UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S ANSWER IN OPPOSITION TO STATE OF NEW YORK'S PETITION FOR INTERLOCUTORY REVIEW OF THE ATOMIC SAFETY AND LICENSING BOARD'S ORDER (DENYING NEW YORK MOTION TO WITHDRAW PROPRIETARY DESIGNATION)

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September 8, 2015
As Corrected, 09/11/15

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b), the NRC Staff ("Staff") hereby responds to the State of New York's ("New York") petition for review of the Atomic Safety and Licensing Board's ("Board") Order of July 20, 2015,[1] denying New York's motion to withdraw the proprietary designation of five documents that had been identified and produced by Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") as part of its document disclosures in this proceeding.[2] In a nutshell, New York's Petition seeks interlocutory review of the Board's Order declining to require public disclosure of five documents which its owners assert contain proprietary information – which New York has in its possession, has filed as evidentiary exhibits in the proceeding, and is fully able to utilize in the litigation of its contentions in this proceeding.

[1] *Entergy Nuclear Operations, Inc*. (Indian Point Nuclear Generating Units 2 and 3), "Order (Denying New York Motion to Withdraw Proprietary Designation)" (July 20, 2015) ("July 20 Order") (unpublished).

[2] "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").

As more fully set forth below, the Staff respectfully submits that New York has failed to demonstrate that the Board's Order *either* (a) "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* (b) "affects the basic structure of the proceeding in a pervasive or unusual manner," as required by 10 C.F.R. § 2.341(f). Further, New York has failed to demonstrate the existence of a "substantial question" that the Board's Order is "clearly erroneous" or that Commission review is otherwise warranted, as required by 10 C.F.R. § 2.341(b)(4). New York's Petition should, therefore, be denied.

BACKGROUND

This proceeding involves the license renewal application ("LRA") submitted by Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") for Indian Point Nuclear Generating Units 2 and 3 ("IP2" and "IP3") on April 23, 2007. Since January 30, 2009, the parties have identified and produced numerous documents as part of their mandatory document disclosures, as required by 10 C.F.R. § 2.336. Among these document disclosures, Entergy identified and produced, *inter alia*, the five documents at issue here, subject to the Board's Protective Order of September 4, 2009.[3] These consist of (a) four Calculation Notes prepared by Westinghouse Electric Company LLC ("Westinghouse")[4] regarding environmentally assisted fatigue ("EAF"),[5] and (b) an internal memorandum prepared by the Pressurized Water Reactor Owners' Group

[3] *Entergy Nuclear Operations, Inc*. (Indian Point Nuclear Generating Units 2 and 3), Protective Order (Sept. 4, 2009) ("Protective Order").

[4] Westinghouse's proprietary documents are subject to the terms of the Board's Protective Order in this proceeding as "Vendor Proprietary Information." Protective Order at 9-10, ¶ T.

[5] The four calculation notes had been designated by Westinghouse as "Proprietary Reports, Class-2" for Indian Point Unit 2 and/or Unit 3. These are: (1) "Accumulator Nozzle Environmental Fatigue Evaluation, CN-PAFM-09-77 (2010)"; (2) "EAF Screening Evaluations, CN-PAFM-12-35 (2012)"; (3) "Refined EAF Analyses and EAF Screening Evaluations, CN-PAFM-13-32 (2013)"; and (4) "Pressurizer Spray Nozzle Transfer Function Database Development and Environmental Fatigue Evaluations, CN-PAFM-13-40 (2013)." Motion at 5, Table Items 2-5.

("PWROG") concerning that organization's views on NRC Staff Branch Technical Position (BTP) 5-3[6] (the "PWROG Memorandum").[7]

New York was afforded access to the five documents long ago – and it has filed each of those documents as evidentiary exhibits for the upcoming hearing on "Track 2" contentions.[8] Nonetheless, on April 9, 2015, New York filed a motion seeking to remove the proprietary designation of those documents, which would allow their disclosure to the public.[9] On April 20, 2015, Entergy filed an answer opposing New York's Motion,[10] while the Staff filed an answer setting out applicable legal principles but taking no position on the Motion;[11] on May 1, 2015, New York filed a reply to Entergy's Answer.[12]

On May 5, 2015, Westinghouse filed a motion before the Board, seeking leave to "appear specially" to preserve the proprietary designation of the Westinghouse and

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[6] NUREG 0800, Rev. 2, *Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants, LWR Edition, Branch Technical Position 5-3, "Fracture Toughness Requirements"* (March 2007) (ADAMS Accession No. ML070850035) (Ex. NYS000521).

[7] New York identified this document as "Pressurized Water Reactor Owners Group, BTP 5-3 Industry Issue, Executive Review (Oct. 28, 2014)." Motion at 5, Table Item 1.

[8] Specifically, New York submitted the four Westinghouse Calculation Notes as Ex. **NYS000366**, Ex. **NYS000510**, Ex. **NYS000511**, and Ex. **NYS000512**; and it submitted the PWROG Memorandum as Ex. **NYS000519**. *See* (1) Ex. NYSR22001 ("Evidentiary Hearing/State of New York ('NYS') Hearing Exhibits" (June 12, 2013), at 62; and (2) "Evidentiary Hearing/State of New York ('NYS') Hearing Exhibits," attached to Letter from Brian Lusignan, Esq. to the Board (June 9, 2015), at 8-9 and 11.

[9] "State of New York Motion to Withdraw the Proprietary Designation of Various Pressurized Water Reactor Owners' Group and Westinghouse Documents" (Apr. 9, 2015) ("NYS Motion").

[10] "Entergy's Answer Opposing New York State's Motion to Strike Proprietary Designations" (Apr. 20, 2015) ("Entergy's Answer"). Entergy's Answer was accompanied by two affidavits and a declaration in support of its request for non-disclosure of the documents: (1) Attachment 1, Affidavit of W. Anthony Nowinowski, Manager, PWROG Project Management Office (Apr. 20, 2015) ("Nowinowski Affidavit"); (2) Attachment 2, Affidavit of James A. Gresham, Manager, Regulatory Compliance, Westinghouse (Apr. 16, 2015) ("Gresham Affidavit"); and (3) Attachment 3, Declaration of Mark A. Gray, Principal Engineer, Westinghouse (Apr. 20, 2015) ("Gray First Declaration").

[11] "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, as corrected April 21, 2015).

[12] "State of New York Reply in Support of Motion to Withdraw Proprietary Designations" (May 1, 2015); *see also* "Order (Granting New York's Motion for Leave to File a Reply)" (Apr. 24, 2015).

PWROG documents;[13] on May 6, New York filed an answer opposing Westinghouse's motion, on the grounds that Westinghouse had not identified any authority permitting it to "appear specially" and the motion was untimely.[14]

On May 5, 2015, the Board scheduled oral argument on New York's motion to withdraw the proprietary designation of the five documents, indicating that counsel for Westinghouse would be permitted to participate inasmuch "[a]s the substantial harm alluded to would fundamentally impact Westinghouse, which, based on earlier filings, is acting on behalf of PWROG."[15] In a subsequent Order (issued after New York filed its answer opposing Westinghouse's special appearance), the Board indicated that it would "hold[ ] Westinghouse's motion in abeyance until after the telephonic oral argument."[16]

Oral argument on New York's Motion was held on May 14, 2015,[17] after which the Board directed the filing of further briefs by Westinghouse/Entergy, New York and the Staff.[18] On June 4, 2015, Westinghouse and Entergy filed a Joint Brief in support of the documents' protection from disclosure;[19] on June 18, New York filed an answer in opposition to

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[13] "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).

[14] "State of New York Answer Opposing Motion of Westinghouse Electric Company LLC to Appear Specially in Connection with the State's Motion to Withdraw Proprietary Designations of Westinghouse and PWROG Documents" (May 6, 2015).

[15] *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), "Order (Setting Oral Argument on Proprietary Designation of Documents)" (May 5, 2015), at 3.

[16] *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), "Order (Scheduling Oral Argument)" (May 8, 2015), at 2.

[17] *See* Transcript of Teleconference (May 14, 2015) ("Tr.").

[18] *See* Tr. at 4,709-13.

[19] "Joint Brief of Entergy and Westinghouse Regarding Proprietary Documents" (June 4, 2015), as refiled (June 17, 2015)

Westinghouse and Entergy's Joint Brief;[20] and on June 25, the Staff filed its answer – stating its view that the Calculation Notes contained confidential proprietary information and should be protected from disclosure, but that further information was needed to support continued withholding of the PWROG Memorandum as proprietary.[21]

On July 20, 2015, the Board issued its ruling on New York's motion to withdraw the proprietary designation of the five documents.[22] Therein, the Board reviewed the standards for withholding proprietary information set forth in 10 C.F.R. § 2.390(b)(4) and the Freedom of Information Act ("FOIA") Exemption 4, 5.U.S.C. § 552(b)(4);[23] reviewed the views expressed by Westinghouse and the parties;[24] and then denied New York's motion, holding that:

(a) Westinghouse had demonstrated that the four Calculation Notes "contain confidential commercial information, which is entitled to protection under 10 C.F.R. § 2.390(a)(4)," and that the disclosure of those documents "would enable a competitor to undercut Westinghouse's market position";[25] and

(b) while "the financial or competitive harm that would flow from the release of the PWROG memo is marginal at best," further briefing and "the presentation of more detail regarding the document would not be a useful expenditure of resources" in that the document had little probative value, New York and its experts had "access to the document" and "can

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[20] "State of New York Reply to Joint Brief of Entergy and Westinghouse Regarding Proprietary Documents" (June 18, 2015) ("New York Reply").

[21] "NRC Staff's Response to Joint Brief of Entergy and Westinghouse Regarding Proprietary Documents" (June 25, 2015) ("Staff Response"), at 7-12.

[22] *Entergy Nuclear Operations, Inc*. (Indian Point, Units 2 and 3), "Order (Denying New York Motion to Withdraw Proprietary Designation)" (July 20, 2015).

[23] *Id.* at 3-4. FOIA Exemption 4 exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged."

[24] *Id.* at 4-6.

[25] *Id.* at 6-7.

agree or disagree with the opinions stated therein," their opinions could then be assessed by the Board, and disclosure of the document therefore "would be of no benefit to this proceeding, or to the public."[26] On August 14, 2015, New York filed its petition for review of the Board's Order.

DISCUSSION

I. New York's Petition for Interlocutory Review Should Be Denied.

A. Applicable Legal Principles

As set forth in 10 C.F.R. § 2.341(f), a petition for interlocutory review will be granted "only" if the petitioner demonstrates that the issue for which it seeks interlocutory review either:

> (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.

These requirements are fundamental to the consideration of any petition for review of an interlocutory (*i.e.,* non-final) Board order. As the Commission observed one month ago in the *Crow Butte* proceeding, "[w]e generally disfavor interlocutory review. The fact that a Board may have made an incorrect legal ruling typically does not warrant interlocutory review because such rulings can be reviewed on appeal from partial initial decisions or a final decision."[27] The Commission then instructed that it will consider undertaking interlocutory review only where the requesting party demonstrates that such review is warranted under 10 C.F.R. § 2.341(f).[28]

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[26] *Id*. The Board did not directly address New York's opposition to allowing Westinghouse to speak and file briefs to protect the proprietary treatment of its own and the PWROG's documents. It is apparent, however, that the Board had implicitly rejected New York's arguments.

[27] *Crow Butte Resources, Inc.* (License Renewal for the In Situ Leach Facility, Crawford, Nebraska), CLI-15-17, 82 NRC ___ (Aug. 6, 2015), slip op. at 7.

[28] *Id*. (footnotes omitted).

Indeed, the Commission has repeatedly applied this same standard in the instant proceeding, in rejecting numerous petitions for interlocutory review.[29]

Moreover, as the Commission pointed out earlier in this proceeding, interlocutory review is rarely undertaken for routine, procedural rulings:

> We note that our Boards have broad discretion to issue procedural orders to regulate the course of proceedings and the conduct of participants. It is the Board's responsibility to "conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, and to maintain order." As a general matter, we decline to interfere with the Board's day-to-day case management decisions, unless there has been an abuse of power. We see no abuse in the Board's actions here.[30]

As discussed below, New York has failed to demonstrate that interlocutory review of the Board's Orders is warranted here, or that the Board "abused its power" in denying New York's motion or in allowing Westinghouse to defend its own and the PWROG's interests.

B. New York Has Not Shown that Interlocutory Review Is Warranted.

As set forth above, New York was required, pursuant to 10 C.F.R. § 2.341(f), to demonstrate that the "extraordinary" action of interlocutory review is warranted,[31] in that the Board's July 20 Order either (i) "threatens the party adversely affected by it [*i.e.,* New York] with immediate and serious irreparable impact which, as a practical matter, could not be alleviated

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[29] *See, e.g.,* (1) *Entergy Nuclear Operations, Inc.* (Indian Point Units 2 and 3), CLI-12-18, 76 NRC 371 (2012) (denying petition for interlocutory review of a Board Order granting New York cross-examination rights); (2) *Id.,* CLI-11-14, 74 NRC 801 (2011) (denying petition for interlocutory review of a Board Order granting summary disposition of Contention NYS-35/36); (3) *Id.,* CLI-10-30, 72 NRC 564 (2010) (denying petitions for interlocutory review of a Board Order admitting Contention NYS-35/36); (4) *Id.,* CLI-09-6, 69 NRC 128 (2009) (denying petition for interlocutory review of a Board Order declining to reconsider an Order admitting a contention); (5) *Id.,* CLI-08-7, 67 NRC 187 (2008) (denying petition for interlocutory review of Board Order cancelling an oral argument on contention admissibility).

[30] *Entergy Nuclear Operations, Inc.* (Indian Point Units 2 and 3), CLI-08-7, 67 NRC at 192 (footnotes omitted).

[31] *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-12-13, 75 NRC 681, 687 (2012), *citing Entergy Nuclear Operations, Inc.* (Indian Point Units 2 and 3), CLI-09-6, 69 NRC at 133.

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." Nowhere in its 25-page Petition, however, does New York show that the Board's Order preserving the proprietary status of the five challenged documents either threatens New York with irreparable harm or affects the basic structure of the proceeding in a pervasive or unusual manner. Rather, the only claims it makes to support interlocutory review are a series of its own *ipse dixit* assertions that:

> (a) "[t]he Order irreparably and adversely affects the State's ability to put forward its case during the upcoming November 2015 evidentiary hearing on its 'Track 2' contentions, [and] interferes with the public's awareness of important, noncommercial issues";[32]
>
> (b) "the Board's ruling involved a prejudicial procedural error, as the continued designation of the entirety of all five documents as proprietary imposes a significant administrative burden on the State, which must submit both nonpublic, nonredacted versions and public, redacted versions of any document that refer to any portion of allegedly proprietary documents – and impedes public access to NRC proceedings";[33] and
>
> (c) "[t]he Order has an immediate and adverse irreparable impact and affects the basic structure of the proceeding in a pervasive and unusual manner, as 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. Additionally, the State will incur the administrative burdens described above if the documents remain subject to the protective order throughout the hearing. Correcting the Board's error after a final ruling on the State's contentions will not address these effects."[34]

The Staff respectfully submits that New York's unsupported assertions do not satisfy its burden of demonstrating extraordinary circumstances such that interlocutory review of the Board's Order is warranted. The Board's Protective Order – which was proposed and adopted

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[32] Petition at 1.

[33] *Id.* at 24.

[34] *Id.* at 25.

with New York's input and consent[35] -- is consistent with the Commission's established practice favoring the use of protective orders in its adjudicatory proceedings to protect against the disclosure of confidential proprietary or safeguards information,[36] and fully protects New York's ability to litigate its claims in the upcoming evidentiary hearings.

Moreover, the Board's preservation of the documents' proprietary designation will not have any material adverse effect on the conduct of this proceeding, New York's ability to litigate its claims, or the public interest. New York has had full access to the five documents at issue, and it even submitted the five documents as evidentiary exhibits in the proceeding.[37] In addition, New York filed approximately ~~20~~ 31 other documents containing proprietary information as evidentiary exhibits for the upcoming hearings – each of which must be protected from public disclosure even if these five documents are disclosed[38] -- and other parties have

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[35] *See* (1) "Joint Motion for Entry of Protective Order" (Aug. 14, 2009) at 1 ("NYS, Riverkeeper, and Clearwater have indicated that they support this Motion and [the] associated proposed Protective Order."); (2) E-mail from Zachary Kahn (Law Clerk, ASLB) (Sept. 2, 2009, 9:35AM) ("Based on the Board's review of the submissions filed by the Parties regarding the Protective Order, the Board proposes to issue the attached Protective Order (changes are highlighted), absent any objections offered by the Parties."); (3) E-mail from Janice Dean, Esq. (New York) to Paul M. Bessette (Entergy) and Zachary Kahn (Law Clerk, ASLB) (Sept. 2, 2009, 10:48AM) ("The State of New York also has no objections to the Protective Order as proposed.").

[36] *See, e.g., USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 460 n.48 (2006), and cases cited therein.

[37] *See* n.8, *supra*.

[38] New York submitted the following additional documents containing proprietary information as exhibits for the upcoming evidentiary hearings – none of which were acknowledged or addressed by New York in its Petition: Ex. **NYS000342**, Ex. **NYS00358A-B**, Ex. **NYS000359**, Ex. **NYS000361**, Ex. **NYS000362,** Ex. **NYS000363**, Ex. **NYS000364**, Ex. **NYS000365**, Ex. **NYS000367**, Ex. **NYS000368**, Ex. **NYS00369A-B**, Ex. **NYS000439**, Ex. **NYS000440**, Ex. **NY000481**, Ex. **NYS000482**, Ex. **NYS000483**, Ex. **NYS000525A-B**, Ex. **NY000529**, Ex. **NY000530**, Ex. **NYS000531**, Ex. **NYS000532**, Ex. **NYS00544A-D**, ~~and~~ Ex. **NYS000549**, Ex. **NY000562,** Ex. **NY000567**, Ex. **NY000568,** Ex. **NY000569**, Ex. **NY000570**, Ex. **NY000571**, Ex. **NY000572,** and Ex. **NY000573**. *See* (1) Ex. NYSR22001 ("Evidentiary Hearing/State of New York ('NYS') Hearing Exhibits" (June 12, 2013), at 58, 61-63 and 73-74; (2) "Evidentiary Hearing/State of New York ('NYS') Hearing Exhibits," attached to Letter from Brian Lusignan, Esq. to the Board (June 9, 2015), at 12; ~~and~~ (3) "Evidentiary Hearing/State of New York ('NYS') Hearing Exhibits," attached to Letter from Brian Lusignan, Esq. to the Board (June 9, 2015) (second letter), at 1 and 4-5; and (4) "Evidentiary Hearing/State of New York ('NYS') Hearing Exhibits" (Ex. NYSR23001), (Sept. 9, 2015), at 80, 83-86, 100, 111-12, 124-26, 129-30, and 132-36.

likewise filed numerous exhibits containing confidential proprietary information that must be protected from disclosure. Thus, portions of the upcoming hearing will need to be conducted *in camera* anyway, and it is therefore not apparent that any benefit could possibly accrue to New York or the public interest if these five documents (and only these documents) are publicly disclosed.[39]

Finally, New York's assertions concerning the Board's action allowing Westinghouse to appear specially and its comments on the admissibility and/or probative value of the PWROG Memorandum, do not demonstrate that the Board's rulings threaten New York with irreparable harm or affect the basic structure of the proceeding in a pervasive or unusual manner. In this regard, New York asserts:

> (a) "Westinghouse's participation in the proceeding had the immediate and irreparable effect of allowing the industry an additional opportunity to defend the proprietary designation of the documents, after the issue had been fully briefed";[40]
>
> (b) "the sudden presence of a second industry party affects the basic structure of the eight-year-old proceeding, and – absent clarification by the Commission – the nature and scope of Westinghouse's rights and obligations going forward will be unclear. . . . Commission review of this issue after a final order on the State's remaining contentions will not protect the State's interests, as by that time any harm arising from Westinghouse's unexplained participation will have already occurred";[41] and

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[39] The Board's Protective Order provides, in pertinent part, as follows:

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

Protective Order (Sept. 4, 2009), ¶ L, at 7.

[40] Petition at 16.

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

> (c) "[t]he Board's Order [regarding the admissibility and probative value of the PWROG Memorandum] inflicts immediate and irreparable impact 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. Review of this error after the Board issues a final decision on the State's remaining contentions will not be adequate, because by that time the State will have been required to litigate its contentions without the benefit of the PWROG Memo."[42]

None of these conclusory assertions by New York demonstrates that interlocutory review is warranted. First, even if the Commission should determine, following issuance of the Board's final decision, that the five documents do not contain confidential proprietary information, New York will have had a full and fair opportunity to litigate its claims using those documents; similarly, no harm will accrue to the public interest as the documents would then be made available for public scrutiny. Second, despite New York's professed uncertainty regarding "the nature and scope of Westinghouse's rights and obligations going forward," Westinghouse only sought to appear specially for the purpose of preserving the proprietary designation of the five documents; it has not sought to participate in the proceeding for any other purpose,[43] and the Board did not grant it any authority other than to address its proprietary claims. Third, the Board has not yet ruled formally on the admissibility of the PWROG Memorandum – and even if it ultimately excludes that document from evidence, New York will have a full opportunity to contest that ruling if the Board's final decision is adverse to its position.

In sum, New York has not satisfied its burden of showing that the Board's rulings *either* threaten New York with irreparable harm or affect the basic structure of the proceeding in a pervasive or unusual manner. Its petition for interlocutory review should therefore be denied.

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[42] *Id.* at 20.

[43] Indeed, the title of Westinghouse's motion plainly states the limited nature of its request, identifying its request as a "Motion . . . to Appear Specially in Connection with State of New York Motion to Strike Proprietary Designations of Westinghouse and PWROG Proprietary Documents."

II. New York Has Not Shown that the Board Committed Reversible Error.

In accordance with 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.

As discussed below, the Staff submits that New York has failed to demonstrate the existence of a "substantial question" that the Board's Order is "clearly erroneous," involved a "prejudicial procedural error," or otherwise warrants Commission review under any of the factors set forth in 10 C.F.R. § 2.341(b)(4)(i)-(v).

A. The Documents' Proprietary Designation

New York claims that the Board's decision to preserve the proprietary designation of the five documents "presents a substantial issue warranting Commission review" and constitutes a "prejudicial procedural error."[44] These claims are without merit.

1. Regulatory Standards Underlying the Protection of Proprietary information.

The Commission's requirements concerning the protection of confidential proprietary documents from public disclosure are set forth in 10 C.F.R. § 2.390 and 10 C.F.R. Part 9 ("Public Records"). As stated in 10 C.F.R. § 2.390(a), "final NRC records and documents . . . shall not, in the absence of an NRC determination of a compelling reason for nondisclosure after a balancing of the interests of the person or agency urging nondisclosure and the public

[44] *Id*. at 24.

interest in disclosure, be exempt from disclosure," except for matters that fall within one of the nine specified categories set forth in § 2.390(a)(1)-(9). Among the matters that are authorized to be withheld from disclosure are confidential proprietary documents – which are defined in § 2.390(a)(4) as "[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential."[45]

The Commission's regulations establish procedures to be followed by persons who submit documents to the NRC that they seek to have withheld from public disclosure, as set forth in 10 C.F.R § 2.390(b).[46] These include, *inter alia*, a designation of the portion(s) of the document sought to be protected from public disclosure, an indication of the basis for proposing that the information be withheld from disclosure, and an affidavit explaining the reasons why the information should be withheld from public disclosure and the harm that could ensue if the information is disclosed to the public.

In evaluating a request for confidentiality, pursuant to 10 C.F.R. § 2.390(b)(3), the Commission will determine "whether information sought to be withheld from public disclosure . . . (i) Is a trade secret or confidential or privileged commercial or financial information; and (ii) If so, should be withheld from public disclosure." Further, in determining whether the information constitutes a trade secret or confidential or privileged commercial or financial information under § 2.390(b)(3), the Commission will consider:

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[45] *Cf.* 10 C.F.R. § 9.17(a)(4) ("trade secrets and commercial or financial information obtained from a person that are privileged or confidential" are exempt from disclosure by the NRC under the Freedom of Information Act); Freedom of Information Act, 5 U.S.C. § 552(b)(4) ("trade secrets and commercial or financial information obtained from a person and privileged or confidential"). *See also*, Trade Secrets Act, 18 U.S.C. § 1905 (prohibiting federal employees from disclosing confidential information obtained in the course or as a result of their employment or official duties).

[46] As the Staff noted, however, in its response to Westinghouse and Entergy's Joint Brief, "these documents were not submitted to the NRC in connection with an NRC regulatory or licensing action under a claim of confidentiality; they were not located in the agency's files and are not 'agency records'; and they have not been evaluated [by the Staff] to determine whether they should be withheld from public disclosure under FOIA." Staff Response (June 25, 2015) at 7.

> (i) Whether the information has been held in confidence by its owner;
>
> (ii) Whether the information is of a type customarily held in confidence by its owner and, except for voluntarily submitted information, whether there is a rational basis therefor;
>
> (iii) Whether the information was transmitted to and received by the Commission in confidence;
>
> (iv) Whether the information is available in public sources;
>
> (v) Whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.[47]

If the documents are determined to contain "trade secrets or privileged or confidential commercial or financial information," the Commission will then determine "whether the right of the public to be fully apprised as to the bases for and effects of the proposed action outweighs the demonstrated concern for protection of a competitive position, and whether the information should be withheld from public disclosure."[48]

Finally, the regulations provide means for participants in NRC proceedings to obtain access to confidential proprietary documents under a protective order and to utilize the documents in *in camera* hearing sessions.[49] As the Atomic Safety and Licensing Appeal Board observed long ago, these measures assure that parties in NRC proceedings are able to make effective use of any documents that are withheld as proprietary:

> In Commission licensing proceedings, protective orders provide an effective means for safeguarding proprietary information, where . . . the party seeking discovery is not a competitor. Further, the rules differentiate between the release of information to the public and to interested parties, and provide that "[w]ithholding from public inspection shall not affect the right, if any, of persons properly and directly concerned to inspect the document." They

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[47] 10 C.F.R § 2.390(b)(4).

[48] 10 C.F.R. § 2.390(b)(5).

[49] 10 C.F.R. § 2.390(b)(6).

> explicitly authorize the use in appropriate circumstances of a protective order and of in camera sessions of the hearing.

Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 469 (1974) (quoting the former regulation, 10 C.F.R. § 2.790(b)(2)).[50] As discussed above, the Board adopted such a protective order in this proceeding (with New York's input and consent), thus assuring that New York and other participants in the hearing have an effective means to utilize the information even if the documents are withheld from public disclosure.

2. The Board Properly Protected the Calculation Notes from Public Disclosure

In its Order, the Board carefully evaluated the documents in accordance with governing legal principles, as set out in 10 C.F.R. §2.390 and FOIA Exemption 4, 5 U.S.C. § 552(b)(4). In particular, with respect to Westinghouse's Calculation Notes, the Board found that those documents contain confidential proprietary information, that the disclosure of those documents could adversely affect Westinghouse's financial and market position, and that the documents satisfy the criteria for withholding set forth in 10 C.F.R. § 2.390(b).[51]

More specifically, Westinghouse and Entergy had filed an affidavit and declarations before the Board showing that the information contained in the Calculation Notes constitutes "confidential or privileged commercial . . . information that should be withheld from public disclosure," based on the criteria set forth in 10 C.F.R. § 2.390(b)(4). In this regard, they asserted, with evidentiary support, that the Calculation Notes were "designated as proprietary to Westinghouse in accordance with the standard Westinghouse process"; that these documents "are of a type that is customarily maintained in confidence by the company"; that "each of the

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[50] Effective February 13, 2004, the Commission renumbered section 2.790 as section 2.390, without modifying its language. *See Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 162 n.5 (2005), *citing* Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2219, 2254-56 (Jan. 14, 2004). *Compare* 10 C.F.R. § 2.390 *with* 10 C.F.R. § 2.790 (2004).

[51] July 20 Order at 6-7.

four documents has in fact been maintained in confidence;" that they were provided to Entergy to support Indian Point license renewal and "were provided . . . [to] Entergy, as Westinghouse proprietary documents"; that the documents are not available in public sources"; that "there is a global competitive market for information of the type in the Calculation Notes" and that release of these documents would likely lead to substantial competitive harm to Westinghouse."[52]

In its order, the Board carefully evaluated the documents in accordance with governing legal principles, as set out in 10 C.F.R. §2.390 and FOIA Exemption 4, 5 U.S.C. § 552(b)(4), and determined that Westinghouse's Calculation Notes contain confidential proprietary information, that disclosure of the Calculation Notes could adversely affect Westinghouse's financial and market position, and that the documents satisfy the criteria for withholding set forth in 10 C.F.R. § 2.390(b).[53] The Board's decision to withhold the Calculation Notes from public disclosure is fully consistent with the Commission's regulatory requirements, discussed above, as well as with the Commission's policies regarding public disclosure. Accordingly, the Board did not err in finding that the Calculation Notes should be withheld from public disclosure in accordance with 10 C.F.R. § 2.390(b)(4).[54]

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[52] Joint Brief at 11.

[53] July 20 Order at 6-7. The Staff reached a similar conclusion. The Staff examined the five documents "as if, hypothetically, they had been submitted to the NRC by the documents' owner(s) or holder(s) with a request for confidentiality, in accordance with the criteria in 10 C.F.R. § 2.390(b)." Staff Response (June 25, 2015) at 7. The Staff's review of the documents and the affidavits and declarations submitted by Westinghouse and Entergy led the Staff to conclude that disclosure of the Calculation Notes could result in competitive or financial harm to Westinghouse, particularly in view of the cost involved in preparation of the Calculation Notes, the advantage that could be had by other commercial entities who obtain public access thereto, and the adverse financial and competitive impacts this could have on Westinghouse. *See id.* at 11-13, and the evidentiary support cited therein.

[54] As the Staff observed in its Answer to New York's Motion, "the Commission has an interest in assuring that all documents in the agency's possession are made public, except as provided by in the exceptions stated in its regulations and the Freedom of Information Act"; at the same time, the Staff observed that "the Commission has an interest in assuring its continued ability to obtain confidential proprietary information from the holders of such information, as necessary to assure the continued proper performance of the agency's statutory responsibilities." Staff Answer (April 21, 2015) at 5.

3. The Board Did Not Err in Its Ruling on the PWROG Memorandum.

In determining to withhold the PWROG Memorandum from public disclosure, the Board found that more information was required to establish the proprietary nature of the document, but since the document was of limited evidentiary value and further briefing would divert time and resources from preparation for the upcoming hearings, and since the document could be addressed by New York's experts, it was not necessary to reach a final determination on whether the document should be withheld from public disclosure as proprietary.[55] Thus, even if the Board might have ultimately found the document to be non-proprietary, a determination not to disclose the document would not have any material effect on New York's ability to litigate its claims in the proceeding or the public's interest in disclosure.

Nothing in New York's Petition demonstrates any error, much less reversible error, in the Board's determinations.[56] Moreover, once a final decision is issued by the Board, New York will be able to renew its argument that the document should be released to the public; in the interim, the Boar's determination to withhold the document from public disclosure has no adverse effect on the proceeding or New York's ability to litigate its claims herein. Accordingly, no reversible error has been committed by the Board.

B. Westinghouse's Participation in the Proceeding

New York contends that the Board's Order "fails to resolve the State's argument that Westinghouse is not a proper participant in the proceeding," and that the Board never ruled upon Westinghouse's motion to "appear specially" in the proceeding.[57] According to New York, the Board's actions allowing Westinghouse to participate in oral argument and to file briefs

[55] July 20 Order, at 3-6.

[56] As the Staff observed in its answer to New York's Motion, the Staff "frequently has occasion to consider requests for confidentiality, and [ ] addresses those requests in accordance with the provisions of 10 C.F.R. § 2.390 and/or 10 C.F.R. Part 9." Staff Answer (April 21, 2015) at 5.

[57] Petition at 14.

"leaves the current status of Westinghouse's role in the relicensing proceeding unclear,"[58] and "departs from governing NRC regulations" concerning the timeliness of motions.[59] According to New York, "[t]his is a substantial issue that warrants review by the Commission," and the Board's action constitutes "a prejudicial 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 proceeding."[60]

These claims are without merit. As discussed above, Westinghouse sought permission to "appear specially" solely to protect the confidentiality of Westinghouse's and the PWROG's documents. The Board's actions allowing Westinghouse to present oral argument and written briefs concerning the confidentiality of the documents did not confer any additional rights upon Westinghouse, and there is no basis for New York's professed concerns to the contrary. Second, contrary to New York's assertion, its arguments concerning the timeliness of Westinghouse's motion hardly establish a "substantial issue" that demands Commission review. Nor is there any basis for New York's expressed concern that it may have to face Westinghouse as an opponent in this proceeding. In sum, New York has not shown that any reversible error was committed by the Board in allowing Westinghouse to "appear specially" in the proceeding.

C. The Board's Comments on the Admissibility of the PWROG Memorandum

Finally, New York claims that the Board erred in issuing "a preemptive, *sua sponte* ruling that the PWROG Memo is inadmissible hearsay with "no probative value," and in stating "unambiguously that 'the memo would not be received in evidence.'"[61] New York then goes on

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[58] *Id.*

[59] *Id.* at 15.

[60] *Id.* at 16.

[61] *Id.* at 17.

to appeal from what it describes as the Board's evidentiary "ruling" and "holding."[62]

The problem with New York's arguments is that they present a non-existent "strawman" for the Commission's consideration. As New York observes, it had not moved for the document to be admitted into evidence,[63] nor had any other party filed a motion to exclude the document from evidence. Accordingly, while the Board's comments may factor into its rationale for not requiring public disclosure of the PWROG Memorandum, for evidentiary purposes those comments simply constitute *dicta* that portend how the Board may rule when New York proffers the document into evidence. Eventually, when New York proffers the document into evidence, it may wish to present for the Board's consideration all of the arguments it raised in its petition for review, in an effort to obtain a ruling in its favor. At this time, however, prior to any evidentiary "ruling" or "holding" by the Board on the document's admissibility, New York's attempt to seek Commission review of this matter should be rejected ae premature.

CONCLUSION

For the reasons set forth above, New York's petition for interlocutory review should be denied.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, MD
this 8th day of September 2015
As corrected 09/11/15

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[62] *Id.* at 17-20.

[63] *Id.* at 17.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER IN OPPOSITION TO STATE OF NEW YORK'S PETITION FOR INTERLOCUTORY REVIEW OF THE ATOMIC SAFETY AND LICENSING BOARD'S ORDER (DENYING NEW YORK MOTION TO WITHDRAW PROPRIETARY DESIGNATION)," dated September 8, 2015, as corrected September 11, 2015, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above captioned proceeding, this 11th day of September 2015.

/Signed (electronically) by/

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