

January 15, 2010

Mr. George K. Mortensen
External Regulations Program Manager
Institute of Nuclear Power Operations
700 Galleria Parkway, SE, Suite 100
Atlanta, GA 30339-5943

SUBJECT: INSTITUTE OF NUCLEAR POWER OPERATIONS REQUEST FOR
WITHHOLDING OF SAFETY AND FITNESS-FOR-DUTY INFORMATION AND
RECORDS FROM PUBLIC DISCLOSURE

Dear Mr. Mortensen:

I am responding to your letter dated November 10, 2009, containing an affidavit dated November 6, 2009, executed by Mr. Ronn Smith, Director of Communications, Institute of Nuclear Power Operations (INPO), requesting that certain safety and fitness-for-duty (FFD) information and reports submitted to the U.S. Nuclear Regulatory Commission (NRC) be withheld from public disclosure pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR), Section 2.390, "Public inspections, exemptions, requests for withholding." Your letter stated that this submittal updates the affidavit submitted to the NRC in 2005. In your November 6, 2009 affidavit, you requested no change to the withholding of INPO Significant Operating Experience Reports (SOER), Significant Event Reports (SER), Significant Event Notifications (SEN), Topical Reports (TR), Equipment Performance and Information Exchange (EPIX) data reports, and NRC Performance Indicator (PI) data. However, you requested withholding of FFD reports and provided reasons why INPO reports should be kept from public disclosure. You should note that per our procedures, we have made both your letter and affidavit publically-available through the NRC's Agencywide Documents Access and Management System (ADAMS) at Accession No. ML093580021. The previous affidavit, dated November 22, 2005, can be located at ADAMS Accession No. ML0600600379.

The affidavit stated that SOERs, SERs, SENs, TRs, EPIX database, and NRC PI data should be considered exempt from public disclosure, because these reports and information are "held in confidence by INPO, are submitted voluntarily by INPO to the NRC, and are not available to the public." Furthermore, you asserted "public disclosure of any of the information reports and data described . . . would be likely to cause substantial harm to the competitive position of INPO taking into account the amount of effort and resources expended by INPO in developing such materials." You also described the information control markings INPO intends to place on these documents to identify these documents as proprietary and/or commercial information.

In paragraph 6 of the affidavit, you stated that FFD reports and information should also be exempt from public disclosure because "public disclosure of any of the information, reports and data described . . . would likely cause substantial harm to the competitive position of INPO taking into account the amount of effort and resources expended by INPO in developing such materials." Furthermore, you stated the following:

Because of its confidential nature, INPO would not customarily release or disclose this [FFD-related] information. Therefore, it is understood that verbal information and written communication related to INPO's FFD Program is regarded in the same fashion as proprietary information. As with other confidential information shared with the NRC, this information when written will be marked "FFD Proprietary Information" and when disclosed verbally will be designated as proprietary at the time of disclosure.

The staff has reviewed your application and the subject INPO reports in accordance with the requirements of 10 CFR 2.390. On the basis of the statements in your affidavit, the NRC will continue to withhold INPO SOERs, SERs, SENs, TRs, EPIX data reports, and NRC PI data from public disclosure. These reports contain proprietary commercial information, the reports are voluntarily submitted to the NRC, and the reports and information have been held in confidence by INPO and affected entities. Therefore, when marked as proprietary, the NRC will withhold these reports and information from public disclosure pursuant to 10 CFR 2.390(b)(5) and Section 103(b) of the Atomic Energy Act of 1954, as amended. If the need arises, we may send copies of this information to our consultants working in the technical or regulatory areas detailed in the reports. We will, of course, ensure that our consultants have signed the appropriate agreements for handling proprietary information.

If the basis for withholding INPO SOERs, SERs, SENs, TRs, EPIX data reports, and NRC PI data from public inspection should change in the future, such that the information could then be made available for public inspection, you should promptly notify the NRC. Additionally, the NRC may also have cause to review this 10 CFR 2.390 determination in the future (e.g., if the scope of a Freedom of Information Act request includes a request for the subject information). In these situations, if the NRC makes a determination contrary to our withholding determination, the NRC will notify INPO in advance of any public disclosure.

Regarding your request that FFD reports and information as required by NRC regulations, be exempt from mandatory disclosure pursuant to 10 CFR 2.390, the NRC denies this request. We reviewed your November 6, 2009, affidavit in accordance with 10 CFR 2.390(b)(3) and (4) and found that INPO had not provided sufficient justification for the NRC to conclude that INPO-related FFD reports contain privileged, confidential commercial, or financial information. Specifically, there were no specific statements as to why the public release of such information would cause substantial harm to the competitive position of INPO. Section 2.390(b)(1)(ii) requires that each supporting affidavit contain a full statement of the reasons on the basis of which it is claimed that the information should be withheld from public disclosure. This section further requires the statement to "address with specificity" the considerations listed in 10 CFR 2.390(b)(4).

If the, FFD performance data and reports are the ones required to be submitted to the NRC pursuant to 10 CFR Part 26.717, "Fitness-for-duty program performance data," and 10 CFR 26.719, "Reporting requirements", these reports are not voluntary and consistent with Commission policy these reports are, and have been, available for public inspection. The NRC staff also notes that INPO's FFD performance information has been provided to the NRC. An example of a previous report is dated August 11, 2008 (ADAMS Accession No. ML082280104). This particular FFD performance data report and others submitted by other NRC licensees have not been held in confidence by their owners and the information contained has not been of a type customarily held in confidence by any licensee, entity, contractor, or vendor implementing the requirements of 10 CFR Part 26, "Fitness for Duty Programs." Lastly, the reports have not

contained trade secrets, privileged, confidential, or financial information that if released would be likely to cause substantial harm to the competitive position of its owner.

Should INPO desire to provide additional justification as to why the NRC should reconsider its denial to exempt INPO-related FFD reports and information from public disclosure, please submit this request under a separate letter with its own affidavit. This request must meet the requirements described above and your reasons must be of sufficient detail to justify why the Commission should consider withholding INPO-related FFD from public disclosure based on the determinations in 10 CFR 2.390(b)(3) and (4).

The NRC will continue to make INPO reports submitted to the NRC pursuant to 10 CFR 26.717 and 10 CFR 26.719 available for public review in ADAMS and in the NRC's Public Document Room, unless the NRC receives subsequent information that justifies withholding. If you have any questions regarding our rejection of your request for withholding of FFD-related information, please contact me or Mr. Paul Harris at (301) 415-1169.

Sincerely,

/RA/

Bruce S. Mallett
Deputy Executive Director for Reactor
and Preparedness Programs
Office of the Executive Director for Operations

Docket No. 99901386

cc: Jim Ellis, Institute of Nuclear Power Operations
Ronn Smith, Institute of Nuclear Power Operations

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Bruce S. Mallett
Deputy Executive Director for Reactor
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Docket No. 99901386

cc: Jim Ellis, Institute of Nuclear Power Operations
Ronn Smith, Institute of Nuclear Power Operations

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DATE	12/22/09	12/23/09	12/28/09	12/23/09	12/24/09
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DATE	1/4/10	1/5/10	1/6/10	1/15 /10	

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