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(57FR 61013)

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March 31, 1993

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Mr. Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Attn: Docketing and Service Branch

Re: Proposed Rule
"Availability of Official Records"
57 Fed. Reg. 61013 (December 23, 1992)

Dear Mr. Chilk:

Westinghouse has reviewed the NRC proposal to amend its regulations related to the treatment of proprietary and copyright information. In response to your invitation for comments on the proposed rule, the attached comments detail our position on the adverse effects the proposed rule would have on the competitive position of the U.S. and the nuclear industry. In addition to providing our own perspective on the proposed rule, Westinghouse has participated in and fully endorses the comments provided by the Nuclear Management Resources Council Inc. (NUMARC) on this most important matter.

Westinghouse firmly believes that the proposed rule change could cause irreparable harm to the U.S. nuclear industry both at home and abroad as foreign competitors could have essentially free access to information customarily held proprietary by U.S. corporations but submitted to the NRC. Under the proposed rule, the competitive position of U.S. corporations, including Westinghouse, will be seriously harmed in what has clearly become a global market. Moreover, the proposed changes to the current rule are not necessary and, we believe, are not mandated by law. The existing NRC rule on proprietary information, as currently implemented, provides the NRC with the information it needs to carry out its responsibilities while maintaining necessary protection against release of proprietary information into the public domain.

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If the current rule is amended, it should contain a provision for the presubmission of documents whereby the proprietary status of documents could be determined before they become agency records. At any time during the presubmission review, the owner of the information should have a right of withdrawal. A presubmission review provision in the amended rule would help protect vital U.S. corporate proprietary information and alleviate many of the problems inherent in the proposed changes to the current rule.

Westinghouse appreciates the opportunity to submit these comments. Protection of proprietary information is required as a matter of sound public policy and is of great importance to Westinghouse, the U.S. nuclear industry and U.S. companies in general. Westinghouse therefore urges the Commission to carefully consider these comments and those submitted by NUMARC before deciding whether to amend the current proprietary rule. If the decision is made to amend the current rule, the Commission should adopt the changes to the proposed rule recommended by NUMARC.

Very truly yours,

cc: Chairman Ivan Selin
Commissioner James R. Curtiss
Commissioner Kenneth C. Rogers
Commissioner Forrest J. Remick
Commissioner E. Gail de Planque
William C. Parler, Esq., General Counsel
Martin G. Malsch, Esq., Deputy General Counsel
Joseph F. Scinto, Esq. Deputy General Counsel

WESTINGHOUSE COMMENTS ON NRC PROPOSED RULE REGARDING AVAILABILITY OF OFFICIAL RECORDS (PROPRIETARY RULE)

March 31, 1993

Westinghouse Electric Corporation ("Westinghouse") submits these comments in response to the invitation for comments on the proposed rule which would amend Nuclear Regulatory Commission ("NRC" or "Commission") regulations on the treatment of proprietary and copyright information submitted to the NRC. "Availability of Official Records" - Proposed Rule, 57 Fed. Reg. 61013 (December 23, 1992). Westinghouse believes that as currently drafted the proposed rule is inadequate to protect the important public policy interests in nondisclosure of proprietary information and, if promulgated, will have serious adverse affects on the competitive position of Westinghouse and the U.S. nuclear industry.

Westinghouse participated with other members of the nuclear industry in the preparation of comments submitted by the Nuclear Management and Resources Council, Inc. ("NUMARC") in connection with this rulemaking (the "NUMARC Comments"). Westinghouse fully supports the views expressed in the NUMARC Comments[1]. If revisions to the Commission proprietary information rules are to be made, Westinghouse urges the Commission to adopt the modifications and proposals set forth in those comments as part of its final proprietary information rule. The purpose of this submittal by Westinghouse is to provide additional perspective on certain aspects of the proposed rule from the viewpoint of a leading U.S. corporation engaged in nuclear

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1 These Comments by Westinghouse do not purport to cover all of the points made in the NUMARC Comments. This does not diminish in any way the support of Westinghouse of all of the suggestions in the NUMARC Comments.

reactor design and manufacture, whose confidential research, engineering and commerical activities result in the development of valuable proprietary information.

The Proposed Amendments to NRC Proprietary Rule Are Harmful and Unnecessary

Westinghouse believes that the proposed amendments to the NRC proprietary rules[2] could cause irreparable harm to U.S. industry and have the potential for adversely affecting the ability of U.S. firms to compete with foreign companies in the worldwide nuclear market. In the current economic and competitive environment, where competition is global in nature, it is inconceivable that the NRC would adopt rules which could have the effect of making freely available to our foreign competitors nuclear technology that has been developed in this country with substantial private and public investment. Such a course would adversely affect competition and endanger the competitive position of the U.S. companies in the world market for nuclear power reactor technology.

The implications of the proposed amended regulations go beyond the nuclear industry. If, as suggested in SECY 92-341 and the Supplementary Information which accompanied the proposed rule, the proposed amendments are required in order to conform NRC regulations to existing case law and statutes, such as the Federal Advisory Committee Act, the Freedom of Information Act and the Sunshine Act, such a result must also be required for other federal agencies. Yet we could locate no instance where other federal agencies have adopted - or even proposed - regulations similar to those now being suggested by the NRC.

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2 These comments are directed at the proposed regulations respecting the protection of proprietary information. As discussed below at page 14, the proposed changes to govern copyrighted information submitted to the Commission are reasonable provided they are modified to reflect the intent of the proposed changes as set forth in the Supplementary Information published with the proposed rule.

Further, the present NRC regulations for the protection of proprietary information have been in place with essentially no change for more than fifteen years. Over that time an extensive body of administrative and case law has developed to support their implementation. There have been no changes in statutory language during that period which suggest the need for, much less require, any of the changes that are now being proposed. Moreover, there have been no court decisions mandating the proposed changes.

The system which the NRC currently utilizes for the protection of proprietary information, and for implementing FOIA, works and works well. The present system benefits everyone -- the industry by providing assurance that the proprietary information will be maintained as confidential when submitted to the NRC; the NRC by making readily available the necessary information to enable it to carry out its statutory obligations; and the public by providing interested parties to NRC proceedings access to proprietary information in connection with those proceedings. The present system minimizes the resources required for administration by the NRC and the industry. The proposed rule, if adopted, would represent a major step backward in this regard. Adoption of the proposed rule would be contrary to the stated Commission objective of revising existing regulations to lessen unnecessary regulatory requirements and would divert resources from the primary Commission and industry objective of ensuring the safety of nuclear facilities and activities.

If the proposed rule changes are adopted, they will not only substantially alter the manner in which proprietary information must be handled but also will dramatically increase the amount of time and effort which will be necessary to ensure protection of proprietary information. The proposed rule, if adopted, also may create delays in the use of proprietary information by the NRC staff while questions of proprietary status are considered. Because of the substantial

uncertainties as to the protection of proprietary information which would be introduced by the proposed changes, there almost certainly will be a reduction in the free flow of such information which the NRC has enjoyed under the present system.

Thus, not only could the proposed rule changes cause competitive harm to Westinghouse and other U.S. companies, and not only are the proposed rule changes not justified by changes in law or court interpretation of Commission responsibilities under the law, but the proposed rule changes also threaten to make more cumbersome and costly the handling of proprietary information, with no commensurate benefit.

Westinghouse Position on Protection of Proprietary Information

Proprietary information comprises an integral part and is at the heart of Westinghouse business and is crucial to the ability of Westinghouse to maintain its competitive advantage in the nuclear services and supply industry both in the U.S. and abroad. The value of Westinghouse proprietary information to its ongoing business can be maintained, however, only so long as the information is appropriately protected from public disclosure.

In the course of conducting its business, Westinghouse regularly supplies the NRC with extensive information and data in support of applications to the NRC for various licenses and license amendments, including applications for construction permits, operating licenses and material licenses, and in support of continued maintenance of such permits and licenses. In addition, Westinghouse regularly supplies the NRC with information and data in connection with NRC rulemakings, currently including the design certification proceeding for the Westinghouse simplified passive advanced light water reactor plant, the AP600. The AP600 program, and the

proprietary information being developed in connection therewith in particular, is an integral part of Westinghouse's future involvement in the nuclear industry.

Westinghouse proprietary information is made available to the Commission, its staff, its Boards, and the Advisory Committee on Reactor Safeguards ("ACRS"). Westinghouse proprietary information also is made available on a confidential basis to consultants to the Commission, its staff and the ACRS, such as national laboratories, universities and individual consultants. In addition, Westinghouse, upon request and subject to protective agreement, supplies proprietary information to various cognizant state agencies. Westinghouse also makes proprietary information available to its licensees, customers and potential customers upon agreement of nondisclosure to unauthorized persons. With regard to licensing reviews and proceedings, as well as NRC rulemakings, Westinghouse proprietary information also is made available to intervenors who request such information in connection with matters at issue in hearings, subject to their agreement not to disclose the information to unauthorized persons. In making such information available to intervenors, Westinghouse makes such information available to the parties themselves, their counsel, and their technical advisors, if requested to do so.

The only group to whom Westinghouse proprietary information is not made available, with exceptions relevant to safety, are competitors of Westinghouse. Even with respect to competitors, Westinghouse proprietary information has been made available (to the extent necessary, when the need to do so has been determined by the Commission in consultation with Westinghouse) to identify potential safety problems in such competitors' reactors or fuels. The point is that although this information is proprietary, Westinghouse has managed its access in

a manner consonent with preserving its commercial value while adequately serving the needs of the NRC and the public.

The preponderance of the information submitted to the NRC by Westinghouse is not proprietary and only a fraction of the total information is submitted with a request for confidential treatment. Westinghouse internal procedures are based upon strict criteria and standards, and provide that Westinghouse protect as proprietary that information which Westinghouse customarily holds in confidence and which constitutes trade secrets or commercial or financial information that is privileged or confidential, the public disclosure of which is likely to cause substantial harm to the competitive position of Westinghouse. Such information is integral to Westinghouse's continuing business endeavors and provides it with a competitive economic advantage over its competitors in its ability to generate and maintain business and to respond to safety questions of its customers and the NRC. Proprietary information also generates substantial license fees to Westinghouse from domestic and foreign entities.

Disclosure of proprietary information other than in the manner described in the preceding paragraphs would result in domestic and foreign competitors of Westinghouse obtaining, at essentially no cost to them, access to and unrestricted use of valuable trade secrets and confidential commercial information developed at great cost by Westinghouse. Disclosure of such information publicly therefore would substantially harm the commercial and economic interests and competitive position of Westinghouse and would weaken free competition in private enterprise. Public disclosure also could endanger the position of the United States (and Westinghouse) as the world leader in nuclear power reactor technology.

Increasingly, Westinghouse is competing in the global nuclear market, and disclosure of proprietary information would adversely effect its ability to compete. This would particularly

be the case if foreign competitiors of Westinghouse and other U.S. companies in the nuclear industry could gain access and knowledge of commercially sensitive technical and commercial information simply by stationing an employee in the NRC public document room or by filing frequent and broadly worded FOIA requests.

Westinghouse interest in NRC regulations concerning treatment of proprietary information is not hypothetical, but is both real and substantial as Westinghouse would be faced with loss of business opportunities and its competitive position in the global market if it loses the ability to protect the proprietary information upon which its business is based. Such disclosure also would harm the interests of the NRC and the public by limiting the availability of technical information to the NRC and discouraging research and development. Withholding of such information from public disclosure is consistent with applicable law and does not interfere with the NRC's ability to inquire into the safety of nuclear power facilities and conduct its regulatory functions.

Policy Reasons for Protection of Proprietary Information

The NUMARC Comments describe the Commission's responsibility under the law to protect proprietary information and the sound policy reasons underlying that policy.[3] Westinghouse would add the following observations to those of the NUMARC Comments.

The safeguarding of proprietary information benefits a number of significant public interests. In the past, there has always existed a free exchange of information between the nuclear industry and the Commission uninhibited by fears that valuable information would be disclosed to competitors. This has enhanced nuclear safety and reliability and the continued

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3 The Commission's responsibility stems from "the longstanding congressional policy which disfavors disclosure of proprietary information." Westinghouse Electric Corporation v. NRC, 555 F.2d 82, 90-91 (3d Cir. 1977).

development of industry innovations and improvements. It is merely stating the obvious to note that the competitive incentive a reactor vendor like Westinghouse has to undertake research, development and testing is chilled by the prospect that the results of such research and testing might freely be made available to competitors. Furthermore, it follows that the voluntary reporting of such information to the Commission may be discouraged if the information thereafter might be openly available to competitors or other unauthorized persons. The result may well be to encourage disclosure of only the minimum amount of information required to obtain a sought-after license or a desired rule.

In addition, publicly disclosing proprietary information and hence making it available to a company's competitors may lead to situations where the work of one vendor no longer can be compared by the NRC against the work of another vendor. After public disclosure there will be less incentive to continue research, development and testing and more incentive to copy or use what the first company's disclosure, whether analysis, problem, solution, etc., reveals, particularly if the information in such disclosure has the approval of the Commission. Incentives, to perform additional research or follow-on testing on a subject which has been investigated and tested by another vendor also would be weakened. The end-result would be a chilling effect on the development of enhancements to nuclear safety and reliability.

At present, the Commission is able to review and evaluate independent and sometimes different solutions to common problems as well as to cross-check the work of various reactor vendors. Disclosure of proprietary information could result in an injurious disruption of this Commission's practice of independent review, analysis and evaluation. In short, disclosure of proprietary information can seriously impair the capability of the Commission to independently review licensing submissions by reducing the data base and the number of analysis techniques

upon which the Commission's safety evaluations are presently predicated. Moreover, the current protection afforded proprietary research and test data by the Commission results in more than one vendor submitting similar information on subjects of Commission interest, thus permitting the Commission, by means of comparison and cross-checking, to evaluate test accuracy, etc. The Commission currently is able to conduct its evaluations in this manner without incurring the substantial delay and cost which would be associated with any research program which it otherwise might need to conduct independently in order to verify the accuracy, etc., of the test data.

Pricing practices in a competitive market where one commercial vendor could anticipate receiving the benefits of another such vendor's research and development soon would eliminate any margin in prices for the conduct of independently supported research and development work. Westinghouse believes that independent development work is beneficial to the industry, the Commission and the public, and contributes to nuclear safety. Such independent development work, which by definition results in the generation of proprietary technical and engineering data, should be encouraged, rather than discouraged as the proposed rule would do.

As noted above, unrestricted disclosure of proprietary information could endanger the position of the United States as the world leader in nuclear power reactor technology. This position is the result of years of pioneering work by U.S. companies and the government on the power generation applications of nuclear energy. Many benefits to the United States are derived from this world leadership position. These benefits are discussed in the NUMARC Comments. For example: (1) the sale of U.S. reactors and licensing of U.S. technology abroad contributes significantly to this country's balance of payments; (2) the existence of a highly developed nuclear power generation technology contributes to this country's goal of energy self sufficiency

and curtailing of its dependency on the energy resources of other nations for the continued growth of the U.S. economy; and (3) nuclear power technology is a major source of employment in this country at a time when the nation is continually confronted with unemployment and the shift of more and more U.S. jobs to foreign nations.

The current United States position of nuclear power technology leadership has not gone unchallenged. Many of the major industrialized nations in the world are seeking to supplant the United States in that position. In this regard, foreign reactor vendors closely scrutinize all information disclosed by the Commission to the general public. To the extent that these foreign companies can secure reactor technology developed at great cost by U.S. firms in this manner, they reap a significant competitive advantage vis-a-vis U.S. companies including Westinghouse. Thus, disclosure of the proprietary information by the Commission not only will harm Westinghouse but also other U.S. companies in the world market and have a detrimental effect on the U.S. economy. Moreover, to the extent that the U.S. loses its leadership position in the area of nuclear technology, U.S. efforts relating to nuclear non-proliferation will be weakened.

One clear and current example of the adverse effects on the United States and its companies that would result under the proposed rule is in connection with the advanced light water reactor program. In addition to private investment by reactor vendors and the utility industry in the development, engineering and design certification of this "new generation" of U.S. nuclear plants, there has been extensive public commitment of time and investment in this program, through the funding of research and development by the U.S. government. The totality of this investment, both public and private, could be significantly compromised by the proposed rule. If not modified as suggested in the NUMARC comments, the proposed rule

could lead to the disclosure of proprietary information relating to advanced light water reactor designs.

In the case of the Westinghouse advanced passive light water reactor, AP600, there are significant features of the design which are proprietary, including the passive containment cooling system and the passive core cooling system. Westinghouse is aware that foreign governments, in cooperation with reactor vendors who are competitors to Westinghouse, also are interested in developing plants based on the AP600 passive safety systems developed by Westinghouse.[4] A competitor given the opportunity under the proposed rule to reap the benefits of Westinghouse's AP600 design effort without making the corresponding investment made by Westinghouse, U.S. utilities and the U.S. government could hardly be expected not to do so. This is particularly the case where obtaining such proprietary information would be as simple as obtaining it from the public document room or pursuant to a FOIA request. Thus, to the extent that this technology is proprietary, but is made available as a result of the proposed NRC regulations, the U.S. as well as Westinghouse will be the clear loser.

Discussion on Proposed Exceptions to the Right of Withdrawal

1. Predisclosure Review Procedures

The NUMARC Comments propose that the Commission adopt, by regulation, predisclosure review procedures whereby a document would not become an agency record, and

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4 For example, Westinghouse is aware that at a recent meeting of a nuclear society in a foreign country, a paper was presented entitled "A Proposed Concept of Passive Pressurized Water Reactor Based on Existing Reactor Coolant System Designs." The paper discusses that country's preliminary conceptual design work to develop a 2-loop 1000 MWe passive pressurized water reactor incorporating known passive safety features of the Westinghouse AP600 into the ABB-CE's reactor coolant system design. It concludes, among other things, that the proposed reactor could be developed under the leadership of that country's domestic nuclear industry and with the maximum utilization of the existing U.S. NSSS designs and manufacturing technology.

hence not be subject to a FOIA exception and not be submitted to an advisory committee or considered by the Commission in a Sunshine Act meeting, until after a determination has been made to afford the document confidential treatment. Westinghouse supports this proposal. The presubmission review procedures suggested by NUMARC would provide for appropriate protection of proprietary information by having the Commission determine whether documents will be afforded confidential treatment if they are submitted to the NRC and affording the submitter the right to withdraw the documents prior to the documents becoming an "agency records." Westinghouse believes that any predisclosure reviews would need to be conducted and concluded promptly by the NRC, and suggests that a time limit be included in the regulations. A ten-day presubmission review period seems appropriate, except in extraordinary circumstances.

2. Predisclosure Notification Procedures

The NUMARC Comments also suggest that the Commission adopt predisclosure notification procedures in accordance with Executive Order 12,600 of June 23, 1987. Here again, Westinghouse believes that the procedures suggested for such notification would enhance the protection afforded owners of proprietary information by furnishing them the opportunity to fully and fairly challenge, in advance, any proposed public release of proprietary information.

3. Commission Meeting Exception and Advisory Committee Exception

There should be no disclosure of proprietary information at open Commission or advisory committee meetings, and the Commission rules should so state. The law provides for closing such meetings when such information is to be discussed, and thus there is no justification for discussion of such information at open meetings. If proprietary information is inadvertently

discussed at an open meeting, it should not lose its proprietary status, and there is no reason to "republish" the disclosure by including the information with the minutes of such meeting.

4. NRC Position on No Right of Withdrawal Under the FOIA Exception

In discussing the proposed FOIA exception to the right of withdrawal, the NUMARC Comments point out that the NRC took opposite positions on a submitter's right to withdraw proprietary information in the cases of Westinghouse Electric Corporation v. NRC, 555 F.2d 82 (3d Cir. 1977) and General Electric Co. v. NRC, 750 F.2d 1394 (7th Cir. 1984).[5] In five separate places in its brief to the Court in the Westinghouse case, the NRC acknowledged that there was a right of withdrawal (except in the limited situation where proprietary information formed the basis of an NRC rule), and this acknowledged right of withdrawal was emphasized to the Court by attorneys representing the NRC during oral argument. The Third Circuit relied on the NRC representations as to the right of withdrawal in rendering its opinion, making reference to that right several times in rejecting Westinghouse arguments. 555 F.2d at 88, 92 and 94. At one point the Third Circuit decision refers to the "absolute right" of return (with the one exception noted). 555 F.2d at 88. Since the Westinghouse case, FOIA has not been amended in any respect affecting the NRC position taken before the Third Circuit. In the 7th Circuit General Electric case, the Court made no reference to the "absolute right" of withdrawal discussion in the 3rd Circuit Westinghouse decision, or the position of the NRC before the 3rd Circuit. As pointed out by the NUMARC comments, the most that can be said

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5 A full discussion of the inconsistent NRC position, together with NRC documents highlighting the position taken by the Commission in the Westinghouse case, is found in the Brief of Westinghouse Electric Corporation dated July 25, 1985 submitted to the Commission on remand from the U.S. Court of Appeals for the Seventh Circuit In the Matter of General Electric Company v. United States Nuclear Regulatory Commission et al.

is that there is a split in the Circuit, and the NRC has been on both sides of the issue. Thus, there is no clear direction from the courts that the right of withdrawal in the current Commission rule is inconsistent with FOIA.

Material Subject to Copyright Protection

Westinghouse believes that the description of the NRC proposed rule concerning copyright protection, as contained in the Supplementary Information which accompanied the proposed rule, provides an appropriate accommodation of the interests in maintaining copyright documents as copyright. Such copyright documents are valuable to a manufacturer such as Westinghouse because of their organization and content, and should not be permitted to be freely copied by those who seek such material at the NRC Public Document Room. At the same time, the NRC has a legitimate interest in providing copies for its own internal use (including use by its advisory committees, etc.) and in providing one a copy (with the copyright notice intact) to its public document rooms. Westinghouse believes it is a reasonable accommodation (although not mandated by law) to permit one copy (with the copyright notice intact) to be furnished in response to public requests for such documents. If the proposed rule is appropriately modified to meet the description contained in the Supplementary Information, as more fully discussed in the NUMARC Comments, Westinghouse supports the NRC resolution of the copyright matter.

Transition Provisions

The NUMARC Comments address the need for transition provisions for proprietary and copyrighted material currently at the NRC if the NRC adopts the proposed rule, even in modified form. Westinghouse emphasizes the need for such provisions. The Commission currently has information submitted by Westinghouse as to which no NRC determination has been made on the Westinghouse proprietary claim. Such information was submitted with the

understanding that (subject to the existing exception in 10 CFR §2.790(c)) it could be withdrawn if the NRC later determined it was not entitled to proprietary treatment. Westinghouse has a right to rely on NRC regulations in effect at the time it submits information. It would be unfair to change the rules in mid-stream without affording Westinghouse the right to protect such information from public disclosure.

Conclusion

Westinghouse appreciates the opportunity to submit these comments. Protection of proprietary information is required as a matter of sound public policy and is of great importance to Westinghouse, the U.S. nuclear industry and U.S. companies in general. Westinghouse therefore urges the Commission to carefully consider these comments and those submitted by NUMARC before deciding whether to amend the current proprietary rule. If the decision is made to amend the current rule, the Commission should adopt the changes to the proposed rule recommended by NUMARC.