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Westinghouse Electric Company

F Ramsey Coates
Vice President and
General Counsel

PO Box 355
Pittsburgh Pennsylvania 15230-0355

January 21, 2002

DOCKET NUMBER
PROPOSED RULE PR 2
(66FR 52721)

Ms. Annette Vietti-Cook, Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-00001

Re: Proposed Rule – "Availability of Official Records"
66 Fed. Reg. 52721 (October 17, 2001)

Dear Ms. Vietti-Cook:

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 companies such as Westinghouse involved in the nuclear industry in the United States.

Westinghouse strongly objects to the proposed amendments to 10 C.F.R. § 2.790 in the Proposed Rule. Westinghouse firmly believes that the proposed rule change could cause irreparable harm to companies both at home and abroad as foreign competitors could have essentially free access to information customarily held proprietary but submitted to the NRC. Under the proposed rule, the competitive position of companies such as Westinghouse will be seriously harmed in what has clearly become a global market. Moreover, the proposed changes to the current rule are not necessary, are not mandated by law and in some instances are contrary to 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 protection against release of proprietary information into the public domain.

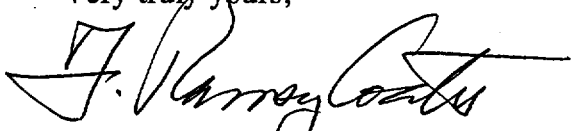
If the current proprietary rule is amended, it should bring NRC regulations into compliance with case law by, among other things, eliminating the balancing test for release of proprietary information and providing the proper standard for determining when voluntarily submitted information is proprietary.

If the current rule is amended, it also should provide for the presubmission of documents whereby the proprietary status of such 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 before deciding whether and how to amend the current proprietary rule.

Very truly yours,



F. Ramsey Coates

cc: Chairmain Richard A, Meserve
Commissioner Greta Joy Dicus
Commissioner Nils J. Diaz
Commissioner Edward McGaffigan, Jr.
Commissioner Jeffrey S. Merrifield
Karen C. Cyr, Esq., General Counsel
Stephen G. Burns, Esq., Deputy General Counsel
Stuart A. Treby, Esq., Assistant General Counsel
for Rulemaking and Fuel Cycle

WESTINGHOUSE COMMENTS ON NRC PROPOSED RULE REGARDING AVAILABILITY OF OFFICIAL RECORDS

December 31, 2001
(Submitted January 21, 2002)

Westinghouse Electric Company ("Westinghouse") submits these comments in response to the invitation for comments on a proposed rule (the "Proposed Rule") which would amend U.S. Nuclear Regulatory Commission ("NRC" or "Commission") regulations on treatment of proprietary and/or copyrighted information submitted to the NRC. "Availability of Official Records" - Proposed Rule, 66 Fed. Reg. 52721 (October 17, 2001). Westinghouse strongly objects to the proposed amendments to 10 C.F.R. § 2.790 contained in the Proposed Rule. Westinghouse believes the revisions contained in the Proposed Rule are seriously flawed and in some instances are not in accordance with existing law or the Freedom of Information Act ("FOIA") Guide, May 2000, published by the Department of Justice ("DOJ") for implementation of the FOIA (the "DOJ FOIA Guide").[1] Adoption by the Commission of the Proposed Rule would seriously compromise protection currently afforded, and required by law to be afforded, by the Commission to proprietary and copyrighted information.

Congress and the courts have recognized that there are important public policy interests in nondisclosure of proprietary information. Failure of the Commission to maintain

[1] On October 12, 2001, Attorney General Ashcroft issued a memorandum to the heads of all departments and agencies that superseded the DOJ FOIA policy memorandum that had been in effect since October, 1993. However, the Ashcroft memorandum did not revoke the DOE FOIA Guide, which contains an extensive discussion of the FOIA exemptions, and its procedural aspects.

effective protection against public disclosure of proprietary information could cause irreparable harm to companies involved in the U.S. nuclear industry and have the potential for adversely affecting the ability of such companies to compete with foreign companies in the worldwide nuclear market. Failure to maintain effective protection also would have a serious adverse effect on the competitive position of Westinghouse and could limit the availability of technical information that would otherwise be provided to the NRC, thereby potentially impeding the NRC review process.

I. SUMMARY

As discussed more fully below, among the more significant problems with the Proposed Rule are the following:

(1) The Proposed Rule fails to follow existing case law by continuing to provide, after information is determined by the NRC to satisfy Exemption 4 of the FOIA, for a balancing test between protection of proprietary information and the "right of the public to be fully appraised," thus ignoring the key determination of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") that such balancing test is impermissible as contrary to the dictates of the FOIA.

(2) The Proposed Rule fails to follow various court cases, including cases decided by the D.C. Circuit, holding that whenever a party succeeds in demonstrating that material falls within Exemption 4 of the FOIA, an agency, in the absence of specific statutory authority, is precluded from releasing the information to the public by virtue of the Trade Secrets Act, 18 USC § 1905.

(3) The Proposed Rule fails to conform to existing case law with regard to voluntarily submitted information by failing to provide that the sole test in determining whether

such information submitted to the Commission comes within Exemption 4 of the FOIA is whether such information is not customarily disclosed to the public by the submitter.

(4) The Proposed Rule should provide for presubmission review of requests that information claimed to be proprietary be protected from disclosure and a clear right of withdrawal of such information if a request for proprietary protection is denied by the NRC, thereby eliminating the risk of disclosure of any information submitted to the NRC where the NRC disagrees with the proprietary claim.

(5) The provisions of the Proposed Rule which contain exceptions to when a document will be returned upon request for withdrawal by a submitter are so broad and vague as to virtually eliminate the right of withdrawal, thus making it less likely that proprietary information will be submitted voluntarily to the Commission.

(6) The Proposed Rule violates the Copyright Act (which sets forth the only limitations allowed by Congress to the exclusive rights in copyrighted works to be imposed by Government edict) to the extent that the Proposed Rule would go beyond the "fair use" doctrine of the Copyright Act by requiring the submitter of copyright information to give an unrestricted right to the NRC to make and distribute copies to carry out its Government functions.

(7) The Proposed Rule would unlawfully remove any accountability of the Commission and its employees for any wrongful acts arising out of improper reproduction or distribution of proprietary or copyrighted information by requiring a person submitting such information to hold the Commission harmless from damages which result from the Commission's improper or unlawful reproduction or distribution of proprietary or copyrighted information.

(8) The requirements in the Proposed Rule for marking proprietary information are overly prescriptive and may be unworkable.

(9) In some instances, statements contained in the Supplementary Information which accompanied the Proposed Rule are either not reflected in the Proposed Rule or are contrary to specific provisions of the Proposed Rule.

(10) If the Commission amends 10 C.F.R. § 2.790, the Commission needs to include a transition provision for previously submitted information.

II. PRIOR WESTINGHOUSE COMMENTS

In 1992, the Commission proposed amending its proprietary rules. "Availability of Official Records - Proposed Rule," 57 Fed. Reg. 61013 (December 23, 1992). The current Proposed Rule represents an attempt by the Commission to clarify the 1992 proposed rule which was never adopted or withdrawn by the NRC. In addition, the current Proposed Rule would provide for additional changes. Westinghouse submitted extensive comments on the 1992 proposed rule changes. Ltr. To Samuel J. Chilk, Secretary, USNRC, from C. L. Caso, General Manager, NATD, Westinghouse, dated March 31, 1993. ("Westinghouse 1993 Comments"). The Westinghouse 1993 Comments on these topics are as relevant today in connection with the current Proposed Rule as they were in 1993. Included in the Westinghouse 1993 Comments were three sections which discussed the following:

(1) The Proposed Amendments to NRC Proprietary Rule Are Harmful and Unnecessary. This section sets forth the reasons why Westinghouse believed the proposed amendments to the proprietary rules could cause irreparable harm to U.S. industry and have the potential for adversely

affecting the ability of U.S. companies to compete in the worldwide nuclear market.

(2) Westinghouse Position on Protection of Proprietary Information. This section sets forth that 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 industry both in the U.S. and abroad. The value of Westinghouse proprietary information to its ongoing business can be maintained only so long as the information is appropriately protected from public disclosure.

(3) Policy Reasons for Protection of Proprietary Information. This section discusses the sound policy reasons that underlie the Commission's responsibility to protect proprietary information from disclosures.[2]

The Westinghouse 1993 Comments on these topics are included as Attachment 1 to these comments on the current Proposed Rule.

III. DETAILED COMMENTS ON THE PROPOSED RULE

Set forth below are additional detailed Westinghouse comments regarding the Proposed Rule and why the proposed amendments to 10 C.F.R. § 2.790 should not be adopted in their current form.

[2] The Westinghouse 1993 Comments make reference to comments filed by Nuclear Management and Resources Council ("NUMARC") dated March 31, 1993. NUMARC was a predecessor to the Nuclear Energy Institute, and in 1993 was the organization of the nuclear power industry responsible for coordination of industry regulatory policy issues.

1. The "Balancing Test Contained in Current Commission Proprietary Regulations And Continued in the Proposed Rule is Contrary to Law and Should be Eliminated

Current NRC regulations provide that "[i]f the Commission determines that the record or document contains trade secrets or privileged or confidential commercial or financial information, the Commission will then determine (i) whether the right of the public to be fully apprised as to the basis for and effects of the proposed action outweighs the demonstrated concern for protection of a competitive position and (ii) whether the information should be withheld from public disclosure . . . ." 10 CFR § 2.790(b)(5)(i). The Supplementary Information makes reference to this balancing test, 66 Fed. Reg. 52724, col.1 and 52725, col. 3, but does not propose any change in the current regulation. Westinghouse submits that in light of the decision of the D.C. Circuit in *Public Citizen Health Research Group v. Food & Drug Administration,* 185 F.3d 898 (D.C. Cir. 1999), the balancing test is clearly contrary to law and must be eliminated from Commission regulations.[3]

In *Public Citizen*, the D.C. Circuit held that in Exemption 4 of the FOIA, Congress had struck the balance between public and private interests, and that further balancing by an agency or by the courts is improper. 185 F.3d at 904. In that case, the Court noted that the plaintiff, Public Citizen, "relies upon dicta of several district court opinions in arguing that under Exemption 4 the court should gauge whether the competitive harm done . . . by the public disclosure of confidential information 'is outweighed by the strong public interest in safeguarding . . . [public health].'" 185 F.2d at 903-04. The D.C. Circuit rejected this

[3] In comments to the NRC dated February 15, 1974, Westinghouse submitted that Congress already had achieved the effective balancing of interests under the FOIA and that the Commission balancing test was improper. This position, now clearly correct under the case law which has developed since 1974, was rejected by the Commission, which has maintained the balancing test first included in its proprietary regulations by amendments promulgated in August, 1972.

position as "inconsistent with the '[b]alanc[e of] private and public interests' the Congress struck in Exemption 4.'" 185 F.2d at 904.

In the DOJ FOIA Guide, the DOJ confirms the clear meaning of the *Public Citizen* case with the following comment:

> "This past year, the D.C. Circuit definitively resolved this issue by flatly rejecting a requester's proposal that the court 'should gauge whether the competitive harm done to the sponsor of an [Investigational New Drug] by the public disclosure of confidential information "is outweighed by the strong public interest in safeguarding the health of human trial participants."' [*Public Citizen Health Research Group v. FDA*, 185 F.3d 898, 903 (D.C. Cir. 1999)] Declaring that a requester cannot 'bolster the case for disclosure by claiming an additional public benefit' in release, the D.C. Circuit held that Congress has already struck the appropriate balance between public and private interests and that '[t]hat balance is accurately reflected in the test of confidentiality set forth in *National Parks.*'" *[citations omitted]* [emphasis added] DOJ FOIA Guide, Exemption 4, p. 15).

It should be noted that Westinghouse's position remains that its proprietary information is 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 issues that may be applicable to competitors' reactors or fuels. Moreover, Westinghouse proprietary information is made available to the Commission as well as 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.[4]

In its Summary to the Proposed Rule, the Commission states that "[t]he Proposed Rule is necessary to conform the NRC's regulations regarding the availability of official records to existing case law . . . ." 66 Fed. Reg. 52721, col. 2. In light of the

[4] See Attachment 1, part 2, for a more complete statement of the Westinghouse proprietary position.

decision in *Public Citizen* and the interpretation of that decision by the Department of Justice, Westinghouse submits that to conform to existing law the Commission is required to eliminate the balancing test from its regulations regarding proprietary information. Failure to do so will leave the regulations at odds with the law.

2. The Proposed Rule Fails to Recognize that Material Determined to be Proprietary Under FOIA Exemption 4 Also is Not Subject to Discretionary Release

The Supplementary Information to the Proposed Rule states that "Qualifying information will continue to receive protection except, as has always been the case, where the Commission makes a determination that the right of the public to be 'fully apprised . . . outweighs the demonstrated concern for protection of a competitive position.'" 66 Fed. Reg. 52724, col. 1. In other words, the Commission is claiming that even after it determines information is proprietary and falls within FOIA Exemption 4, it still can release the information upon the determination stated above. As noted above, the D.C. Circuit in *Public Citizen* clearly has rejected any authority of an agency to perform such a balancing test. The position taken by the Commission also is completely inconsistent with rulings of the D.C. Circuit which hold that the Trade Secrets Act, 18 USC § 1905, prohibits the disclosure of all data protected by FOIA Exemption 4 unless otherwise authorized by statute or a rule promulgated in accordance with a grant of statutory authority. *CNA Financial Corporation v. Donovan*, 830 F.2d 1132, 1142 (D.C. Cir. 1987).

The DOJ FOIA Guide spells out the law as follows:

> "The practical effect of the Trade Secret Act is to limit an agency's ability to make a discretionary release of otherwise exempt material, because to do so in violation of the Trade Secrets Act would not only be a criminal offense, it would also constitute 'a serious abuse of agency discretion' redressable through a reverse FOIA suit. Thus, in the absence of a statute or properly promulgated regulation giving the agency authority to release the information – which would remove the disclosure prohibition

> of the Trade Secrets Act – a determination by an agency that information falls within Exemption 4 is 'tantamount' to a decision that it cannot be released." DOJ FOIA Guide, Exemption 4, p. 25 [emphasis added].[5]

In other words, as stated in the DOJ FOIA Guide:

> ". . . absent an agency regulation (based upon a federal statute) that expressly authorizes disclosure," the Trade Secrets Act constrains an agency from making a discretionary disclosure of Exemption 4 information. DOJ FOIA Guide, Discretionary Disclosure and Waiver, p. 2

See also *Pacific Architects and Engineers, Inc. v. United States Department of State*, 906 F.2d 1345 (9th Cir. 1990).

In an effort to overcome the clear holdings of the cases, the Supplementary Information states that claiming the prerogative of balancing (and hence of discretionary release) "is a right already reserved to the Commission in its regulations." 66 Fed. Reg. 52725, col. 3. The Supplementary Information further claims that there is nothing in FOIA case law or the Trade Secrets Act that prohibits balancing. The Commission position is circular and is contrary to the law.

In order for the Commission proprietary regulations authorizing balancing to be properly promulgated and hence to constitute a law expressly authorizing disclosure, they must be based upon a federal statute which authorizes balancing or on some other statute giving the Commission authority to make discretionary releases. *Chrysler Corp. v. Brown, Secretary of Defense*, 441 U.S. 281 (1979). In *Brown*, the government agency whose disclosure regulations were at issue claimed as authority for their promulgation both the FOIA and a provision in an Executive Order which permitted the agency to promulgate "necessary and appropriate" disclosure regulations. The U.S. Supreme Court rejected both the FOIA and the

[5] The DOJ FOIA Guide notes that "[v]irtually every court that has considered the issue has found the Trade Secrets Act and Exemption 4 to be coextensive." DOJ FOIA Guide, Exemption 4, p. 25.

Executive Order as authorizing the disclosure regulations. As to the FOIA, the Court stated: ". . . the Government cannot rely on the FOIA as congressional authorization for disclosure regulations that permit the release of information within the Act's nine exemptions." 441 U.S. at 303-04. With regard to the Executive Order provision, the Court stated: "But in order for such regulations [promulgated pursuant to the Executive Order] to have 'the force and effect of law', it is necessary to establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress." 441 U.S. at 304.

After stating that it was not necessary to decide whether the Executive Order was authorized by any of the several statutes cited by the agency or was authorized by some "more general notion that the Executive can impose reasonable contractual requirements," including a requirement for disclosure of proprietary information, the Court went on to say:

> "The pertinent inquiry is whether under any of the arguable *statutory* grants of authority the [agency] disclosure regulations relied on by the respondents are reasonably within the contemplation of that grant of authority. We think that it is clear that when it enacted these statutes, Congress was not concerned with public disclosure of trade secrets or confidential business information, and, unless we were to hold that any federal statute that implies some authority to collect information must grant *legislative* authority to disclose that information to the public, it is simply not possible to find in these statutes a delegation of the disclosure authority asserted by the respondents here." [emphasis in the original] (441 U.S. at 306)

The U.S. Supreme Court in *Brown* also rejected a contention that a general grant of authority to an agency head to "prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and custody, use, and preservation of its records, papers and property" authorize the disclosure regulations there at issue. 441 U.S. at 309. Such a "housekeeping regulation" was declared by the Court "to be simply a grant of authority to the agency to regulate its own affairs."

Thus disclosure pursuant to regulations promulgated under this general statutory grant was not "authorized by law" within the meaning of the Trade Secrets Act. 441 U.S. at 309.

There is no provision in the FOIA, the Trade Secrets Act, the Atomic Energy Act of 1954, as amended, or any other statute that grants the Commission authority to perform a balancing test or to release information that it has determined to be proprietary.[6] In the absence of any statutory grant of authority, the Commission cannot authorize itself to make such releases.[7]

3. The Proposed Rule Fails to Provide the Proper Standard Under Law For Determining When Voluntarily Submitted Information is Within Exemption 4

In *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992), the D.C. Circuit announced a new test for purposes of determining whether information voluntarily submitted to the government is confidential under Exemption 4 to the FOIA:

> ". . . we conclude that financial or commercial information provided to the government on a voluntary basis is 'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." 975 F.2d at 879.

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[6] The authority cited in the Code of Federal Regulations for the balancing provision of Commission proprietary regulations is Section 161 of the Atomic Energy Act of 1954, as amended. The only provision in Section 161 that is even arguably applicable is subparagraph (p). That subparagraph authorizes the Commission to: "p. make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of the Act." The Supreme Court in the *Brown* case specifically rejected such a "housekeeping statute" as providing authority for limiting the scope of the Trade Secrets Act. In *Brown*, the agency argued that it had an explicit grant of legislative authority for balancing by virtue of a "housekeeping statute" which authorized the agency to prescribe regulations in the performance of its business. The Court rejected this argument. 441 U.S. at 309.

[7] In a peculiar sentence, the Supplementary Information states: "Ultimately, if submitters desire official agency consideration of their voluntarily submitted material, they must operate under rules that are applied consistently to all, including information availability." 66 Fed. Reg. 52725, col. 3. This seems to say that the Commission can establish whatever rules it wants, even if they are contrary to law, and as long as they are applied consistently, they must be complied with if a person desires to make a voluntary submittal. Such a position clearly is wrong. Moreover, the Commission's repeated statements in the Supplementary Information that it has rarely released information over the objection of the submitters is a statement which would substitute "trust us" for the rule of law.

The Court, citing U.S. Supreme Court encouragement of "the development of categorical rules whenever a particular set of facts will lead to a generally predictable application of FOIA," observed that the rule for voluntarily submitted information is "objective." Thus, the D.C. Circuit held that "[FOIA] Exemption 4 protects any financial or commercial information provided to the Government on a voluntary basis if it is of a kind that the provider would not customarily release to the public." 975 F.2d at 880.

Despite this clear ruling of the D.C. Circuit, and despite the Commission statement in the Summary of the Proposed Rule that the Proposed Rule is necessary to conform NRC's regulations to existing case law, the Proposed Rule does not address this standard for voluntarily submitted information. Instead, in the Supplementary Information to the Proposed Rule, after noting that in *Critical Mass* "the court established a new and broader standard of categorical protection for information voluntarily submitted to an agency," states that "The Commission does not consider it necessary to incorporate a specific standard for voluntarily submitted information because the proposed changes do not purport to alter the standards for withholding proprietary information." 66 Fed. Reg. 52725, col. 1. The position of the Commission that because it is not changing its current standards for withholding voluntarily submitted proprietary information it thus need not incorporate a specific standard for such submitted information ignores the fact that the current Commission standard is not in accordance with the law. The Commission position is directly contrary to the development of a categorical rule that is objective, as required by the U.S. Supreme Court and the D.C. Circuit. For voluntarily submitted information, the Commission is required to comply with the holding of the D.C. Circuit in *Critical Mass* and conform its regulations to that holding. It is

circular to say, as the quoted sentence from the Supplementary Information seems to say, that the reason the Commission is not making changes to the standard is because it is not proposing to alter the standard.

Current Commission regulations provide that in determining whether information is proprietary, the Commission will consider a number of factors, including "whether the information is of a type customarily held in confidence by its owner and whether there is a rational basis therefor" and ". . . whether public disclosure of the information sought to be withheld is likely to cause substantial harm . . . ." 10 CFR § 2.790(b)(4). However, the language of the D.C. Circuit in *Critical Mass* limits consideration for voluntarily submitted information only to a consideration of whether it is of a kind that would not customarily be released to the public by the provider. Thus, for voluntarily submitted information it is improper for the Commission to continue to include in its proprietary rule tests which require a showing of "a rational basis" for maintaining confidentiality, and consideration of the likelihood of "substantial harm to" a submitter of proprietary information. The Commission cannot require any tests for determination of whether voluntarily submitted information comes within the FOIA Exemption 4 which go beyond the test set forth in *Critical Mass*.

The Commission statements in the Supplemental Information that any information which adequately supports a withholding request under existing rules will satisfy the voluntary standard, and that "all the information required to be addressed in the affidavits is relevant to the Commission's consideration of the withholding request" (66 Fed. Reg. 52725, col. 2) fly in the face of the holding in *Critical Mass*. Moreover, the Commission

statement that it "believes it is reasonable to have a rule that does not connect itself excessively to particular criteria" (66 Fed. Reg. 52725, col. 2) not only is bad law, but is directly contrary to the ruling of the D.C. Circuit, since that Court in *Critical Mass* lays out the specific and only criterion that applies to voluntarily submitted information.

In summary, it is incumbent on the Commission to bring its regulations into conformance with current case law and to modify the regulations to include the correct standard for determining the proprietary status of voluntarily submitted information.

4. The Proposed Rule Should Provide for Presubmission Review of Proprietary Claims

The Supplementary Information also notes that in comments submitted on the amendments proposed in the 1992 proposed rule commentators urged that, to protect proprietary information adequately, the NRC should implement presubmission review procedures. During such review, a document would not be considered an "agency record" under FOIA. As also noted in the Supplementary Information, the purpose of such procedure would be to allow submitters an absolute right to withdraw documents for which proprietary protection is denied during the "presubmission" period. 66 Fed. Reg. 52726, col. 1. The NRC response to this suggestion of presubmission review procedures is to completely reject it, apparently based on the premise that such procedures will not survive judicial scrutiny because upon "submission" documents become "agency records" subject to the FOIA and on a claim

that such procedures "would erode confidence in the NRC." 66 Fed. Reg. 52726, col. 2.[8] In taking this position, the Commission misreads the law as to when documents become agency records.

The U.S. Supreme Court has articulated a two-part test for determining when a document becomes an agency record: (1) the document must either have been created or obtained by an agency; and (2) the document must be under the control of the agency at the time of an FOIA request. *United States Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989), *affirming, Tax Analysts v. United States Department of Justice*, 845 F.2d 1060 (D.C. Cir. 1988).

As stated by the D.C. Circuit in its opinion in *Tax Analysts*:

> "The Eleventh Circuit has conveniently distilled the essence of Supreme Court and D.C. Circuit rulings into four relevant considerations for deciding whether an agency has sufficient 'control' over a document to make it an 'agency record.' They are:
>
> [1] the intent of the document's creator to retain or relinquish control over the records; [2] the ability of the agency to use and dispose of the record as it sees fit; [3] the extent to which agency personnel have read or relied upon the document; and [4] the degree to which the document was integrated into the agency's record system or files.
>
> *Lindsey v. Bureau of Prisons*, 736 F.2d at 1465 (citations omitted)." 845 F.2d at 1068-69.

[8] The Commission cites one District Court case, *Teich v. Food and Drug Administration*, 751 F.Supp. 243 (D.D.C. 1990), as support for its proposition that an agency may not exclude documents from FOIA through presubmission procedures. That case involved FDA presubmission procedures. (EPA also has presubmission procedures which are in use by that agency.) However, in *Teich*, the court found that the two requirements for a document to be an agency record – that it be obtained by the agency and be under its control – had been met. The FDA had placed the document in question in its unrestricted files and its staff had used the document in preparation for an inspection. Thus, the record involved in the *Teich* case had not been processed under the FDA presubmission review procedures. Despite the case, the FDA presubmission procedures remain in its regulations and are utilized by that agency. We are aware of no other case which follows the *Teich* case or which purports to invalidate presubmission review procedures.

This test is read as "requiring that all four factors be present" for a document to be an agency record. 845 F.2d at 1069. See also DOJ FOIA Guide, Procedural Requirements, p. 1.

Under these tests, agency possession and power to disseminate a document are insufficient by themselves to transform a non-agency document into a record. *Tax Analysts,* 845 F.2d at 1068. A document is not under sufficient agency control where its dissemination is controlled by the submitter. *McErlean v. United States Department of Justice, Immigration and Nationalization Service*, No. 97 CIV. 7831 (BS-J), 1999 WL 791680 (S.D.N.Y. Sept. 30, 1999). As the case law clearly states, a document does not become an agency record subject to FOIA requests where (1) a document is submitted to an agency for review of proprietary claim only and the submitter makes it clear that it does not intend to relinquish control unless the proprietary claim is upheld; (2) the submitter restricts the ability of the agency to use or dispose of the document until after a determination has been made that the proprietary claim is valid; (3) agency personnel do not rely on the document for any substantive purpose; and (4) the agency does not integrate the document into the agency's recordkeeping system or files.[9] Thus, the Commission can and should establish in its regulations a presubmission review process – an action which would be fully in accord with the law.

By failing to provide for presubmission review, the Proposed Rule puts at risk of public disclosure any information submitted with a claim of proprietary status where the NRC disagrees with the proprietary claim. In light of the provisions of the Proposed Rule

[9] The Supplementary Information cites the U.S. Supreme Court decision in *Tax Analysts,* stating that the case holds "that records within the physical custody and control of the agency constitute 'agency records.'" 66 Fed. Reg. 52726, col. 2. However, the Supplementary Information does not mention the four considerations which the Courts have held are relevant in deciding whether an agency has sufficient "control" over a document to make it an "agency record."

which severely limit, if not eliminate, the right of withdrawal (as discussed above), inclusion of a provision for presubmission review is essential.

5. The Commission Has Virtually Eliminated the Right of Withdrawal

The Proposed Rule provides that whenever a submitter desires to withdraw a document from Commission consideration, it may request return of the document and the document will be returned unless one of five new exceptions set forth in the Proposed Rule apply. This contrasts with the present rule under which the Commission will return a document on request unless it was submitted in a rulemaking proceeding and forms the basis for a final rule. The new exceptions contained in the Proposed Rule are so broad that they virtually eliminate the right of return. The expansion of the exceptions to the right of withdrawal are even more troublesome in light of the other changes being proposed by the Commission in the Proposed Rule, including the failure of the Proposed Rule to eliminate the balancing test or to provide for presubmission review.

The first new exception greatly broadens the "forms the basis of" test to include documents which form the basis not only of rulemakings but of NRC's official decisions on licensing. The broadened exception could be interpreted to encompass almost all documents required to be submitted to the NRC and many documents which are voluntarily submitted. This exception would thereby make any right of withdrawal illusory.

The second exception to the right of withdrawal in the Proposed Rule would apply to a document "made available to or prepared for an NRC advisory committee." Again, this exception is overly broad. 10 CFR 1.13 authorizes the Advisory Committee on Reactor Safeguards ("ACRS") to review and report on safety studies, applications for construction permits and facility operating licenses, and advise the Commission regarding hazards of

proposed or existing facilities and safety standards. All documents relating to these issues are "available" to the ACRS and presumably would fall within this exception, even if not relied upon by the ACRS. Accordingly, this exception also is too vague. At most, only proprietary information actually relied upon by the ACRS should be exempt from return. Of course, in accordance with our comments above, there should be no public disclosure of such proprietary information.

The third exception relates to documents "revealed, or relied upon" in an open Commission meeting. Again, this is vague. It is not clear what "revealed" means, or why a proprietary document would be "revealed" at an open Commission meeting other than in an impermissible or unintended manner. Yet under this exception, the right of withdrawal in such situations apparently would be denied. Also, it is not clear how a determination of reliance at an open Commission meeting will be made, much less made in a consistent and objective way.[10]

In each of the proposed new exceptions to the right of withdrawal, there is no objective standard to determine when the right of withdrawal would not be available. It therefore would be imprudent to alter the current objective exemption to the right of withdrawal with these new, overly broad and vague exceptions in the Proposed Rule. Futher, the Commission should include in any Proposed Rule a provision explicitly stating that proprietary documents utilized by the ACRS, the Advisory Committee on Nuclear Waste or other Commission advisory committees, and proprietary documents utilized at Commission

[10] Similar problems of vagueness are found in the other exceptions to the right of withdrawal which would be established by the Proposed Rule.

meetings, are not to be publicly disclosed. With respect to advisory committees, the Federal Advisory Committee Act specifically authorizes this, and, of course, the FOIA authorizes it with respect to Commission meetings.

6. The Proposed Rule Violates the Copyright Act

Section 106 of the Copyright Act (17 U.S.C.) sets forth exclusive rights of the holder of a copyright in copyrighted works. Subsequent sections of the Copyright Act provide for a number of limitations on those exclusive rights. Other than the exception for "fair use" none of those limitations appear to apply to the use apparently intended by the Commission in the Proposed Rule. *Williams and Wilkins Co. v. The United States*, 487 F.2d 1345, 180 USPQ 49 (Ct. Cl. 1973). In fact, the Commission claims in the Supplementary Information that it intends only to come within the fair use doctrine, 66 Fed. Reg. 52728, cols. 2, 3. However, the actual wording of the Proposed Rule suggests otherwise. Thus, the Proposed Rule states: "Submitting information to NRC for consideration in connection with NRC licensing or regulatory activities shall be deemed to constitute authority for the NRC to reproduce and to distribute sufficient copies to carry out the Commission's official responsibilities. The Commission may waive the requirements of this paragraph on request, or on its own initiative, in circumstances the Commission deems appropriate." 66 Fed. Reg. 52730, col. 2. This language could be interpreted as going beyond the "fair use" doctrine. To the extent that the Proposed Rule would go beyond the "fair use" doctrine by requiring the submitter of copyrighted material to give an unrestricted right to the NRC to make and distribute copies as a condition providing the Commission information, the Proposed Rule usurps the power of Congress and violates the Copyright Act.

The copyright license requirement set forth in the proposed new Section 2.790(e)(1)(i) of the Proposed Rule also may have the practical effect of restricting the provision of information to the Commission. For example, a licensee may not be able to comply with Commission mandated reporting requirements in regard to safety issues if the reporting of such issue relies upon information not owned by the licensee and with respect to which the licensee has no right to grant a copyright license.

Further, the Proposed Rule raises a potential due process issue if a party to a hearing before the Commission may be prevented from presenting its best case because such party does not have a right to license the Commission to use copyrighted information of a third party relevant to the hearing. A party appearing before the Commission therefore may be denied an effective hearing because, under the foregoing circumstances, it will be precluded from making its most effective case. We can find no other federal agency which requires a copyright license as a condition of accepting submittals from licensee or the public.

7. The Hold Harmless Requirement of the Proposed Rule Unlawfully Removes Commission Accountability for Wrongful Reproduction or Distribution of Documents

The Proposed Rule states that "Any person submitting information [to the NRC] shall . . . (ii) Hold the Commission harmless from damages that result from the Commission's reproduction or distribution of the [proprietary] documents." 66 Fed. Reg. 52730, col. 3. The Supplemental Information contains no explanation of or justification for this provision.

Requiring a person, as a condition for submitting information to the Commission, to agree to hold the NRC harmless for any reproduction or distribution of material not only will discourage submission of information to the Commission, but additionally removes any accountability of the Commission and its employees for wrongful acts

arising out of any improper reproduction or distribution of such proprietary or copyrighted information. We are aware of no authority under which the Commission can require such a waiver, and are aware of no other agency that requires such a waiver. Moreover, it is clear that Congress intended to make the agencies of the U.S. Government subject to the copyright laws of the United States when it expressly waived its sovereign immunity to copyright infringement claims under 28 U.S.C. § 1498(b). Under the law, the Commission has no authority to take away the right to sue the NRC for copyright infringement.

8. The Proposals on Marking of Proprietary Information are Too Prescriptive

The Proposed Rule would require that a person submitting a document to the NRC with a request that it be withheld from disclosure as proprietary must mark "[t]he top of the first page of the document and the top of each page containing such [proprietary] information . . . 'Confidential Information Submitted Under 10 CFR 2.790 . . . .'" Proposed Rule § 2.790(b)(1)(i)(A). In addition, under the Proposed Rule each page containing proprietary information must indicate the basis for the proposed withholding.

There appears to be no legal mandate or justification for the very specific and prescriptive wording which the Proposed Rule would require. The Supplementary Information concedes that the Proposed Rule is "prescriptive" but claims, as the reason for the new provision, a desire to ease the administrative burden on the NRC and to eliminate any ambiguity about whether a submitter intended to request proprietary treatment. 66 Fed. Reg. 52723, col. 2. The Supplementary Information also concedes that there are "potential burdens" associated with applying the prescriptive language, but states that applying such language is considered to be worth the mutual effort to reduce the risk of inadvertent disclosure. Of course, it is the submitter of information who is required to expend the

additional effort and who is at risk of inadvertent disclosure if the marking of the document is unclear. The goal sought by the Commission can be accomplished with less burden by utilizing more general language requiring that the proprietary claim be clearly identified, but allowing some variation depending on the practice of each submitter and the nature of the document being submitted.

The requirements in the Proposed Rule for marking proprietary information will be an administrative nightmare for both those who submit such information and for the NRC. Indeed, based upon Westinghouse experience, we believe the requirements are unworkable. Any submitter of proprietary information will have an obvious interest in making sure that the information is properly marked, and this self-interest, coupled with the nonprescriptive requirement of the present rule, will accomplish the goal which apparently is sought by the Commission in the Proposed Rule.

9. The Proposed Rule should be Revised to Properly Reflect Comments in the Supplementary Information

There are several instances where the Proposed Rule is at variance with the explanations contained in the Supplementary Information. For example, the Proposed Rule contains prescriptive language with respect to procedures to be followed in submitting proprietary documents. Thus, the Proposed Rule states in 2.790(b):

> "(b) The procedures in this section must be followed by anyone submitting a document to the NRC who seeks to have the document, or a portion of it, withheld from public disclosure because it contains [proprietary information] . . . .
>
> (1) The submitter shall request withholding ". . . and shall comply with the document marking and affidavit requirements set forth in this paragraph . . . .
>
> (i) The submitter shall ensure that the document containing information sought to be withheld is marked as follows . . . ." (emphasis added)

The explanation of this provision in the Supplementary Information is equivocal. After stating that the NRC "would not impose a penalty for failure to use the precise wording prescribed" in the Proposed Rule, the Supplemental Information then states that "the Commission does not assume responsibility for any unintended consequence resulting from a submitter's failure to comply with regulatory standards." 66 Fed. Reg. 52723, col. 3. However, the Supplemental Information also says: "Language substantially similar to that prescribed would be equally acceptable." Nowhere in the Proposed Rule is this or any similar statement found.

Given the mandatory-sounding language of the Proposed Rule ["must" and "shall"], it appears that even if "equally acceptable" language is used by a submitter, the Commission nonetheless assumes no responsibility for inappropriate disclosure. When combined with the "hold harmless" provisions contained in the Proposed Rule, it appears that while the Commission recognizes the need for proper marking of proprietary information, the Commission also is concerned with absolving itself and its employees from any responsibility whatsoever for improper or unlawful treatment of such proprietary information. This would be the case even in situations where proprietary marking is clear but not in strict compliance with the mandatory language of the regulation. Submitters of information should not be subjected to this risk. Thus, Westinghouse suggests that the Commission include in any revised proprietary rule language making it clear that use of substantially similar language to that stated in the rule for marking documents will be acceptable.

Another instance where the Supplementary Information is at variance with the actual language of the Proposed Rule relates to the exception to return of information. The Proposed Rule states that if information "was revealed, or relied upon, in an open Commission

meeting . . ." a document will not be returned. The Supplementary Information, however, states that this provision "addresses materials used for open meetings." 66 Fed. Reg. 52726, col. 3 (emphasis added). Obviously, there is a difference in the language and if the Proposed Rule is adopted with this provision, the language should be clarified in accordance with the above comments.

The Proposed Rule would change the time period for release of a document from not less than thirty days from notification of a denial of withholding to a "reasonable time'. The Supplementary Information also states: "In all cases the time period will be long enough to allow a submitter to seek judicial relief." 66 Fed. Reg. 52728, col. 3. If the Proposed Rule is adopted, this language should be added.

10. Transition Provisions

Finally, there is a need for transition provisions for proprietary and copyrighted material previously submitted to the NRC if the NRC adopts the Proposed Rule, even in modified form. The Commission currently has information submitted by Westinghouse as to which no NRC determination has been made on the Westinghouse proprietary claims. 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 determined it was not entitled to proprietary treatment. Westinghouse has a right to rely on NRC regulations in effect at the time it submitted such information. It would be unfair to change the rules regarding the treatment of proprietary or copyrighted information in mid-stream without affording Westinghouse the right to protect such information from public disclosure.

IV. CONCLUSION

Westinghouse appreciates the opportunity to submit these comments. Protection of proprietary and copyrighted information is required as a matter of law and sound public policy. Such protection is of great importance to Westinghouse and is essential for it to maintain its competitive position in the nuclear industry. Westinghouse therefore urges the Commission to carefully consider these comments before deciding whether to proceed with the Proposed Rule. If the decision is made to amend the current Commission proprietary rule, the Commission should adopt changes to the Proposed Rule consistent with existing case law and these comments.

ATTACHMENT 1

EXCERPT FROM PRIOR WESTINGHOUSE COMMENTS

DECEMBER 23, 1992

(1) The Proposed Amendments to NRC Proprietary Rule are Harmful and Unnecessary

(2) Westinghouse Position on Protection of Proprietary Information

(3) Policy Reasons for Protection of 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 competitors 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.

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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.