

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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In the Matter of

ENERGY NUCLEAR OPERATIONS, INC.

(Indian Point Nuclear Generating Units 2 and 3)

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

CLI-15-24

MEMORANDUM AND ORDER

The State of New York seeks review of the Atomic Safety and Licensing Board's recent order denying New York's motion to withdraw a proprietary designation from certain documents produced by Entergy Nuclear Operations, Inc. in this license renewal proceeding.¹ As discussed below, we find that New York has not met the standards for interlocutory review and we therefore deny review at this time.

¹ Order (Denying New York Motion to Withdraw Proprietary Designation) (July 20, 2015) (unpublished) (July 20 Order); see *State of New York Petition Pursuant to 10 C.F.R. § 2.341 for Commission Interlocutory Review of the July 20, 2015 Atomic Safety and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 Designation* (Aug. 14, 2015) (Petition) (non-public).

I. BACKGROUND

New York has been a party to this license renewal proceeding since its inception.² In August 2009, the parties negotiated a Protective Order that they jointly submitted to the Board for approval.³ The Board issued the Protective Order shortly thereafter; that Protective Order governs the disclosure and use in this proceeding of documents that Entergy (or any other participant) claims contain proprietary trade secrets and/or proprietary commercial or financial information.⁴

As part of its mandatory disclosures, Entergy identified and disclosed the existence of the five documents here at issue, which it designated as proprietary information.⁵ Following requests for disclosure, Entergy produced the documents, unredacted, to New York under the Protective Order. Four of these documents are Calculation Notes concerning environmentally-assisted fatigue prepared by Westinghouse Electric Company, LLC (Westinghouse).⁶ The fifth document is an internal memorandum prepared by the Pressurized Water Reactor Owners'

² See *generally* LBP-08-13, 68 NRC 43 (2008) (ruling on standing and contention admissibility).

³ See *Joint Motion for Entry of a Protective Order* (Aug. 14, 2009).

⁴ Protective Order (Sept. 4, 2009) (unpublished).

⁵ See *Entergy's Answer Opposing New York State's Motion to Strike Proprietary Designations* (Apr. 20, 2015), at 3 n.11 (listing disclosure updates).

⁶ New York has identified the Calculation Notes as evidentiary exhibits for the upcoming hearing on "Track 2" contentions. See Pre-filed Ex. NYS000366, Indian Point Units 2 & 3 Accumulator Nozzle Environmental Fatigue Evaluation, CN-PAFM-09-77 (2010) (ADAMS accession no. ML11356A371) (non-public); Pre-filed Ex. NYS000510, Indian Point Unit 2 and Unit 3 EAF Screening Evaluations, CN-PAFM-12-35 (2012) (ML15160A339) (non-public); Pre-filed Ex. NYS000511, Indian Point Unit 2 (IP2) and Unit 3 (IP3) Refined EAF Analyses and EAF Screening Evaluations, CN-PAFM-13-32 (2013) (ML15160A340) (non-public); Pre-filed Ex. NYS000512, Indian Point Unit 2 Pressurizer Spray Nozzle Transfer Function Database Development and Environmental Fatigue Evaluations, CN-PAFM-13-40 (2013) (ML15160A341) (non-public).

Group (PWROG) addressing technical and regulatory issues related to the resolution of NRC Staff Branch Technical Position 5-3.⁷

Earlier this year, New York filed a motion seeking to remove the proprietary designation of those documents, which would allow their public disclosure.⁸ Westinghouse sought leave to “appear specially” before the Board to contest New York’s motion.⁹ New York opposed Westinghouse’s motion, arguing among other things that Westinghouse had not cited authority allowing such participation.¹⁰

The Board held a telephonic oral argument on the motion and permitted Westinghouse’s representative to participate therein on behalf of Westinghouse and the PWROG.¹¹ Following oral argument, in response to Westinghouse’s request, the Board

⁷ New York has also identified the PWROG Memorandum as a hearing exhibit. Pre-filed Ex. NYS000519, BTP 5-9 Industry Issue Executive Review (Oct. 28, 2014) (ML15160A342) (non-public) (PWROG Memorandum); see also *Declaration of W. Anthony Nowinowski* (May 29, 2015) (Attachment 2 to *Joint Brief of Entergy and Westinghouse Regarding Proprietary Documents* (June 4, 2015, refiled June 17, 2015), ¶ 4 (non-public) (Joint Brief); 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”* (Mar. 2007) (ML070850035).

⁸ *State of New York Motion to Withdraw the Proprietary Designation of Various Pressurized Water Reactor Owners’ Group and Westinghouse Documents* (Apr. 9, 2015). Entergy opposed New York’s motion; the Staff took no position. *Entergy’s Answer Opposing New York State’s Motion to Strike Proprietary Designations* (Apr. 20, 2015); *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, corrected Apr. 21, 2015).

⁹ *Motion of Westinghouse Electric Company LLC to Appear Specially in Connection with State of New York Motion to Strike Proprietary Designations of Westinghouse and PWROG Proprietary Documents* (May 5, 2015) (Westinghouse Motion).

¹⁰ *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).

¹¹ See Transcript of May 14, 2015, Teleconference at 4639-716 (non-public) (Tr.).

allowed Westinghouse to brief the issue of the proprietary designations jointly with Entergy.¹²

In July, the Board denied New York's motion. The Board found that the four Calculation Notes contained confidential commercial information, which is entitled to protection under 10 C.F.R. § 2.390(a)(4).¹³ Specifically, the Board found that the Calculation Notes had been "maintained in confidence" by Westinghouse and that their release "likely would lead to substantial competitive harm" to Westinghouse.¹⁴

Regarding the PWROG Memorandum, the Board held that the case for "competitive harm" from disclosure was "marginal at best" but that further briefing on the question would not be a "useful expenditure of resources" because, in the Board's view, the memorandum itself lacked probative value and would not be received in evidence.¹⁵ The Board observed that New York's experts could, however, provide their views on the document to the Board; "the probative evidence would be [New York's] experts' opinion supported by their qualifications and reasoning."¹⁶

New York's petition for review followed. The Staff and Entergy oppose interlocutory review.¹⁷

¹² See Tr. at 4709-10; Joint Brief.

¹³ July 20 Order at 6; see 10 C.F.R. § 2.390(a)(4).

¹⁴ July 20 Order at 7.

¹⁵ *Id.* at 6. The Board likewise concluded that release of the memorandum would not benefit the public. *Id.*

¹⁶ *Id.*

¹⁷ *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)* (Sept. 8, 2015) (Staff Answer); *Entergy's Answer Opposing New York State's Petition for Interlocutory Review of July 20, 2015 Licensing Board Order* (Sept. 8, 2015);

II. DISCUSSION

A. Standard of Review

As a rule, we disfavor Interlocutory review and grant requests for such review only under “extraordinary circumstances.”¹⁸ We are particularly disinclined to interfere with respect to case management decisions.¹⁹ Without more, the possibility that a Board may have made an incorrect legal ruling does not warrant interlocutory review. Such rulings can be reviewed, if necessary, on appeal from a partial initial decision or other final appealable order.²⁰ Our regulations provide for interlocutory review where the requesting party shows that the Board’s ruling:

see also State of New York Combined Reply in Support of Petition for Interlocutory Review (Sept. 18, 2015).

Westinghouse seeks leave to file an amicus curiae brief opposing the petition for review. *Amicus Curiae Brief of Westinghouse Electric Company Opposing New York Petition for Interlocutory Review* (Sept. 8, 2015) (Westinghouse Amicus Brief); *Westinghouse Electric Company Motion For Leave To File Amicus Curiae Brief* (Sept. 8, 2015). Our rules contemplate amicus briefs only after we grant a petition for review, and do not provide for amicus briefs supporting or opposing petitions for review. 10 C.F.R. § 2.315(d) (permitting the filing of amicus briefs “if a matter is taken up by the Commission under § 2.341 or *sua sponte*”); *see also Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1), CLI-03-9, 58 NRC 39, 44 n.21 (2003). Nonetheless, as a matter of discretion, we have considered Westinghouse’s filing here.

¹⁸ CLI-09-6, 69 NRC 128, 133 (2009) (declining interlocutory review of a Board decision that denied reconsideration of a contention admissibility determination in this case); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001).

¹⁹ Indeed, we have declined interlocutory review on case management matters throughout this proceeding. *See, e.g.*, CLI-12-18, 76 NRC 371, 374 (2012) (declining to take interlocutory review of Board’s decision to allow cross-examination); CLI-08-7, 67 NRC 187, 192 (2008) (declining to take interlocutory review of Board’s decision to cancel oral argument). Further, “[P]rocedural rulings involving discovery . . . rarely meet the standard for interlocutory review.” *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 324 (1998) (citing, *inter alia*, *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-630, 13 NRC 84, 86 (1981)).

²⁰ *Nuclear Innovation North America LLC* (South Texas Project, Units 3 and 4), CLI-11-6, 74 NRC 203, 209-10 (2011); *see also Private Fuel Storage*, CLI-01-1, 53 NRC at 5; *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 61 (1994).

- (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.²¹

Applying these standards to New York's petition, we find that immediate review is not warranted.

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

New York argues that the Board's order irreparably and adversely affects its ability to put forward its case in the upcoming evidentiary hearing and identifies three specific issues that it claims warrant interlocutory review.²² First, New York argues that the Board "reached beyond the scope of [New York's motion] to issue a *sua sponte* ruling on the admissibility" of the PWROG Memorandum.²³ With respect to this issue, New York claims that the Board "issued a preemptive, *sua sponte* ruling that the PWROG Memorandum is inadmissible hearsay with 'no probative value.'"²⁴ New York argues that this ruling effectively prevents New York from using the PWROG Memorandum as evidence in the upcoming hearing.²⁵ Second, New York argues that the Board "improperly shift[ed] the burden to [New York]" to show that the documents were not proprietary and otherwise failed to address certain of its arguments.²⁶ Among these, New York argues that the Board neglected to address its argument that, even if the documents are proprietary, the public interest in disclosure outweighs the need to protect a company's

²¹ 10 C.F.R. § 2.341(f)(2).

²² Petition at 1.

²³ *Id.* at 1, 17-20.

²⁴ *Id.* at 17 (citing July 20 Order at 6).

²⁵ Petition at 20.

²⁶ *Id.* at 1, 20-25.

competitive position.²⁷ Third, New York argues that the Board erred in allowing Westinghouse to participate in the proceeding “without explaining the nature or extent of its rights or obligations.”²⁸ New York claims that the Board’s ruling leaves Westinghouse’s role in the proceeding “unclear,” which in turn both threatens New York with immediate and serious irreparable impact and affects the basic structure of the proceeding.²⁹ As discussed below, these arguments do not demonstrate the need for interlocutory review.

First, we find that the Board’s statements concerning the probative value of the PWROG Memorandum have not caused New York irreparable injury.³⁰ Whether the Board erred in its treatment of the PWROG Memorandum is a matter that can be addressed following an initial decision.³¹ In the meantime, the Board’s ruling does not impair New York’s ability to present its case. Notwithstanding its views on the memorandum, the Board provided a path forward for New York to address the same or similar information through its experts.³² New York has the five unredacted documents in its possession and is not constrained from using any or all of them in support of its case. And New York will have the opportunity at the end of this proceeding to raise an objection to the weight ultimately accorded by the Board to the PWROG

²⁷ *Id.* at 23-24.

²⁸ Petition at 1, 14-17.

²⁹ *Id.* at 16-17.

³⁰ See *Hydro Resources*, CLI-98-8, 47 at 324.

³¹ Cf. *Public Service Co. of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-393, 5 NRC 767, 768 (1977) (“[D]uring the course of lengthy proceedings licensing boards must make numerous interlocutory rulings, many of which deal with the reception of evidence and the procedural framework under which it will be admitted. It simply is not our role to monitor these matters on a day-to-day basis; were we to do so, ‘we would have little time for anything else.’”) (quoting *Toledo Edison Co. et al.* (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98, 99 (1976)).

³² July 20 Order at 6.

Memorandum. At that time, New York may also renew its claim that “the Board shifted to [New York] the burden to show that the PWROG Memo was admissible evidence.”³³ In sum, the Board’s decision to withhold the documents from public disclosure at this time does not prevent New York from fully litigating its claims in this proceeding.

Nor does New York’s claim that the Board’s order imposes a “significant administrative burden”³⁴ on the state present a prejudicial procedural error warranting immediate review. Filing non-public versions and redacted, public versions of certain documents is part of the ordinary administrative burden involved in participating in litigation and does not merit interlocutory review.³⁵ As the Staff points out, New York must file non-public versions of other documents and therefore a portion of the evidentiary hearing will be held *in camera* in any event.³⁶

Further, we decline to provide immediate review of the Board’s actions with respect to Westinghouse’s participation. New York has not demonstrated that Westinghouse’s participation in the case has posed serious irreparable impact or affected the basic structure of this proceeding. In particular, the adjudicatory record does not bear out New York’s claim that it must prepare for the upcoming hearing “without knowing whether or how Westinghouse will participate.” The record to date reflects that Westinghouse’s participation has been limited to the protection of its interests with respect to the proprietary designation of the five identified

³³ Petition at 21.

³⁴ *Id.* at 24.

³⁵ See, e.g., *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-11-10, 74 NRC 251, 256 (2011) (expansion of issues for litigation from the board’s denial of motion for summary disposition had neither a “pervasive and unusual effect” on the litigation nor a “serious and irreparable impact” to the moving party); CLI-09-6, 69 NRC at 133-36 (expense is not irreparable harm), 136-38 (increased litigation burden did not have a pervasive effect on the basic structure of the proceeding).

³⁶ See Staff Answer at 9.

documents, and New York has taken the opportunities available to respond to Westinghouse's arguments and develop the adjudicatory record.³⁷ New York has therefore not demonstrated that interlocutory review is warranted.

Finally, New York's concerns regarding release of information to the public do not warrant interlocutory review. As discussed above, the Board's decision does not affect New York's ability to pursue its case—New York retains full access to all five documents and has offered all five as evidentiary exhibits for the upcoming hearing.³⁸ Our rules of practice, supplemented in this proceeding by the Protective Order, provide mechanisms to accommodate litigation where non-public information may be discussed. In particular, the rules expressly provide for *in camera* hearing sessions where information sought to be withheld from public disclosure is offered into evidence.³⁹ New York will have the opportunity to renew its objections to the proprietary designations at the conclusion of the Board's proceeding. If at that time we determine that information withheld under the Protective Order should have been publicly disclosed, we will direct that such information and the transcript of the related *in camera* session will be made publicly available.⁴⁰

³⁷ See Westinghouse Amicus Brief at 6-10; Westinghouse Motion at 1-3 (unnumbered). New York has filed a second motion for disclosure of additional documents authored by Westinghouse. *State of New York Motion for Public Disclosure of Various Westinghouse Documents* (Oct. 19, 2015) (non-public). The record reflects that Westinghouse has sought to participate in activities before the Board associated with this motion—as it has done so far—for the limited purpose of addressing Westinghouse's proprietary designations for the documents at issue in that motion. See Order (Granting Westinghouse Electric Company's Motion for Leave to Appear Specially Regarding Additional Proprietary Documents) (Nov. 3, 2015) (unpublished). As the case goes forward, we expect that New York (like any other party) will have the opportunity, as provided by our rules, to fully respond to Westinghouse's arguments.

³⁸ See *supra* notes 6 & 7.

³⁹ 10 C.F.R. § 2.390(b)(6) ("*In camera* sessions of hearings may be held when the information sought to be withheld is produced or offered in evidence."); Protective Order ¶ L.

⁴⁰ 10 C.F.R. § 2.390(b)(6); see *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160 (2005) (ruling on the disclosure and redaction of various

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER CLI-15-24** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Brian Newell _____]
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