

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

-----X

In re:

Docket Nos. 50-247-LR; 50-286-LR

License Renewal Application Submitted by

ASLBP No. 07-858-03-LR-BD01

Entergy Nuclear Indian Point 2, LLC,
Entergy Nuclear Indian Point 3, LLC, and
Entergy Nuclear Operations, Inc.

DPR-26, DPR-64

October 19, 2015

-----X

**STATE OF NEW YORK
MOTION FOR PUBLIC DISCLOSURE
OF VARIOUS WESTINGHOUSE DOCUMENTS**

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

TABLE OF CONTENTS

PRELIMINARY STATEMENT	1
BACKGROUND	2
Westinghouse’s Fatigue Analyses for IP2 and IP3 and the Documents at Issue.....	2
The Board’s July 2015 Order and the State’s Interlocutory Appeal.....	5
NYS’s Objection to the Proprietary Designations of the Westinghouse Documents.....	6
APPLICABLE LEGAL STANDARDS	7
The Protective Order and NRC Regulations.....	7
The Freedom of Information Act.....	9
The NRC Approach to Open Government.....	10
ARGUMENT.....	10
I. Entergy and Westinghouse Bear the Burden of Showing Why the Westinghouse Documents Should Not be Publicly Disclosed.....	11
II. The Board Should Order the Public Disclosure of CUF Results and Associated Summaries in Seven of the Westinghouse Documents	12
A. The CUF results and associated statements in the seven Westinghouse Documents do not constitute trade secrets or confidential commercial information	14
B. The CUF results and summaries in the seven Westinghouse Documents have not been held in confidence by Westinghouse, and is already available in public sources	15
C. The public’s right to understand the basis of NRC’s decision-making with regard to the CUF results in the seven Westinghouse Documents outweighs any possible competitive harm to Westinghouse	17
III. Alternatively, the Board Should Order the Disclosure of the 10 Westinghouse Documents in Their Entirety	18
A. Westinghouse has already publicly disclosed its methodologies for conducting environmental fatigue analysis using WESTEMS	19
B. The Westinghouse Documents do not Contain Trade Secrets or Confidential Commercial Information	23
C. Disclosure of the Westinghouse Documents is in the Public Interest	23
CONCLUSION.....	24

PRELIMINARY STATEMENT

The State of New York submits this motion pursuant to Paragraph D of the Atomic Safety and Licensing Board's September 4, 2009 Protective Order to compel the public disclosure of 10 calculation note documents authored by Westinghouse to support Entergy's license renewal application to the Nuclear Regulatory Commission to extend the operating life of the Indian Point nuclear facilities. Among other things, the documents summarize the purposes and goals of Westinghouse's metal fatigue analyses at the Indian Point facilities, and report the outputs of fatigue usage calculations and transient cycle limits for various components at the site. Westinghouse designated the documents as proprietary in their entirety, and Entergy disclosed them only to the State, Riverkeeper, and NRC Staff. The documents are material to NRC's evaluation of Entergy's application.

Public disclosure of the 10 documents, particularly parts of the documents reporting data outputs resulting from Westinghouse's fatigue analyses, cannot harm the competitive position of Westinghouse. Moreover, some of the results for certain components or their earlier versions have been publicly disclosed. Also, Entergy has provided the documents to NRC Staff to secure NRC approval of the license application. Given that restricting public access is the exception to NRC's policy of ensuring public disclosure, it is Entergy and Westinghouse – and not the State – who bear the heavy burden to show that information contained in the documents is proprietary. Westinghouse and Entergy should not be permitted to affirmatively use the calculation notes to support the license renewal application while at the same time shielding from public scrutiny the information contained in those documents. The State seeks, at a minimum, the disclosure of redacted versions of these documents so as to provide the public with the results, summaries, and goals of Westinghouse's fatigue evaluations for the Indian Point facilities.

In submitting this motion, the State recognizes that the Board denied a previous New York motion that sought the public disclosure of other Westinghouse fatigue analyses prepared to support Entergy's Indian Point re-licensing application. This motion concerns a different set of 10 documents, including Indian Point-specific calculation notes and reports that Entergy and Westinghouse disclosed this summer as part of their lead up to the adjudicatory hearing. In this motion, the State has sought to tailor its arguments and present additional information to support its position in connection with the 10 documents. The State respectfully maintains that the fatigue results and summaries for the Indian Point facilities do not qualify for protection under the Board's Protective Order, NRC regulations, and the Freedom of Information Act.

The State has followed the dispute resolution set out in the Board's Protective Order. Westinghouse and Entergy oppose the motion. Riverkeeper and Clearwater support the motion. NRC Staff took no position. In furtherance of the State's role in this proceeding to ensure meaningful public access to the decision-making concerning the continued operation of the Indian Point nuclear power facilities, which are located only 24 miles from New York City, the State respectfully requests that the Board compel the public disclosure of the 10 documents identified in this motion.

BACKGROUND

Westinghouse's Fatigue Analyses for IP2 and IP3 and the Documents at Issue

In 2007, Entergy Nuclear Operations, Inc. ("Entergy"), owner and operator of Unit 2 and Unit 3 of the Indian Point Nuclear Facilities ("Indian Point"), applied for a renewal license ("LRA") to extend its operation of Indian Point for 20 years. For approval of Entergy's LRA, NRC regulations require Entergy to provide reasonable assurance that the effects of aging on certain nuclear reactor components will be adequately managed for the period of extended

operation.¹ For this purpose, as part of its LRA Entergy provided NRC with its evaluations of the cumulative usage factor (“CUF”) for metal fatigue on various components at IP-2 and IP-3, including components within the reactor vessel, reactor vessel internals, pressurizer, steam generators and reactor coolant system and Class 1 piping. Entergy, at the behest of NRC, later revised these CUF evaluations to account for certain environmental factors (“CUF_{en}”). Component CUF and CUF_{en} values, therefore, are relevant to the Track 2 Contentions in this proceeding.

Entergy’s Aging Management Program (“AMP”), and specifically, its Fatigue Management Program for managing the effects of aging due to metal fatigue (“FMP”), depend on Entergy demonstrating that the CUF_{en} values for components constituting the reactor coolant system pressure boundary and for RVI components will not exceed a value of 1.0 throughout the period of extended operation. At a CUF value of 1.0, which is the design limit on fatigue, “crack initiation is assumed to have started in a structural component.”² The 10 documents at issue in this motion (the “Westinghouse Documents”) are key data points in Entergy’s effort to show that CUF_{en} values of components subject to its FMP are safely and reliably below 1.0.³

In its 2007 LRA, a publicly filed document, Entergy presented CUF values for various limiting locations at IP-2 and IP-3.⁴ In response to NRC’s request for additional information, in 2008, Entergy adopted Commitment 33, to update its initial fatigue evaluations reported in the

¹ See 10 C.F.R. §§ 54.21(a)(3) and (c)(1)(iii).

² Generic Aging Lessons Learned (GALL) Report, NUREG-1801, Rev. 2 (2010), X.M1-1 (NYS00147A-D). Additionally, as required by the American Society of Mechanical Engineers (“ASME”), CUF_{en} values cannot not exceed 1.0 to show compliance with its ASME Section III certification of the component for service.

³ For the Board’s, convenience, these 10 documents are listed in Attachment No. 1 to the Kwong Declaration (“Kwong Decl.”), and are provided as Attachments 2-11 to the Kwong Declaration.

⁴ Entergy’s 2007 LRA, Tables 4.3-13 and 4.3-14 (ENT00015B).

LRA to account for the effects of the reactor water environment.⁵ For this purpose, Entergy retained Westinghouse, and through various reports, including so-called “calculation notes,” Westinghouse presented its fatigue evaluations for certain components at IP-2 and IP-3 to support the application.⁶ Upon completion by Westinghouse, Entergy certified the completion of Commitment 33 to the NRC and, in a public filing, identified component-specific environmentally-adjusted CUF values based on Westinghouse’s fatigue evaluations.⁷

Entergy subsequently adopted two additional commitments to its LRA related to its fatigue evaluations. In 2011, Entergy adopted Commitment 43, in which it promised to determine whether NUREG/CR-6260 locations are the limiting locations at IP2 and IP3.⁸ In 2013, Entergy adopted Commitment 49, in which it committed to re-evaluate its CUF determinations to include an environmentally-adjusted fatigue factor (“ F_{en} ”).⁹ To meet both Commitments 43 and 49, Entergy again retained Westinghouse to perform fatigue evaluations, which Westinghouse did with its WESTEMSTM software program. In disclosures designated as containing proprietary information, Entergy presented Westinghouse’s updated and “refined” fatigue evaluations.¹⁰

⁵ See Letter from Fred Damico, Entergy, to NRC, NL-08-021, Attachment 2, at 15 (Jan. 22, 2008) (NYS000351) (Entergy committed to “update the fatigue usage calculations using refined fatigue analyses to determine valid CUFs less than 1.0 when accounting for the effects of reactor water environment.”).

⁶ See WCAP-17149-P, Rev. 1 (July 2010) (NYS000363); CN-PAFM-09-21 (Jun. 2010) (NYS000364); CN-PAFM-09-67 (Jun. 2010) (NYS000365); CN-PAFM-09-77 (Jun. 2010) (NYS000366); CN-PAFM-09-79 (Jun. 2010) (NYS000367).

⁷ See Entergy Communication, NL-10-082, Attachment 1, at 2 (NYS000352) (August 2010) (Kwong Decl., Att. 12).

⁸ See Commitment 43, Letter from Fred Damico to NRC, NL-11-032, Attachment 1, at 26 (March 2011) (NYS000151) (Under Commitment 43, Entergy will review its ASME fatigue evaluations to determine whether NUREG/CR-6260 locations are the limiting locations at IP2 and IP3).

⁹ See Entergy Letter NL-13-052, Attachment 2 at 20 (NYS000501) (May 2013) (Under Commitment 49, Entergy committed to “[r]ecalculate each of the limiting CUFs in Section 4.3 of the LRA for the reactor vessel internals to include the reactor coolant environment effects (F_{en}).”)

¹⁰ See CN-PAFM-12-35, at 40-41 (NYS000510) (updated); CN-PAFM-13-32 (NYS000511) (refined), CH-PAFM-13-40 (NYS000512) (refined), CN-RIDA-13-57 (NYS000525A-B) (refined), and CN-PAFM-13-32, Rev. 3 (ENT000683) (refined).

In this proceeding, the State’s expert witness, Dr. Richard Lahey, has expressed his concern that the iterative process used by Westinghouse, [REDACTED]

[REDACTED]

[REDACTED].¹¹ Dr. Lahey has also expressed his concern that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].¹²

The Board’s July 2015 Order and the State’s Interlocutory Appeal

This motion is not the Board’s first consideration of a dispute surrounding Westinghouse fatigue evaluations in this proceeding. In April 2015, the State moved to challenge the proprietary designations of four Westinghouse documents that present fatigue evaluations, submitted in support of Entergy’s LRA for the Indian Point facilities.¹³ By its Order of July 2015, the Board denied the State’s motion, finding that the Westinghouse documents “contain confidential and trade secret information within the purview of 10 C.F.R. § 2.390(a)(4).”¹⁴ The Board noted the State’s argument that Westinghouse would not suffer substantial competitive injury from disclosure of the calculation notes because Westinghouse had already publicized certain aspects of the notes in industry publications and presentations.¹⁵ However, the Board found that the information in the calculation notes, “if taken piece-by-piece or together, would

¹¹ See, e.g., Revised Pre-filed Written Testimony of Richard T. Lahey, Jr. in support of Contention NYS-26B/RK-TC-1B (June 2, 2015) (NYS000530); Supplemental Reply Statement of Position of the State of New York and Riverkeeper, Inc. in support of Contention NYS-26B/RK-TC-1B (September 9, 2015) (NYS000570).

¹² *Id.*

¹³ See State of New York Motion to Withdraw the Proprietary Designation of Various Pressurized Water Reactor Owners’ Group and Westinghouse Documents (Apr. 9, 2015).

¹⁴ See Order (Denying New York Motion to Withdraw Proprietary Designation) (July 20, 2015), at 7.

¹⁵ *Id.* at 5.

enable a competitor to undercut Westinghouse's market position."¹⁶ The Board appeared not to consider the State's proposal that Entergy produce public redacted versions of the Westinghouse calculation notes. In August 2014, the State petitioned the NRC Commissioners for interlocutory review of the Board's July 2015 Order.¹⁷

NYS's Objection to the Proprietary Designations of the Westinghouse Documents

The State brings the current motion after exhausting the procedures set forth in the Protective Order.¹⁸ On September 17, 2015, the State provided its Notice of Objection to counsel for Entergy, requesting that Entergy provide public disclosure of the Westinghouse documents.¹⁹ In its Notice of Objection, the State asserted that "Entergy's request to entirely withhold" the information contained in the documents as proprietary was "overly broad."²⁰

On September 30, counsel for the State and Entergy held a telephone conference to discuss the State's Notice of Objection. In an effort to resolve the issue without litigation, the

¹⁶ *Id.* at 7.

¹⁷ 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). The State's petition is fully briefed and currently before the Commissioners for review.

¹⁸ See *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Protective Order (unpublished) ("Protective Order") at ¶¶ C, D (Sept. 4, 2009) (ML092470105).

¹⁹ See Kwong Decl., Att. 13. The State's Notice of Objection also listed other documents, but the State later retracted its objections to those documents in its consultations with counsel for Entergy. On August 31, 2015, the State expressed its initial concern over Entergy's filing of proprietary versions of its Statements of Position and Prefiled Testimony of August 10, 2015, and asked Entergy to file redacted, public versions of these documents. (Kwong Decl., Att. 14). A few days later, on September 3, counsel for Entergy responded that it "does not agree that the Protective Order requires redacted filings," but offered to produce redacted versions of these documents within two weeks. (Kwong Decl., Att. 15). In its September 17, Notice of Objection, the State listed Entergy's SOPs and PFTs to preserve its objection to the proprietary designation of these documents. (Kwong Decl., Att. 13). The next day, on September 18, Entergy filed redacted filings for the Track 2 Contentions. (Kwong Decl., Att. 16). Based on these redacted filings, the State informed Entergy during consultations that it would agree to withdraw its initial objection with respect to Entergy's initially filed SOPs and PFTs on the Track 2 Contentions. The State also agreed to withdraw its objection to one Westinghouse document, NYS000366, which had been inadvertently listed on the State's September 17 Notice of Objection. The current motion challenges Entergy's proprietary designations over the entirety of the remaining 10 documents listed in the State's Notice of Objection, as set forth above. (Kwong Decl., at 1).

²⁰ *Id.*

State proposed – without prejudice to its objection – to modify the scope of its challenge if Entergy would file public redacted versions of the documents. The State narrowed its interest to the data outputs reported in the documents, *i.e.*, the CUF values, rather than the underlying methodologies. The State expressed its view that the CUF values in the listed documents are mere revisions of CUF values being relied on by Entergy in its LRA and already provided in public form in this proceeding, and that the disclosure of these revised CUF values, without the underlying methodologies, could not harm Westinghouse’s competitive position. On October 5, Entergy, through its counsel, declined to produce public versions of the documents, and did not address the State’s offer to resolve its objections by filing public redacted versions of the documents.²¹ As described in the enclosed 10 C.F.R. § 2.323(b) Certification, despite its sincere efforts to do so, the State has been unable to resolve the issues raised in this motion. The State therefore seeks an order to compel Entergy and Westinghouse to produce public versions of the documents in dispute.

APPLICABLE LEGAL STANDARDS

The Protective Order and NRC Regulations

Under NRC regulations, the “disclosure of information in NRC files shall be the rule, and nondisclosure the exception.”²² In this proceeding, requests for nondisclosure of allegedly proprietary information are governed by the Board’s September 4, 2009 Protective Order. The Protective Order provides that the Initial Holder of information that is relevant to this proceeding holds the burden of proving that the information is privileged or confidential.²³ The Board can then determine, as applicable, whether, on balance, protection of the information contained in the

²¹ See Kwong Decl., Att. 17.

²² *Westinghouse Electric Corp. v. United States Nuclear Regulatory Commn.*, 555 F.2d 82, 87 (3d Cir. 1977).

²³ See Protective Order, at ¶ D.

document from public disclosure is warranted under 10 C.F.R. § 2.390.²⁴ The Board makes the ultimate determination on “whether information sought to be withheld from public disclosure . . .

(i) [i]s a trade secret or confidential or privileged commercial or financial information; and (ii) [i]f so, should be withheld from public disclosure.”²⁵ In making this determination, the Board considers the following factors:

(i) Whether the information has been held in confidence by its owner; (ii) Whether the information is of a type customarily held in confidence by its owner and, except for voluntarily submitted information, whether there is a rational basis therefor; (iii) Whether the information was transmitted to and received by the Commission in confidence; (iv) Whether the information is available in public sources; (v) Whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.²⁶

Even if a document contains confidential commercial information, the Board must “determine whether the right of the public to be fully apprised as to the bases for and effects of the proposed action outweighs the demonstrated concern for protection of a competitive position, and whether the information should be withheld from public disclosure under this paragraph.”²⁷

The Protective Order contemplates the use of redaction to protect proprietary information from public release. For example, upon the request by NRC Staff counsel or by a Participant to the proceeding, the Initial Holder must “produce a copy of the document with the proprietary information unredacted.”²⁸ Additionally, the Protective Order explicitly provides for the use of redaction as a means of resolving disputes between the parties bound by the Protective Order that

²⁴ *Id.*

²⁵ *Id.* § 2.390(b)(3).

²⁶ *Id.* § 2.390(b)(4).

²⁷ *Id.*, § 2.390(b)(5).

²⁸ *See* Protective Order, at ¶ A.

relate to the public release of information in a proprietary document.²⁹

The Freedom of Information Act

Because 10 C.F.R. § 2.390 is part of the NRC’s regulatory framework for implementing the Freedom of Information Act’s (“FOIA”)³⁰ requirements for ensuring public access to agency documents, judicial interpretations of FOIA’s disclosure requirements are instructive.³¹ The Supreme Court has described the FOIA exemptions as “limited exemptions” that “do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.”³²

FOIA Exemption 4, like 10 C.F.R. § 2.390(a)(4), exempts from public disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential[.]” Information has been construed to be “commercial” under Exemption 4 “when the provider of the information has a commercial interest in the information submitted to the agency.”³³ However, commercial or financial information is only considered confidential “if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.”³⁴ The D.C. Circuit has also held that in certain situations where a private entity has voluntarily submitted allegedly exempt information to a government situations, such information will be considered “‘confidential’ for the purpose of Exemption 4 if it is of a kind that would

²⁹ See Protective Order, at ¶ C.

³⁰ 5 U.S.C. § 552.

³¹ See *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-05-08, 61 N.R.C. 129 at 163 (Commission determined that 10 C.F.R. § 2.790 (now, § 2.390) embodied the standards of FOIA’s Exemption 4 for trade secrets and confidential commercial/financial information).

³² *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

³³ *Baker & Hostetler, LLP v. United States Dept. of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006).

³⁴ *National Parks and Conservation Assoc. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted).

customarily not be released to the public by the person from whom it was obtained.”³⁵

The NRC Approach to Open Government

The NRC has committed itself to an open, accountable, and accessible government. According to the NRC, this commitment “explicitly recognizes that the public must be informed about, and have a reasonable opportunity to participate meaningfully in, the NRC’s regulatory processes.”³⁶ This commitment to transparency promotes two goals: first, to provide the public with “understandable information about the NRC’s role, processes, activities, and decisions.”³⁷ Second, transparency promotes public participation so that “NRC can make regulatory decisions with the benefit of information from a wide range of stakeholders.”³⁸ The NRC demands that these stakeholders, which include the public, “must have a reasonable opportunity to participate meaningfully in the NRC’s regulatory processes.”³⁹

ARGUMENT

The Board should issue an order to compel the public production of the 10 Westinghouse Documents. Westinghouse and Entergy cannot demonstrate that the information contained in these documents, in particular, the bare CUF_{en} values and cycle limits, is confidential commercial information that should be shielded from the public. The public interest in the information contained in these documents outweighs the possible harm, if any, that may result to the competitive position of Westinghouse and Entergy from the disclosure of the documents. At minimum, the Board should require the public disclosure of the data outputs, e.g., CUF_{en} values

³⁵ *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc), cert. denied 507 U.S. 984 (1993).

³⁶ U.S. NRC Strategic Plan, Fiscal Years 2008-2013, at 16 (available at: <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1614/v4/sr1614v4.pdf>).

³⁷ U.S. NRC Open Government Plan Addendum, Activities for 2014-2015, at 2 (May 13, 2014) (available at: <http://pbadupws.nrc.gov/docs/ML1410/ML14101A097.pdf>).

³⁸ *Id.*

³⁹ *Id.*

and associated summary statements contained in seven of the 10 Westinghouse Documents. The information that the State seeks to make public is highly relevant inasmuch as it forms the basis of Entergy's LRA and is being relied on by NRC Staff in evaluating Entergy's LRA.

Westinghouse and/or NRC have already publicly released this information in various forms in the course of this proceeding. Westinghouse has itself publicized its approach to fatigue analysis in its promotional materials and at industry events. The Board should follow the general presumption of public access, embodied in the NRC regulations, in FOIA, in NRC policy pronouncements, and in the Protective Order that governs the disclosure of information in this proceeding, and compel the public disclosure of this information.

I. Entergy and Westinghouse Bear the Burden of Showing Why the Westinghouse Documents Should Not be Publicly Disclosed

Entergy and Westinghouse cannot establish that the documents are proprietary in their entirety, and have declined multiple opportunities to offer redacted versions of the documents. Pursuant to the Protective Order in this proceeding, NRC regulations, and NRC policy pronouncements, the Westinghouse documents have a presumption of public availability. Entergy and Westinghouse have the burden to show why any information within the Westinghouse documents should be considered proprietary. To prevail on their burden, Entergy and Westinghouse must demonstrate that the Westinghouse Documents, or portions of these documents, are privileged or confidential.⁴⁰ Westinghouse should, at minimum, identify any competitor(s) in the service provider market for conducting pressurized water reactor fatigue evaluations, and provide information to establish that this is indeed a competitive market for these services. Westinghouse should also describe the "ease or difficulty with which the

⁴⁰ See Protective Order, at ¶ D; 10 C.F.R. § 2.390(b)(3)(v).

information could be properly acquired or duplicated by others.”⁴¹ Finally, Westinghouse should explain with specificity and by competent evidence how public disclosure of information specific to Indian Point will cause Westinghouse substantial harm.⁴² In the absence of such a showing, the Board should grant the State’s motion and compel the public production of the ten Westinghouse documents, or in the alternative, of some portion of them.

II. The Board Should Order the Public Disclosure of CUF Results and Associated Summaries in Seven of the Westinghouse Documents

The results of Westinghouse’s fatigue evaluations for IP-2 and IP-3 are not trade secrets or confidential commercial information, in some instances have already been public disclosed, and are necessary for the public to understand NRC’s decision-making with regard to Entergy’s LRA. At minimum, the Board should order the public disclosure of the CUF_{en} evaluations and transient cycle limits, and associated background, summary, and conclusion statements, which are contained in the following Westinghouse Documents (and identified in the “Key report sections” of each entry):

Declaration Attachment Number	Exhibit Number	Description, Date & Pages	Summary and Key Report Sections
2	ENT000681	Westinghouse, WCAP-17199-P, Rev. 1, Environmental Fatigue Evaluation for Indian Point Unit 2, Dec. 2014, 95 pages.	<div style="background-color: black; height: 15px; width: 100%;"></div> <div style="background-color: black; height: 15px; width: 95%;"></div> <div style="background-color: black; height: 15px; width: 80%;"></div> <div style="background-color: black; height: 15px; width: 100%;"></div> <div style="background-color: black; height: 15px; width: 85%;"></div> <div style="background-color: black; height: 15px; width: 60%;"></div>
3	ENT000682	Westinghouse, WCAP-17200-P, Rev. 1, Environmental Fatigue Evaluation for Indian Point Unit 3, Dec. 2014, 89 pages.	<div style="background-color: black; height: 15px; width: 100%;"></div> <div style="background-color: black; height: 15px; width: 95%;"></div> <div style="background-color: black; height: 15px; width: 80%;"></div> <div style="background-color: black; height: 15px; width: 100%;"></div> <div style="background-color: black; height: 15px; width: 85%;"></div> <div style="background-color: black; height: 15px; width: 60%;"></div>

⁴¹ *Id.* § 2.390(b)(5).

⁴² Entergy and Westinghouse did not present such information during the consultation process. Should Westinghouse and Entergy hereafter seek to make such a showing, the State reserves the right to depose Westinghouse’s employees, and file a reply.

Declaration Attachment Number	Exhibit Number	Description, Date & Pages	Summary and Key Report Sections
4	ENT000683	Westinghouse, Calculation Note CN-PAFM-13-32, Rev. 3 “Indian Point Unit 2 (IP2) and Unit 3 (IP3) Refined EAF Analyses and EAF Screening Evaluations,” June 25, 2015, 104 pages.	[REDACTED]
5	ENT000688	Westinghouse, Calculation Note CN-PAFM-13-40, Rev. 1, “Indian Point Unit 2 and Unit 3 Pressurizer Spray Nozzle Transfer Function Database Development and Environmental Fatigue Evaluations,” Jan. 15, 2015, 138 pages.	[REDACTED]
6	ENT000689	Westinghouse, WCAP-12191, Rev. 4, Transient and Fatigue Cycle Monitoring Program Transient History Evaluation Report for Indian Point Unit 2, Dec. 2014, 52 pages.	[REDACTED]
7	ENT000690	Westinghouse, WCAP-16898-P, Rev.1, Indian Point Unit 3 Transient and Fatigue Cycle Monitoring Program Transient History Evaluation, May 2015, 72 pages.	[REDACTED]
11	NYS000367	Westinghouse – Calculation Note, CN-PAFM-09-79, IPECPROP00057559, Indian Point Unit 2 Boron Injection Tank Nozzle Environmental Fatigue Evaluations, Jun. 18, 2010, 76 pages.	[REDACTED]

Westinghouse can, and should, employ redaction to limit public disclosure of genuinely proprietary information. In fact, redactions have been applied to Westinghouse documents in the past. For example, during the course of NRC’s acceptance review of Westinghouse’s WESTEMS fatigue evaluation software, Westinghouse applied redactions to create a non-

proprietary version of its Topical Report for the WESTEMS computer code.⁴³ Furthermore, it is highly revealing that Entergy, in its production of redacted versions of its Statements of Position and Prefiled Testimony on the Track 2 Contentions, limited its use of redaction to only small amounts of these documents, despite having initially filed the entirety of these documents with proprietary designations.⁴⁴

A. The CUF results and associated statements in the seven Westinghouse Documents do not constitute trade secrets or confidential commercial information

Westinghouse would incur no harm to its competitive position with the public disclosure of updated CUF_{en} values or transient limits, or the associated background, summary and conclusion statements in these seven Westinghouse Documents. In particular, during the dispute resolution process established by the Protective Order, Entergy and Westinghouse failed to establish any justification at all for withholding the summary tables of CUF_{en} output values for reactor vessel components contained in these documents.⁴⁵ The disclosure of CUF_{en} values and the associated information, alone, could not possibly enable any competitor of Westinghouse to discern the methods and assumptions underlying the WESTEMS analysis. For example, Section 2 (Summary of Results and Conclusions) of CN-PAFM-13-32, Rev. 3, entitled “IP2 and IP3 Refined EAF Analyses and EAF Screening Evaluations” provides results of Westinghouse’s

⁴³ See “Topical Report on ASME Section III Piping and Component Fatigue Analysis Utilizing the WESTEMS Computer Code,” WCAP-17577-NP, Rev. 2, June 2013 (ML13170A026) (Kwong Decl., Att. 18).

⁴⁴ See public redacted versions, filed by Entergy on September 18, 2015, of Entergy’s Statement of Position Regarding Contention NYS-25 (Embrittlement), Entergy’s Statement of Position Regarding Contention NYS-26B/RK-TC-1B (Metal Fatigue), Entergy’s Revised Statement of Position Regarding Contention NYS-38/RK-TC-5 (Safety Commitments), Testimony of Entergy Witnesses Nelson F. Azevedo, Robert J. Dolansky, Alan B. Cox, Jack R. Stronsnider, Timothy J. Griesbach, Randy G. Lott, and Mark A. Gray Regarding Contention NYS-25 (Embrittlement), Revised Testimony of Entergy Witnesses Nelson F. Azevedo, Alan B. Cox, Jack R. Stronsnider, Randy G. Lott, Mark A. Gray, and Barry M. Gordon Regarding Contention NYS-26B/RK-TC-1B (Metal Fatigue), and Revised Testimony of Entergy Witnesses Nelson F. Azevedo, Robert J. Dolansky, Alan B. Cox, Jack R. Stronsnider, Timothy J. Griesbach, Barry M. Gordon, Randy G. Lott, and Mark A. Gray Regarding Contention NYS-38/RK-TC-5 (Safety Commitments).

⁴⁵ See, e.g., CN-PAFM-13-32, Rev. 3 at 7-9 (ENT000683) (summary tables of CUF_{en} values for reactor components).

refined EAF evaluations for the IP2/IP3 equipment and piping locations. Tables 2-1 through 2-4 provide summaries of IP2 and IP3 EAF results for various RVI and equipment locations. Tables 2-5 and 2-6 provide a summary of revised screening CUF_{en} values for IP2 and IP3 piping locations based on a refined fatigue analysis.

While these tables reveal relevant information regarding the condition of components in Entergy's aging nuclear facilities, they reveal next to nothing about Westinghouse's analytical or manufacturing processes and do not appear to contain trade secrets or confidential commercial information. Similarly, significant portions of the notes – such as cover pages, tables of contents, lists of acronyms, definitions, and references, general descriptions of the bases for the CUF_{en} calculations grounded in publically available NUREG or ASME code volumes, and the final CUF_{en} output values calculated for reactor components – should not be considered proprietary. Yet, Westinghouse has refused to release even these summary tables through the use of redaction. Equally surprising – and unsupportable – is Westinghouse's reluctance to disclose the documents' cover pages and sections that discuss background and purpose.

B. The CUF results and summaries in the seven Westinghouse Documents have not been held in confidence by Westinghouse, and is already available in public sources

Much of the information contained in the seven Westinghouse Documents identified above is already available to the public. Indeed, this includes the results of various Westinghouse environmentally-assisted fatigue screening evaluations, including such evaluations performed by Westinghouse in support of Entergy's LRA for the Indian Point facilities.

Entergy has already disclosed previous iterations of the CUF evaluations in its public filings to the NRC in this proceeding. For example, in its initial 2007 LRA, Entergy presented a summary table of CUF results for a variety of NUREG/CR-6260 limiting locations, which it

filed publicly.⁴⁶ In 2010, Entergy was forced to adopt its Commitment 33 at the request of NRC, under which Entergy recalculated the 2007 CUF results to include adjustments for environmental factors. Entergy, through its counsel, presented the adjusted CUF results for the various NUREG/CR-6260 limiting locations to the NRC in another summary table, which Entergy also filed publicly.⁴⁷ Both presentations involved CUF evaluations for a variety of different components at the Indian Point facilities.

Subsequently, NRC requested that Entergy make fatigue evaluations of several non-NUREG/CR-6260 locations, and to consider certain conservatisms, that NRC believed were not adequately considered in the previous fatigue evaluations presented in Entergy's LRA. Entergy presented these results to NRC in 2012 and 2013.⁴⁸ Several of the Westinghouse Documents are 2014 and 2015 revisions of these same CUF values that Entergy has already disclosed publicly. However, none of the results of these updated fatigue evaluations have been publicly disclosed in 2007 and 2010.

Westinghouse has disclosed various other CUF_{en} values in its public filings to the NRC. For example, Entergy reports the CUF_{en} values of thermowells associated with Indian Point pressurizers (maximum CUF of 0.021), for an IP-2 Loop 3 Accumulator Nozzle (0.95), an IP-2 pressurizer surge nozzle (0.264) and an IP-3 pressurizer surge line nozzle (0.9612).⁴⁹ Similarly, NRC has also disclosed CUF_{en} values in its various public filings. For example, a publicly-available 2013 NRC Staff inspection report for IP-2 discloses the CUF_{en} result for a pressurized nozzle (reported to be 0.999 at 60 years).⁵⁰ In connection with relicensing proceedings at other

⁴⁶ Entergy's 2007 LRA, Tables 4.3-13 and 4.3-14 (ENT00015B)

⁴⁷ See Entergy Communication, NL-10-082, Attachment 1, at 2 (NYS000352) (August 2010).

⁴⁸ These include the Westinghouse calculation notes that the State previously moved to be disclosed to the public.

⁴⁹ See Letter NL-08-057, Entergy to NRC, Attachment 2, at 12-13 (March 24, 2008) (NRC000109).

⁵⁰ NRC License Renewal Team Inspection Report 05000247/2013010 at 7 (ML13263A020).

nuclear power facilities, one NRC Board has publicly listed various CUF_{en} values.⁵¹

C. The public’s right to understand the basis of NRC’s decision-making with regard to the CUF results in the seven Westinghouse Documents outweighs any possible competitive harm to Westinghouse

Even assuming the calculation notes contain confidential commercial or financial information – which the State disputes – the “right of the public to be fully apprised as to the bases for and effects of the proposed action outweighs the demonstrated concern for protection of a competitive position.” 10 C.F.R. 2.390(b)(5).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁵² [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁵³ The public has an interest in understanding whether Entergy’s LRA sets forth reasonable assurances that the Indian Point facilities will continue to operate safely for a period 20 years after its designed lifespan. The most direct evidence of this is the fatigue evaluations for critical components in the reactor pressure vessel and reactor vessel internals, *i.e.*, how close the CUF_{en} values are to 1.0, whether they exceed 1.0, and the adequacy and reliability of the methods used to generate those CUF values. In particular, the CUF_{en} values inform NRC’s determination of whether or not Entergy is able to fulfill License Renewal Application

⁵¹ See, e.g., *Entergy Nuclear Vermont Yankee, LLC*, (Vermont Yankee Nuclear Power Station), LBP-08-25, 68 N.R.C. 763, 818-819 (2008).

⁵² See, e.g. CN-PAFM-13-40, Rev. 1, at 16-18 (Kwong Decl., Att. 5).

⁵³ See, e.g., Revised Pre-filed Written Testimony of Richard T. Lahey, Jr. in support of Contention NYS-26B/RK-TC-1B (June 2, 2015) (NYS000530); Supplemental Reply Statement of Position of the State of New York and Riverkeeper, Inc. in support of Contention NYS-26B/RK-TC-1B (September 9, 2015) (NYS000570).

Commitments 43 and 49. A CUF_{en} value of 1.0 or more requires corrective action.⁵⁴

The disclosure of the summary and conclusion sections of the Westinghouse documents to the public would enable the public to understand the NRC's decision-making surrounding the sufficiency or insufficiency of Entergy's FMP. It would also shed light on the State's Contentions that Entergy has not provided reasonable assurance that the effects of aging will be managed during the period of extended operation. Furthermore, as courts have recognized for FOIA purposes, mere data, without more, does not rise to the level of a protected trade secret or confidential commercial information.⁵⁵

III. Alternatively, the Board Should Order the Disclosure of the 10 Westinghouse Documents in Their Entirety

As discussed above in Point II, the State objects to Entergy and Westinghouse's proprietary designations over portions of the seven Westinghouse Documents, i.e., CUF_{en} values, allowable transient cycles, and associated summaries. The State also has an additional and more general objection to Entergy and Westinghouse's decision to withhold public disclosure of these seven Westinghouse Documents in their entirety. This general objection extends to Westinghouse's efforts to shield from public disclosure the entire contents of the following three Westinghouse Documents:

Declaration Attachment Number	Exhibit Number	Description, Date & Pages	Summary and Key Report Sections
8	NYS000363	Westinghouse, WCAP-17149-P, Rev. 1, Evaluation of Pressurizer Insurge/Outsurge Transients for Indian Point Unit 2 and Westinghouse, WCAP-17162-P, Rev. 1, Evaluation of Pressurizer Insurge/Outsurge Transients for Indian Point Unit 3, July 2010, 111 pages.	[REDACTED]

⁵⁴ See LRA Commitment 49, Attachment 1 to Letter from Fred Dacimo to USNRC Document Control Desk, NL-13-052 (May 7, 2013), at 9.

⁵⁵ See *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1289, n. 23 (D.C. Cir. 1983) (noting the distinction between data relating to processes and methods, which are the product of private innovation and eligible for protection, and safety and efficacy data, which are in the public interest to disclose).

Declaration Attachment Number	Exhibit Number	Description, Date & Pages	Summary and Key Report Sections
9	NYS000364	Westinghouse – Calculation Note, CN-PAFM-09-21, Indian Point Units 2 & 3 Charging Nozzles Environmental Fatigue Evaluation, Jun. 18, 2010, 85 pages.	[REDACTED]
10	NYS000365	Westinghouse - Calculation Note, CN-PAFM-09-67, Pressurizer Surge Nozzle and Lower Head Transfer Functions for Indian Point Units 2 and 3, Jun. 18, 2010, 86 pages.	[REDACTED]

A. Westinghouse has already publicly disclosed its methodologies for conducting environmental fatigue analysis using WESTEMS

Just as the publication of CUF values and accompanying summary remarks will undoubtedly cause no competitive harm to Westinghouse, neither would the public disclosure of the methods and analyses in these Westinghouse documents. There is little, if anything, that is “secret” about Westinghouse’s methodology for screening EAF and calculating cumulative usage factors because Westinghouse has itself publicized its methodology in industry publications and presentations. Westinghouse cannot now claim that public disclosure of documents reflecting the application of its methods will cause it substantial competitive harm.

In 2014, Mr. Mark Gray presented a paper entitled “License Renewal Environmental Fatigue Screening Application,” at a meeting of the ASME.⁵⁶ In that paper, Mr. Gray and his co-author, Christopher Kupper, who are both Westinghouse employees who have either authored or overseen the development of the fatigue evaluations in the Westinghouse documents at issue in this motion, describe in detail Westinghouse’s methodology for performing environmentally-assisted fatigue screening analyses in support of license renewal applications. The document presents a veritable “roadmap” for performing an EAF screening evaluation such as that performed by Westinghouse in support of Entergy’s LRA and summarized in several of the

⁵⁶ See Kupper, C. and M. Gray, “License Renewal Environmental Fatigue Screening Application,” PVP2014-29093, ASME Pressure Vessels and Piping Conference in Anaheim, California (2014) (“ASME Paper”) (NYS000513) (Kwong Decl., Att. 19).

documents which are the subject of this motion. A section of the paper entitled “Method Overview” provides a summary of the process elements of the overall screening method.⁵⁷ Each of these process elements is explored in greater depth in subsequent sections entitled “Data Collection,” “Transient Sections,” “Screening Fen Application,” “Stress Basis Comparison,” “Leading Location Identification,” “Application of Methodology,” and “Phase 2 EAF Screening.”⁵⁸ Mr. Gray also provides an outline for completing a subsequent, refined EAF analysis:

PHASE 2 EAF SCREENING

The EAF screening process described above can be considered a first-pass evaluation (Phase 1) designed to identify the potential locations of concern for further EAF analysis. The next step of the EAF screening process (Phase 2) is to perform a more refined EAF evaluation for the identified leading locations if required.

The goal of Phase 2 is to minimize the number of detailed analyses (e.g., finite element or integrated CUF_{en} calculations) required for the identified leading locations. For this step, the screening CUF_{en} values can potentially be reduced below 1.0 by using one (or a combination) of the following methods:

1. Application of projected transient cycles for 60 years
2. Reduction of conservatism in existing stress calculations (without performing any new detailed analyses)
3. Comparison with similar component detailed analyses
 F_{en} refinement

The ASME paper adds to Westinghouse’s disclosures in its own marketing and promotional materials for WESTEMS, which include an overall description and benefits of WESTEMS for “[ASME] design analysis and online fatigue monitoring purposes.”⁵⁹

⁵⁷ ASME Paper, at 2.

⁵⁸ ASME Paper, at 3-7.

⁵⁹ See “WESTEMS™ Integrated Diagnostics and Monitoring Systems,” Westinghouse Electric Co. (March 2015) (Kwong Decl., Att. 20).

Starting with Mr. Gray's ASME paper and the WESTEMS promotional document, it would take little effort for a competitor to identify and simulate the basic elements of Westinghouse's EAF screening and refined analysis strategy and technique. In the ASME paper, Mr. Gray states that Westinghouse's methodologies are similar to those set forth in an August 2012 report by the Electric Power Research Institute ("EPRI").⁶⁰ Indeed, Mr. Gray points out that "the only fundamental difference" between the two methods is the comparison of component fatigue usage on a common basis with respect to the stress analysis methods.⁶¹ According to the ASME paper, Westinghouse's approach utilizes a large database of component fatigue evaluations and related experience to establish the analysis method basis of comparison.⁶²

Much information about Westinghouse's fatigue evaluation program WESTEMS has also been publicly disclosed in NRC Staff documents. In a NRC Safety Evaluation Report that evaluates component fatigue analysis using WESTEMS, the NRC explains that:

The WESTEMSTM computer code has the ability to compute a stress history for given piping and components from temperature, pressure, and moment transient input data. Fatigue usage is then evaluated from the stress history. The WESTEMSTM methodology to calculate stress and cumulative usage fatigue (CUF) involves developing transfer functions (stress tensors caused by unit pressure, unit moment, and unit temperature step load increase or decrease) to convert transient data to stress versus time for a given component to address NB 3200 requirements.⁶³

NRC's Safety Evaluation Report for WESTEMS goes on to present a detailed technical evaluation, including a description of WESTEMS' "two phase process" for conducting fatigue analysis, which can include "reduc[ing] conservatism" by eliminating "redundant peaks," and

⁶⁰ See "EAF Screening: Process and Technical Basis for Identifying EAF Limiting Locations," EPRI Report 1024995 (August 2012) (Kwong Decl., Att. 21).

⁶¹ ASME Paper, at 2.

⁶² *Id.*

⁶³ Safety Evaluation Report, "Topical Report on ASME Section III Piping and Component Fatigue Analysis Utilizing the WESTEMSTM Computer Code" (WCAP-17577, Revision 2) (ENT000687).

how “revised user inputs” are a part of this process.⁶⁴ The Safety Evaluation Report goes on to provide an “Overview of WESTEMS™ Fatigue Analysis,” which presents in step-wise fashion a “roadmap” for conducting component fatigue analysis using WESTEMS, in the same manner as performed by Westinghouse analysts and described in the Westinghouse documents at the subject of this motion:

3.4 Overview of WESTEMS™ Fatigue Analysis

The WESTEMS™ design analysis module calculates the stresses required by ASME Section III, Subsections NB 3200 and NB 3600, and provides a comparison of the calculated results to those allowed under the ASME Code. Westinghouse provided the general steps for the fatigue analysis calculation as follows:

- (1) Calculate primary plus secondary stress intensity ranges.
- (2) Calculate Simplified Elastic Plastic penalty factors (Ke) for each stress range pair.
- (3) Calculate total stress intensity ranges.
- (4) Calculate alternating stress intensity (Sa) including Ke required by the code.
- (5) Calculate fatigue usage factors using the Sa value and corresponding cycles.
- (6) Calculate thermal stress ratchet requirements.

The staff reviewed the calculation process and found that it meets the ASME Code requirements and that the steps are in the right order. Accordingly, the staff found this process acceptable.⁶⁵

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

⁶⁴ *Id.* at 4-5.

⁶⁵ *Id.* at 8.

B. The Westinghouse Documents do not Contain Trade Secrets or Confidential Commercial Information

Entergy and Westinghouse bear the burden of demonstrating that the ten Westinghouse Documents contain trade secrets or confidential commercial information. The Westinghouse Documents, however, all pertain specifically to fatigue analysis performed at the Indian Point facilities. No competitive harm would result to Westinghouse because the information has little to no value outside this proceeding. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁶⁶

[REDACTED] Entergy and Westinghouse bear the burden of demonstrating that the public disclosure of analysis performed specifically for the Indian Point facilities would likely cause Westinghouse substantial competitive injury.

C. Disclosure of the Westinghouse Documents is in the Public Interest

The Westinghouse Documents address important industry and plant-specific technical issues directly pertinent to NRC’s evaluation of Entergy’s License Renewal Applications for IP-2 and IP-3. These documents also identify issues relevant to NRC’s assessment of Entergy’s compliance with its current operating licenses. The concerns of Entergy and Westinghouse are an insufficient basis for depriving the public access to these documents, particularly if the information contained in that document is relevant to NRC’s evaluation of Entergy’s compliance with its current operating licenses for IP-2 and IP-3, and its consideration of Entergy’s LRAs for those facilities.

⁶⁶ CN-PAFM-09-67, at 10 (NYS000365).

CONCLUSION

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

Executed on October 19, 2015

Signed (electronically) by

Lisa S. Kwong
Mihir A. Desai
John J. Sipos
Assistant Attorneys General
Office of the Attorney General
for the State of New York
The Capitol
Albany, New York 12224
(518) 776-2400
Lisa.Kwong@ag.ny.gov
Mihir.Desai@ag.ny.gov
John.Sipos@ag.ny.gov

10 C.F.R. § 2.323 Certification

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

Executed on October 19, 2015

Signed (electronically) by

Lisa S. Kwong
Assistant Attorney General
Office of the Attorney General
for the State of New York
The Capitol
Albany, New York 12224
(518) 776-2422
Lisa.Kwong@ag.ny.gov