitions."); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 & n.44 (2006).

56 *Crow Butte*, CLI-15-17, slip op. at 5.

57 *See Indian Point*, CLI-09-6, 69 NRC at 133-37 (denying Entergy's petition for interlocutory review of the Board's December 18, 2008 Order denying reconsideration of its July 31, 2008 decision to admit for litigation Consolidated Contention Riverkeeper EC-3/Clearwater EC-1); *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-10-30, 72 NRC 564, 568-69 (2010) (denying Entergy's and NRC Staff's separate petitions for interlocutory review of the Board's decision in LBP-10-13 admitting Contention NYS-35/36); *Indian Point*, CLI-11-14, 74 NRC at 801, 811-12 (denying Entergy's petition for interlocutory review of the Board's decision granting summary disposition of Contention NYS-35/36 in favor of New York); *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-12-18, 76 NRC 371, 373-76

demonstrated below, the arguments advanced by New York in support of its Petition are far less compelling, and certainly not sufficient to warrant interlocutory review of the Board's July 2015 Order under 10 C.F.R. §2.341(f)(2) and controlling Commission precedent.

IV. THE COMMISSION SHOULD REJECT NEW YORK'S PETITION

As the party seeking Commission review of an interlocutory Board ruling, New York "*must* show grounds for interlocutory review under 10 C.F.R. § 2.341(f)(2)."[58] For the reasons set forth below, none of New York's three principal arguments meets the "high bar" imposed by that regulation.[59] Accordingly, the Commission should deny New York's Petition in its entirety.

A. Westinghouse's Limited Participation in This Proceeding Does Not Pose Any Immediate Serious and Irreparable Harm to New York or Affect the Basic Structure of the Proceeding in a Pervasive or Unusual Manner

1. New York's Argument Is Moot Given Westinghouse's Participation to Date

New York first argues that the Commission should grant interlocutory review of the Board's alleged failure to rule on whether Westinghouse is a proper participant in this proceeding. As a threshold legal matter, New York's argument is moot, insofar as Westinghouse already has submitted its views in writing via its Joint Brief with Entergy, and the Board considered those views in its July 2015 Order. The purpose of the irreparable harm prong of Section 2.341(f)(2) is to enable a party to avert a *potential or threatened* irreparable harm that cannot otherwise be mitigated through review of a licensing board's final decision; *i.e.*, the criterion is forward-looking.[60] As New York acknowledges, the Board granted Westinghouse permission to brief the issues raised by New York's July 2015 Motion in a consolidated filing with Entergy during the

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(2012) (denying Entergy's petition for interlocutory review of the Board's September 21, 2012 Order granting, in part, New York's motion for cross-examination of witnesses at hearing).

58 *Pilgrim*, CLI-08-2, 67 NRC at 35 (emphasis added).

59 *Vt. Yankee*, CLI-07-1, 65 NRC at 3.

60 *See* 10 C.F.R. § 2.341(f)(2)(i) (referring to an issue that "[t]hreatens the party adversely affected by it with immediate and serious irreparable impact"); *Pilgrim*, CLI-08-2, 67 NRC at 36 ("We fail to see any irreparable harm that could befall [the petitioner for interlocutory review] from waiting to raise its concerns later.").

May 14, 2015 oral argument.[61] New York did not seek immediate Commission review of the Board's decision to do so, but instead waited until after Entergy and Westinghouse submitted their Joint Brief and the Board ruled on the July 2015 Motion.[62] Thus, at this late juncture, it is unclear what relief New York seeks on appeal, as the Commission cannot undo Westinghouse's (rightful and well justified) participation in this proceeding via its contributions to the Joint Brief. Regardless, New York has not demonstrated the "threat" of serious and irreparable harm or a pervasive and unusual effect on the proceeding, as required by 10 C.F.R. § 2.341(f)(2).

2. The Board Appropriately Allowed Westinghouse to Participate in the Briefing on the Specific Issues Raised by New York's Motion

New York also erroneously asserts that the Board somehow has conferred "party" status on Westinghouse, and left "the current status of Westinghouse's role in this relicensing proceeding unclear."[63] As an initial matter, there is no confusion as to the parties in this proceeding—only the Applicant, NRC Staff, and participants that have satisfied the Commission's standing and intervention requirements can be considered "parties" to the proceeding.[64] Westinghouse meets none of those descriptions and, importantly, never has sought or been granted party status.

Furthermore, the Board made clear the basis for, and scope of, Westinghouse's participation in this proceeding in its May 5, 2015 Order, in which it noted that "the Board has a duty to protect documents whose disclosure would cause substantial harm to the competitive position of the owner of the information, PWROG or Westinghouse."[65] Similarly, during the May 14, 2015 oral argument, Chairman McDade explained the basis for the Board's decision to allow

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61 *See* Petition at 4; May 14, 2015 Tr. at 4709.

62 Notably, New York did not seek reconsideration of the Board's July 2015 Order.

63 Petition at 14, 16-17.

64 *See* 10 C.F.R. § 2.309.

65 May 5, 2015 Order at 3 ("As the substantial harm alluded to would fundamentally impact Westinghouse, which, based on earlier filings is acting on behalf of PWROG, counsel for Westinghouse may also participate [in the oral argument on New York's April 2015 Motion].").

Westinghouse to participate in the additional briefing on New York's July 2015 Motion. Specifically, in response to a comment from New York counsel, Chairman McDade explained that the Board has an obligation under the Trade Secrets Act and NRC regulations to ensure that it does "not inadvertently undercut the commercial position of Westinghouse, *who is not a party to this proceeding*."[66] He further noted that Westinghouse's limited participation in the briefing process would ensure that the Board has "a full understanding of the facts and the issues."[67]

Thus, Westinghouse's participation in this proceeding has been for a reasonable and permissible purpose, and is not somehow undefined or "unexplained."[68] The Board's actions, moreover, are fully consistent with the NRC's Rules of Practice in 10 C.F.R. Part 2, under which the Board has broad authority to regulate the course of the hearing and the conduct of participants.[69] Contrary to New York's claims, Westinghouse's participation has been limited to the briefing on New York's April 2015 Motion, and there is no intent by Westinghouse or Entergy to expand Westinghouse's limited, defined role related to this matter. Further, New York has had ample opportunity to respond to all written submissions authored by Westinghouse/PWROG employees and counsel in support of Entergy's opposition to the April 2015 Motion. As such, New York has not been prejudiced by the "additional opportunity" given to Entergy and Westinghouse to "defend the proprietary designations of the documents."[70] Additionally, because Westinghouse will not be participating as a purported "second industry party" in the November 2015 evidentiary hearings on New York's pending safety contentions, there is no associated

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66 May 14, 2015 Tr. at 4715 (emphasis added).

67 *Id.*

68 Petition at 17.

69 *See* 10 C.F.R. § 2.319(g).

70 Petition at 16.

prejudicial procedural error to the State.[71] So, again, New York has failed to clear the high bar for interlocutory review deliberately created by the Commission in 10 C.F.R. § 2.341(f)(2).

3. Westinghouse's Special Participation in This Proceeding Has Been Timely and Has Not Caused Any Prejudice to New York

Finally, there is no basis for New York's claim that Westinghouse's special participation in this proceeding was untimely.[72] During the oral argument, the Board inquired about the timing of Westinghouse's direct involvement in the proceeding, and found Westinghouse's explanation to be satisfactory. In short, this specific legal dispute did not come before the Board until New York filed its April 2015 Motion, at which point Entergy represented Westinghouse's interests.[73] Westinghouse diligently worked with Entergy to provide appropriate information in support of Entergy's opposition to the Motion, including two affidavits and a declaration. When New York filed a motion for leave for reply on April 22, 2015 (which the Board granted on April 24, 2015), Westinghouse undertook preparation of a motion to appear specially in the proceeding. Westinghouse filed that motion on May 5, 2015, only four days after New York filed its reply on May 1, 2015, and essentially in parallel with the Board's May 5, 2015 Order inviting Westinghouse's participation. This all occurred less than 30 days after New York filed its initial Motion—a reasonable time frame under the circumstances. As stated above, New York was given the opportunity to respond to all Westinghouse and PWROG submissions.

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71 *See* Petition at 16-17 ("Additionally, the Board's failure to provide a reasoned basis for allowing Westinghouse to participate fails to define the scope of Westinghouse's rights in the proceeding, which is a prejudicial procedural error as the State must now prepare for and conduct the Track 2 evidentiary hearing without knowing whether or how Westinghouse will seek to participate in or comment upon the proceedings.").

72 *See* Petition at 5-7, 14-16.

73 *See* May 14, 2015 Tr. at 4644-45 (Mr. Repka, Counsel for Westinghouse).

In conclusion, New York arguments concerning Westinghouse's participation in this proceeding—which has been timely, permissible, and narrowly focused—do not provide any basis for interlocutory review of the Board's July 2015 Order.

B. The Board's Determination That the PWROG Memo Lacks Probative Value Does Not Pose Any Immediate Serious and Irreparable Harm to New York or Affect the Basic Structure of the Proceeding in a Pervasive or Unusual Manner

New York also seeks interlocutory review of the July 2015 Order on the ground that the Board improperly "issued a preemptive, *sua sponte* ruling that the PWROG Memo is inadmissible hearsay with no probative value."[74] It claims that the ruling "imposes legal requirements with no basis in NRC regulations."[75] New York further asserts that the Board's Order inflicts immediate and irreparable harm and affects the basic structure of this proceeding in a pervasive and unusual manner, "as it prevents the State from using the PWROG Memo as evidence in the Track 2 evidentiary hearing."[76] As discussed below, New York's second line of argument also falls far short of satisfying either one of the interlocutory review criteria in 10 C.F.R. § 2.341(f)(2).

First, even if its claims are *assumed* to be correct, New York, at most, has asserted only that the Board committed potential legal error in finding that one document, the PWROG Memo, lacks probative value. However, "[a] mere legal error is not enough to warrant interlocutory review because interlocutory errors are correctable on appeal from final Board decisions."[77] Nor does legal error, standing alone, alter the basic structure of an ongoing proceeding, because such errors can be raised on appeal after a licensing board issues its final decision.[78]

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74 Petition at 17 (internal quotation marks omitted).

75 *Id.*

76 *Id.* at 20.

77 *Conn. Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 373 (2001) (citing *Private Fuel Storage,* CLI-01-1, 53 NRC at 5; *Hydro Res., Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314 (1998)).

78 *See Dr. James E. Bauer* (Order Prohibiting Involvement in NRC Licensed Activities), CLI-95-3, 41 NRC 245, 246 (1995) (citing *Ga. Power Co.* (Vogtle Elec. Generating Plant, Units 1 and 2), CLI-94-15, 40 NRC 319, 320-21 (1994); *Rancho Seco*, CLI-94-2, 40 NRC at 93-94)).

New York contends that review of the Board's alleged error at the proceeding's end will prejudicially foreclose its reliance on purportedly unique information in the PWROG Memo.[79] That argument lacks merit. Although the Board found that the PWROG Memo lacks probative value because it is not reliable hearsay, it noted that "New York has access to the document and the opportunity to present it to [its] experts, who can agree or disagree with the opinions stated therein," such that the probative evidence would be the experts' opinions supported by their qualifications and reasoning.[80] The Board therefore did not categorically preclude New York from addressing the issues or opinions presented in the PWROG Memo at hearing.[81] Thus, there is no reason for the Commission to review the Board's determination—which may be rendered moot by developments at hearing or the Board's final merits decision—at this time.[82]

In addition, New York fails to explain why the Commission could not remedy the Board's alleged prejudicial procedural error at the end of the proceeding by overruling the Board's decision to exclude the PWROG Memo from evidence and, if necessary, remanding the matter for further proceedings on the merits.[83] Indeed, it is for that reason that rulings on the admissibility of evidence are unlikely to meet the standards for interlocutory review.[84]

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79 *See* Petition at 20.

80 July 2015 Order at 6.

81 It bears mention that New York has proffered the PWROG Memo for admission into evidence as a non-public exhibit (Exhibit NYS000519). Thus, the Board presumably will formally rule on the document's admissibility as evidence during the November 2015 hearings.

82 *See Toledo Edison Co. et al.* (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-314, 3 NRC 98, 99 (1976) ("The most that can be said is that, if on review of the eventual initial decision we should conclude that the Board below was wrong, a new hearing might have to be ordered. But it is also possible that the ultimate result will moot the questions which the applicants would have us resolve immediately.").

83 *See id.* at 100 ("In the last analysis, the potential for an appellate reversal is always present whenever a licensing board (or any other trial body) decides significant procedural questions adversely to the claims of one of the parties. The Commission must be presumed to have been aware of that fact when it chose to proscribe interlocutory appeals.").

84 *See*, *e.g.*, *Hydro Res.*, CLI-98-8, 47 NRC at 324 (("[P]rocedural rulings involving discovery and admissibility of evidence or the scheduling of hearings rarely meet the standard for interlocutory review . . . ."); *Pub. Serv. Co. of Ind.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-393, 5 NRC 767, 768 (1977) (quoting *Davis-Besse*, ALAB–314, 3 NRC at 99) ("[D]uring the course of lengthy proceedings licensing boards must make numerous interlocutory rulings, many of which deal with the reception of evidence and the procedural

Finally, even putting aside New York's clear failure to satisfy the interlocutory review criteria, the Board acted well within the authority delegated to it under 10 C.F.R. Part 2 in deciding—based on its determination that the PWROG Memo lacks probative value—not to require further expenditure of adjudicatory resources debating the appropriateness of the PWROG Memo's proprietary designation. Indeed, 10 C.F.R. § 2.319 states explicitly that a licensing board "has the duty to take appropriate action to control the prehearing and hearing process [and] to avoid delay and to maintain order," and "has all the powers necessary to those ends."[85]

For all of these reasons, New York's claims regarding the Board's disposition of the parties' dispute regarding the proprietary designation of the PWROG Memo fail to establish any immediate serious and irreparable harm to New York or a pervasive and unusual effect on the proceeding that warrants interlocutory Commission review of the Board's ruling.

C. The Board's Determination Regarding the Proprietary Status of the Five Documents Does Not Pose Any Immediate Serious and Irreparable Harm to New York or Affect the Basic Structure of the Proceeding in a Pervasive or Unusual Manner

In its third and final argument, New York contends that the Board's "refusal" to order the public disclosure of any portion of any of the five documents at issue is erroneous because it departs from judicial and Commission precedent, NRC regulations, and the Board's Protective Order.[86] In particular, New York claims that the Board: (1) improperly shifted to the State the burden to establish the admissibility of the PWROG Memo and the non-proprietary nature of the Calculation Notes; (2) inappropriately relied on "pro-forma assertions of confidentiality" by Westinghouse and Entergy; and (3) committed prejudicial procedural error by imposing a

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framework under which it will be admitted. It simply is not our role to monitor these matters on a day-to-day basis; were we to do so, 'we would have little time for anything else.'").

85 Those powers include, among others, the authority to: (1) restrict irrelevant, immaterial, unreliable, duplicative or cumulative evidence and/or arguments; (2) regulate the course of the hearing and the conduct of participants; (3) dispose of procedural requests or similar matters; (4) issue orders necessary to carry out its duties under 10 C.F.R. Part 2; and (5) take any other action consistent with the Atomic Energy Act of 1954 ("AEA"), NRC regulations, and the Administrative Procedure Act. *See* 10 C.F.R. § 2.319(e), (g), (h), (q), and (s).

86 Petition at 21.

significant administrative burden on the State and impeding public access to NRC proceedings.[87] None of those assertions satisfies the Commission's strict criteria for interlocutory review.

New York, at bottom, disputes the legal and factual bases underlying the Board's determination that all five documents in question should remain non-public in accordance with the terms of the Protective Order. As the Commission previously has reminded the parties in this proceeding, potential legal error alone does not justify interlocutory review.[88] Therefore, even if the Board committed the legal or procedural errors alleged by New York, those errors do not warrant immediate Commission review absent the showing required by Section 2.341(f)(2). In any case, as demonstrated below, New York provides no reason to believe that the Board's conclusions are questionable in any respect.

1. The Board Did Not "Shift" Any Burden to New York

The Board did not, as New York incorrectly claims, attempt to "shift" the parties' burdens. In fact, the Board specifically noted in its July 2015 Order that, under the Protective Order, the party seeking to restrict the disclosure of relevant information "retains the burden of establishing that the information is confidential business information."[89] The Board found that Entergy, in concert with Westinghouse, has satisfied that burden here.[90]

2. The Board Did Not Rely on Pro Forma Assertions of Confidentiality

The Board also did not rely on "pro-forma assertions of confidentiality" by Westinghouse in concluding that the documents in question—particularly the Calculation Notes—should remain

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87 *Id.* at 24.

88 *See Indian Point*, CLI-11-14, 74 NRC at 805, 812. *See also Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 467 (2004) (quoting *Vogtle*, CLI-94-15, 40 NRC at 321) (stating that the Commission has "declined interlocutory review even where [it] concluded that 'aspects of the Licensing Board's decision . . . appear highly questionable.'").

89 July 2015 Order at 4 (citing Protective Order at ¶ D).

90 *See id.* at 6-7. The Board aptly noted that Entergy is required to identify via its mandatory disclosures not only admissible evidence but also documents such as the PWROG Memo, which, while properly discoverable, may or may not constitute admissible evidence. *See id.* The Board, in other words, implicitly recognized that it is not Entergy's burden to establish the evidentiary value of documents that other parties may offer as evidence.

non-public subject to the Protective Order.[91] Citing pages 10-13 of the Joint Brief, the Board found that Westinghouse established that it has a substantial commercial interest in the market for engineering services for nuclear plants, including ASME Code fatigue screening evaluations.[92] It also found that the Calculation Notes contain data developed by Westinghouse in conducting ASME Code Section III evaluations.[93] The cited pages of the Joint Brief contain extensive references to the second, supplemental declaration prepared by Westinghouse Principal Engineer Mark Gray, in which he describes each of the Calculation Notes section by section, showing how each section includes confidential commercial information.[94]

3. The Board Has Not Imposed Undue Burden or Impeded Public Access

Also contrary to New York's claim, the Board has not imposed any undue administrative burden on New York or improperly impeded public access to the adjudicatory proceedings on Entergy's application. New York claims that it "*must* submit both nonpublic, nonredacted versions and public, redacted versions of any document that refer to any portion of allegedly proprietary documents."[95] But neither the Protective Order nor NRC regulations impose such a requirement. Indeed, paragraph K of the Protective Order, which addresses the treatment of all pleadings, issuances, testimony, exhibits, and correspondence in this proceeding containing proprietary information, does not specify any need to submit public, redacted versions of any

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91 As noted in the Joint Brief, from Westinghouse's perspective, the level of detail in the affidavits and declaration accompanying Entergy's April 2015 Answer to New York's April 2015 Motion was consistent with the company's customary practice at the NRC, extending back more than four decades, with respect to the confidentiality of proprietary information. *See* Joint Brief at 3. Thus, Entergy disagrees with the claim that it and Westinghouse have relied on "pro forma" assertions in connection with this dispute. In any event, Entergy and Westinghouse furnished more detailed, supplemental declarations by Mr. Gray of Westinghouse and Mr. Nowinowski of the PWROG as Attachments 1 and 2 to the Joint Brief, respectively, to address the Board's request for a section-by-section discussion of the five documents in dispute.

92 *See* July 2015 Order at 7 (citing Joint Brief at 10-13).

93 *See id.*

94 *See* Joint Brief at 11-13 (citing Gray Declaration II at ¶¶ 6-8, 10-14, 18-22, 24-28).

95 Petition at 24 (emphasis added).

documents.[96] Therefore, to the extent there is any additional administrative burden on New York, that burden is voluntary and cannot be the basis for an interlocutory appeal. The Commission, moreover, made clear earlier in this proceeding that the desire to avoid litigation-related burdens or expenses does not constitute grounds for interlocutory review under Section 2.341(f)(2).[97]

There also is no basis for New York's claim that the Board's July 2015 Order unnecessarily or improperly impedes public access to the proceedings. The Board's conclusion that the five documents at issue should continue to be treated as non-public reflects its sound and informed judgment, based on its review of the documents and the parties' extensive briefing of this matter. The fact that New York disagrees with that conclusion is not, in and of itself, sufficient to justify interlocutory review of the Board's ruling.

Additionally, New York provides no reason to believe that the Board will not attempt to hold public hearings to the maximum extent practicable. Insofar as the Board must hold *in camera* hearings to protect confidential, proprietary information from public disclosure, such hearings are expressly authorized by NRC regulations and the Protective Order.[98] The Board's

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96 *See* Protective Order at 6-7. In its Petition, New York cites paragraph C of the Protective Order for the proposition that "the Protective Order also provides for the partial redaction of a document where the document contains both proprietary information and non-proprietary information." Petition at 13-14. However, paragraph C of the Protective Order states 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." Protective Order at 3. Thus, paragraph C indicates that the parties may agree to use redacted versions of documents as one means of resolving disputes involving confidential proprietary information. It does not require parties to submit redacted versions of all documents containing such information, including exhibits offered for admission into evidence.

97 *See Indian Point*, CLI-09-6, 69 NRC at 133-36 (discussing the long line of NRC adjudicatory decisions consistently holding that litigation-related delays and expenses do not constitute irreparable injury for purposes of obtaining interlocutory review).

98 *See* 10 C.F.R. § 2.390(b)(6) ("In camera sessions of hearings may be held when the information sought to be withheld is produced or offered in evidence."); Protective Order at ¶ L. Section 2.390, by design, permits the use of protective orders and *in camera* hearings to allow all relevant parties to access proprietary documents while still preserving the documents' confidentiality. Notably, the Commission long has endorsed the use of protective orders and associated procedures. *See*, *e.g.*, *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-80-24, 11 NRC 775, 777 (1980) ("[T]he Commission's regulations, 10 CFR [2.390], contemplate that sensitive information may be turned over to intervenors in NRC proceedings *under appropriate protective orders*.") (emphasis added). This proceeding is no exception. New York overlooks the fact that parties to NRC

decision to exclude certain information or documents from the public record remains subject to appeal by New York after the Board renders its final decision on the relevant issues. If New York pursues such an appeal, and the Commission is persuaded by its arguments, then the Commission may direct disclosure of any information in the record that it determines to have been improperly withheld from the public.[99] Thus, there is no potential for immediate and irreparable harm that requires the Commission to undertake interlocutory review of the Board's July 2015 Order, particularly given that portions of the upcoming hearings necessarily will be closed to the public due to the expected discussion of other proprietary documents that are *not* subject to New York's April 2015 Motion or the instant appeal.

New York's attempt to address the Commission's stringent interlocutory review criteria in connection with this third argument is cursory and far from compelling. New York merely repeats the arguments already refuted above. Specifically, it asserts that the criteria in section 2.341(f)(2) are satisfied because: (1) the public's ability to obtain non-proprietary information about issues of public interest and to follow the proceeding will be immediately and irreparably impaired, and (2) New York will incur significant administrative burdens if the documents remain subject to the Protective Order throughout the hearing.[100] As discussed above, both of those claims lack merit, and do not establish the presence of extraordinary circumstances warranting interlocutory review.

At the end of the day, New York continues to rely on a vague invocation of the asserted public policy benefits of public disclosure of information considered in the NRC regulatory

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adjudications—including the parties to this proceeding—have routinely filed documents under protective cover due to their proprietary nature, as expressly contemplated by NRC regulations.

99 *See* 10 C.F.R. § 2.390(b)(6) ("If the Commission subsequently determines that the information should be disclosed, the information and the transcript of such in camera session will be made publicly available."); *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 164-83 (2005) (affirming in part and reversing in part the licensing board's rulings regarding the non-disclosure of certain information).

100 *See* Petition at 25. Again, a party may not "obtain interlocutory review merely by asserting potential delay and increased expense attributable to an allegedly erroneous ruling by the Licensing Board." *Sequoyah Fuels*, CLI-94-11, 40 NRC at 61.

process.[101] In the present context, the Commission has 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 "does not include incidental benefits from disclosure that may be enjoyed by members of the public."[102] The bases for the NRC Staff's conclusions regarding those aspects of the Entergy's application under challenge by New York are well documented in the Staff's safety evaluation report and two supplements thereto. Inasmuch as those bases are further vetted during the November 2015 hearings, they will be documented in the evidentiary record and the Board's final merits decision, both of which will be made public to the full extent permitted by NRC regulations and the Board's Protective Order. As the board in the *Private Fuel Storage* case noted, "[t]his is a matter that is best left to the conclusion of the merits of this litigation."[103] That observation makes practical sense here. Given that the Board may or may not rely on the disputed documents in its future merits decision, there is no basis for asserting that immediate public disclosure of the documents is necessary for ascertaining the bases for the agency's action.[104] In contrast, disclosure of the documents likely would lead to substantial and irreparable competitive harm to Westinghouse. Thus, any balancing of interests "strongly favors the latter interest" in nondisclosure of the documents.[105]

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101 At the same time, New York ignores the strong policy that is reflected in the Trade Secrets Act and FOIA, and the NRC regulations implementing those statutes, in favor of protecting confidential commercial information. The Commission in *Private Fuel Storage* specifically recognized the "strong legislative intent against disclosure of proprietary information." *Private Fuel Storage,* CLI-05-1, 61 NRC at 180 (quoting *Westinghouse Elec. Corp. v. NRC*, 555 F.2d 82, 87, 90-91 (3rd Cir. 1977)). That policy also is manifest in the AEA. In fact, "Congress's purpose in enacting section 103(b)(3) of the [AEA] was 'to protect the property right, the commercial right, which a licensee as a developer of a new procedure, new idea, should properly have.'" *Id.* (quoting *Gen. Elec. Co. v. NRC*, 750 F.2d 1394, 1401 (7th Cir. 1984)).

102 *Private Fuel Storage*, CLI-05-01, 61 NRC at 179-80 (quoting Final Rule, Availability of Official Records, 68 Fed. Reg. 18,836, 18,837 (Apr. 17, 2003)) (emphasis added).

103 *See Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), LBP-00-6, 51 NRC 101, 135 (2000).

104 *See Private Fuel Storage*, CLI-05-1, 61 NRC at 169 (citations omitted) (observing that certain settlement terms at issue in the proceeding "shed little or no light on the NRC's conduct or decision").

105 *Id.*

V. CONCLUSION

For the foregoing reasons, the Commission should reject New York's request for interlocutory review of the Board's July 2015 Order in its entirety. New York has failed to satisfy the Commission's stringent criteria for interlocutory review in 10 C.F.R. § 2.341(f)(2).

Respectfully submitted,

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Dated in Washington, D.C.
this 8th day of September 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	
	)	September 8, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of "Entergy's Answer Opposing New York State's Petition for Interlocutory Review of July 20, 2015 Licensing Board Order" was submitted through the NRC's E-filing system.

Signed (electronically) by Martin J. O'Neill

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