BEFORE THE UNITED STATES
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
CONSUMERS POWER COMPANY	)	Docket Nos. 50-329
	)	50-330
Midland Plant, Units 1 and 2	)	

BRIEF OF WESTINGHOUSE ELECTRIC CORPORATION IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER DENYING WESTINGHOUSE MOTION TO QUASH SUBPOENA

INTRODUCTION

This brief is submitted by Westinghouse Electric Corporation ("Westinghouse") in support of its Motion for Reconsideration of Order Denying Westinghouse Motion to Quash Subpoena. The facts are as follows:

On November 23, 1971, the Atomic Safety and Licensing Board (the "Licensing Board") hearing the application of Consumers Power Company for a license to construct Midland Plant Units 1 and 2 (the "Midland proceeding") issued an oral order or subpoena to Westinghouse requiring the production of three Westinghouse

proprietary reports (the "Reports") (Tr. 5028-5030).[1] In response to this subpoena, Westinghouse on December 7, 1971 filed a Motion to Quash Subpoena (the "Motion"), setting forth therein a variety of reasons for said Motion. The Motion was accompanied by a letter to Chairman Arthur W. Murphy of the Licensing Board, requesting permission to file a brief and an opportunity to present oral argument in support of the Motion. The Licensing Board initially did not respond to these requests. Rather, on December 22, 1971, the Licensing Board issued an "Order with Respect to Various Motions Filed in this Proceeding", in which, inter alia, it denied the Motion and requested Westinghouse to file and serve arguments and supporting data "to sustain the claim that the information in question is proprietary". The procedure being followed was clarified by Chairman Murphy on December 27, 1971 and Westinghouse was requested to submit a brief

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[1] The reports are: (1) Westinghouse Report WCAP 7153-L "Investigation of Chemical Additives for Reactor Containment Sprays" (Proprietary); (2) Westinghouse Report WCAP 7198-L "Evaluation of Protective Coatings for Use in Reactor Containment" (Proprietary); and (3) Westinghouse Report WCAP 7499-L "Topical Report - Elemental Iodine Removal by Reactive Sprays" (Proprietary).

by January 15, 1972 in support of the points raised in the Motion. In addition, the Chairman suggested that Westinghouse might file a motion to reconsider the Licensing Board Order of December 22, 1971 denying the Motion. This brief and accompanying Motion for Reconsideration of Order Denying Motion to Quash Subpoena (the "Motion for Reconsideration") are filed in response to that request.

The Midland proceeding involves the application of Consumers Power Company for a construction license. The Babcock & Wilcox Manufacturing Company (B&W), a competitor of Westinghouse, has contracted to supply the nuclear steam supply system for the plant. In considering this brief and motion, it must always be recalled that Westinghouse is not a party to the Midland proceeding nor is Westinghouse the vendor whose nuclear equipment is being purchased for use in the proposed Midland plant. Rather, Westinghouse is an outside, third person to the proceedings, and an attempt is being made to drag Westinghouse reports into a proceeding in which Westinghouse is not otherwise involved.

SUMMARY OF ARGUMENT

The basic position of Westinghouse, as more fully explained in the Argument below (pp. 5-33) can be summarized as follows:

(1) The Licensing Board has determined that the reports are not needed in the Midland proceeding, and in the absence of a finding of need and relevance, the reports need not be produced.

(2) Even if the threshold finding of need and relevance were made, the reports are proprietary to Westinghouse and should not be required to be produced in a proceeding in which Westinghouse is not a party and is not a vendor of nuclear equipment to the applicant. If inquiry is to be made into the proprietary nature of the reports, the test to be applied is whether the material is customarily held in confidence by the originator, and applying that test, the reports are clearly proprietary under applicable law and regulations.

(3) As a matter of public policy, due process and the orderly conduct of administrative proceedings, the reports should not be required to be produced. Production of these and similar reports in this and other

hearings by a non-party competitor would constitute an unreasonable burden on Westinghouse, when taken in the context of requiring a person not otherwise involved in certain proceedings to appear and defend in each of such proceedings its right not to disclose trade secrets or commercial, privileged or confidential information.

ARGUMENT

I. The Absence of a Required Showing of Need and Relevance Regarding the Reports Requires That the Subpoena Be Quashed

This Licensing Board determined at least as early as June 25, 1971, that one prerequisite to the production of the Westinghouse reports was a demonstration of "need" for such reports (Tr. 2303), and that no such need existed (Tr. 2301). In this analysis the Board was clearly correct.

Initially, the reports under consideration were requested by the Saginaw Valley Intervenors (the "Intervenors") from the Atomic Energy Commission (the "AEC" or

the "Commission") under § 2.744 of the Regulations of the AEC. (10 C.F.R. § 2.744) (Tr. 1417; 1549).[2] That section states, in relevant part:

> "(a) AEC records and documents, except internal working papers and other records of the type which are exempt from public disclosure under Section 9.5 of this chapter, will be produced upon request for inspection and copying or photographing.
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> "(b) An application by a party to a proceeding for the production of Commission inspection reports and other records or documents, the basic purpose of which is to record matters of fact relating to license applications or licensed activities, shall be addressed to the presiding officer in writing and shall set forth the need of the party for such documents and the relevancy thereof to the issues in the proceeding . . ." (Emphasis added.)

Further, under § 2.744 the requested information will be authorized for production only (1) after a determination of need and relevance, and (2) if the facts are not otherwise available to the moving party, and even then such production is subject to the deletion of pro-

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[2]The reports in question were filed with the AEC for use only in connection with applications involving Westinghouse reactors, and were submitted with an application for withholding from public disclosure. The AEC thus received the reports in confidence, and the request for non-disclosure has been honored. (See attached affidavit of R. A. Wiesemann.)

prietary information. The pertinent language of § 2.744(b) reads:

> "Upon a determination of need and relevancy by the presiding officer, such inspection reports and such records and documents will be produced if the facts recorded therein are not otherwise available to the moving party. Production of such reports, records and documents will be subject to the deletion of:
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> . . .
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> (4) information of a proprietary nature." (Emphasis added.)

Thus, the language of § 2.744 makes it clear that as a threshold matter the Licensing Board is required to find that the reports are both relevant to and needed in the proceeding. Acting under § 2.744, the Licensing Board found no need for the production of these reports and hence initially denied their requested production. (Tr. 2301).

The subpoena to Westinghouse, of course, subsequently was issued under § 2.720 of the Regulations (10 C.F.R. § 2.720), since that section relates to subpoenas to non-parties. For a subpoena issued under § 2.720 to withstand challenge, it must require material which is

relevant to the hearing and must not be unreasonable. Not only is the Licensing Board authorized to require a showing of relevance (§ 2.720(a)), but the subpoena may be quashed ". . . if it is unreasonable or requires evidence not relevant to any matter in issue" (§ 2.720(f)). Since this requirement of need is clearly present when documents are being sought from the AEC under § 2.744 of the Regulations, and since a requirement of good cause is also present when documents are sought from a party to the proceeding under § 2.741 of the Regulations (10 C.F.R. § 2.741), it would indeed be a strained and incongruous reading of § 2.720 not to require a threshold determination of need and relevance where documents are sought from a stranger to the hearing.[3]

In the ruling of the Atomic Safety and Licensing Appeal Board (the "Appeal Board") involving the Midland

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[3] In connection with an analogous legal problem, the Atomic Safety and Licensing Appeal Board has held that the standards for determining whether information is proprietary do not vary depending on whether § 2.720 or § 2.744 is utilized for production of information. In the Matter of Consumers Power Company (Midland Plant, Units 1 and 2), Docket Nos. 50-329, 50-330, Memorandum of Atomic Safety and Licensing Appeal Board, dated September 21, 1971, p. 8. See discussion infra, p. 19.

proceeding,[4] the Appeal Board held that with respect to the request to the AEC under § 2.744 for production of the documents in question, a threshold showing of need and relevance was required, and that the finding of the Licensing Board of no need for the documents was within its discretionary authority. The Appeal Board went on to discuss in Question Number 3 whether, despite the conclusion that no need has been shown, an inquiry need be made into the basis for the assertion that the reports are proprietary. The language of the Appeal Board on this subject has been a matter of some confusion and interpretation. In its Order dated December 22, 1971, the Licensing Board stated its understanding of the Appeal Board ruling as follows (at p. 9):

> "As the Board understands the ruling of the Appeal Board, unless there is a finding by the Atomic Safety and Licensing Board that the claim that the information sought is proprietary the documents must be made available to intervenors. We had not in fact made such a finding because we felt that the absence of need relieved the Board of the obligation to do so."

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[4] In the Matter of Consumers Power Company (Midland Plant, Units 1 and 2), Docket Nos. 50-329, 50-330, Memorandum of Atomic Safety and Licensing Appeal Board, dated September 21, 1971, p. 8.

Westinghouse respectfully submits that this is not a proper or necessary interpretation of the Appeal Board decision. Question Number 3 considered by the Appeal Board was whether inquiry must be made into the basis for the assertion that information is proprietary where no need for the information is found. This question was answered by the Appeal Board only in the context of § 2.744. Thus, the Appeal Board began its consideration of Question 3 with the statement:

> "As noted in the answer to Question 2, it is our opinion that Section 2.744 is the appropriate rule for disposition of intervenor's request."

Thereafter, the entire consideration of Question 3 related to the test under § 2.744. The Appeal Board in this context said that:

> "Whether the information is, in fact, proprietary is initially for the Licensing Board to decide based on all relevant factors available."

We submit that when read in context, this merely means that if the requisite need and relevance are found by the Licensing Board, then the Licensing Board in the first instance makes a determination of proprietary

(as opposed, for example, to such a determination being made by the Commission itself). In other words, the word "initially" as used by the Appeal Board in its ruling did not mean that the first inquiry is into the proprietary nature of the documents, but rather that the Licensing Board, as opposed to other possible reviewers, gets the first opportunity to review the claim of proprietary.

If the Licensing Board's view of the holding of the Appeal Board remains the same, despite the above argument, then Westinghouse respectfully submits that such an interpretation is erroneous and the matter should be resubmitted to the Appeal Board for further consideration and clarification.

Further, as indicated above (pp. 7-8, supra), both in the case of a request for production of documents from a party under § 2.741 and from the AEC under § 2.744, there is a requirement of good cause and relevance.[5]

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[5] The Opinion of the Atomic Safety and Licensing Appeal Board In the Matter of Northern States Power Company (Monticello Nuclear Generating Plant Unit 1), Docket No. 50-263, decided August 20, 1970, held, with respect to production of a party's documents requested by another party pursuant to § 2.741, that the initial determination of the Licensing Board must be "good cause" and "relevancy". Only thereafter does a Licensing Board approach the question of privilege.

Surely if the protection of good cause and relevance are afforded a party to a proceeding, the same protection should not be denied, and a greater burden should not be placed on, one not a party to the proceeding but whose documents are requested. The proposition that a non-party like Westinghouse should be required to produce documents and materials where those documents and materials are not needed simply because the documents and materials may be of a non-proprietary nature, is so incredible an interpretation of the regulations as hardly to demand an answer. Such an interpretation would allow any party to an Atomic Safety and Licensing Board hearing, without the limitation of a finding of need, relevance, or good cause, to force any stranger to the hearing to produce documents, regardless of expense or inconvenience. We respectfully submit such a procedure cannot be contemplated under any fair reading of the regulations, and indeed would violate

fundamental standards of fairness and due process.[6]

As previously indicated (p. 5, supra), the Board has determined that no need exists for production of the Westinghouse reports. We also submit that the use by Intervenors of the reports in a hearing involving a reactor to be manufactured by B&W, a competitor of Westinghouse, where Westinghouse has no responsibility or relationship with or to the plant under consideration, would be irrelevant. The intended use of the reports in the Midland proceeding, as announced by Intervenors, was to allow a comparison of the reagents used by Westinghouse and B&W in iodine removal systems in order to determine the best available technology. Counsel for Intervenors

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[6]See 4 Moore's Federal Practice ¶ 26.30[4] at p. 26-245 (2d Ed 1971) (". . . courts are loath to order disclosure of trade secrets absent a clear showing of an immediate need for the information requested."); Hartley Pen Company v. United States District Court for the Southern District of California, Central Division, 287 F. 2d 324, 331 (9 Cir. 1961) (". . . the requirements of relevance and necessity must be established where disclosure of a trade secret is sought . . ."); United States v. Serta Associates, Inc., 29 F.R.D. 136, 138 (N.D. Ill. 1961) (where the court quashed a subpoena "because it is not convinced of the relevancy of the documents sought, and additionally because it would be most reluctant to force a non-party competitor to divulge confidential information"); See also Korman v. Shull, 184 F. Supp. 928 (W.D. Mich. 1960); United States v. Reynolds, 345 U. S. 1 (1952).

urged that a comparison of all available reactor technology be made. (Tr. 1549-1552).[7]

That a comparison of competing systems is not relevant to a licensing board proceeding is now beyond argument. As this Licensing Board specifically stated (Tr. 2114):

> ". . . I think the Board is satisfied on that aspect of it, that this hearing cannot get into the question of whether the particular feature is better in one reactor than in another reactor."

This position has been adopted by the Appeal Board in its Memorandum in the proceeding In the Matter of Wisconsin Electric Power Company and Wisconsin-Michigan Power Company, (Point Beach Nuclear Plant, Unit 2), Docket No. 50-301, where the Appeal Board said (at page 8):

> "We wish to make it clear that, in a given case, the only question to be considered is whether the proposed reactor satisfies applicable licensing requirements. If so, the fact that other systems were used with respect to other reactors at other sites is not relevant. Since the intervenors

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[7]Also see letter dated August 10, 1971 from Myron M. Cherry, Esq. to Chairman Murphy. For the position of the AEC Regulatory Staff on this matter, see Tr. 2111-2113.

> have not related their contentions to whether the proposed plant in this proceeding, will meet the requisite licensing requirements, it was not an abuse of discretion for the Licensing Board to refuse to consider contentions involving other reactors."

Westinghouse respectfully submits that any assertion subsequently made by the Intervenors that they do not in fact intend to utilize the Westinghouse proprietary reports to test the adequacy of the competitive reagent is not convincing and that the reason now asserted by Intervenor for the relevance of the reports is still fundamentally for purposes of comparison of different systems. The very examination of such reports and utilization thereof by the Intervenor in the Midland proceedings necessarily contemplates a comparison of reactor technology. Intervenors, in a document dated December 10, 1971 and entitled "Saginaw Valley, et al., Response to Westinghouse Electric Corporation's Motion to Quash Subpoena", made the following argument with respect to relevance of the Westinghouse reports (at p. 5):

> "In point (1) Westinghouse argues that the subpoena is unreasonable and requires evidence not relevant in any matter

properly in issue in the proceeding.

> "It is quite clear that Babcock & Wilcox and Westinghouse have taken positions not dissimilar but in opposition to each other with regard to the reagent appropriate to use in an iodine spray removal system. Accordingly, and the question of best technology aside, we are dealing here with the issue of whether the analysis by Babcock & Wilcox is in accordance with the Rules and Regulations of the Commission; and it is obviously proper to demonstrate that another vendor in the nuclear field, namely Westinghouse, has examined the same technology, and has come to a different conclusion." (Emphasis in original)

To argue that one is putting aside the question of best technology and then to state, as Intervenors have done, that another vendor has come to a different conclusion with regard to the same technology is, we suggest, sophistry. The Westinghouse conclusion to use a different reagent than that used by B&W is not relevant to an inquiry into whether the reagent chosen by B&W will be adequate to meet the Commission criteria, and inquiry into that conclusion inevitably involves comparison of the technology of Westinghouse and B&W.

Further, with respect to the claim by Intervenors

that they cannot examine into the question of adequacy of the B&W system unless they are free to use the reports in question the Licensing Board, after reading the Westinghouse reports, the B&W reports and various articles in the published literature (see Tr. 2301) concluded that use of the Westinghouse reports was not necessary to such an examination. See Certification of Questions to the Appeal Board, dated August 18, 1971, p. 2.

In summary, a finding of need for and relevance of the Westinghouse reports must be demonstrated prior to the production thereof and irrespective of whether such reports are proprietary. The Licensing Board has already made a determination that no need exists for production of the reports. The Intervenors have indicated that their intended use of the reports is to assist in making a comparison of reactor systems technology. Under applicable Appeal Board rulings, such comparison would be irrelevant to the Midland proceedings. Accordingly, neither need nor relevance is present and the Licensing Board should quash the subpoena to

Westinghouse.[8]

II. The Westinghouse Reports Are Proprietary and Therefore Are Not Required to be Produced in Response to the Subpoena

Even assuming that need and relevance had been found by the Licensing Board, we respectfully submit that Westinghouse should not be required to produce the reports since the reports are proprietary. The factual basis for establishing the proprietary nature of the reports is contained in the affidavit of Robert A. Wiesemann of Westinghouse, submitted with this brief. That affidavit sets forth in detail the methods and procedures utilized and the criteria applied by Westinghouse in establishing these reports as proprietary. Further, this Licensing Board has already made a prima facie determination that there is a sufficient basis for the Westinghouse position that the reports are proprietary (Tr. 2302).

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[8]It should be noted that in the Atomic Safety and Licensing Board hearing involving the application of the Wisconsin Electric Power Co. for a license for its Point Beach Unit #2 where Westinghouse is the vendor, a similar situation arose involving a subpoena to B&W to produce B&W proprietary reports and a witness relating to the reagent used in B&W iodine removal systems. The Licensing Board in that case quashed the subpoena to B&W. Point Beach Transcript, p. 1043.

The legal standard for determining whether information is proprietary does not depend upon whether production of the reports is sought under § 2.720 or § 2.744 of the AEC Regulations. As the Appeal Board said in its Memorandum in this proceeding dated September 21, 1971 (at p. 8):

> "Generally speaking, we perceive of no reason why the standards for determining whether information is proprietary should be different depending upon whether Section 2.720 or Section 2.744 is utilized for production of the information."

This being the case, it is clear that the exemptions from public disclosure set forth in § 9.5 (10 C.F.R. § 9.5), as referenced in § 2.744, are applicable to a request for documents under § 2.720, since otherwise disparate and inconsistent standards would arise.

The basic statutory provisions governing disclosure of information by a federal agency, and exemptions from such disclosure, are contained in the Freedom of Information Act, as embodied in the Administrative Procedure Act, 5 USCA § 552.[9] The Freedom of Information

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[9] An order by the Licensing Board granting a subpoena forcing production of documents would clearly be the act of an agency making records available to the public. See 5 USCA § 552(a)(3).

Act, passed in 1967, recognized that valid grounds exist for withholding of information from public disclosure, and accordingly that act provides for a number of exemptions from disclosure. 5 USCA § 552(b). Among catagories of information as to which disclosure is not to be made are (5 USCA § 552(b)):

> "(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential."

The legislative history of the Freedom of Information Act makes it clear that both the House and Senate intended in this exemption No. 4 to exempt from disclosure material which would not customarily be made public by the originator.[10] General Services Administration v. Benson, 415 F. 2d 878, 881 (9 Cir. 1969).

To implement the provisions of 5 USCA § 552, the AEC adopted Part 9 of its Regulations (10 C.F.R. 9).

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[10] H. R. Report No. 1497, 89th Cong. 2d Sess. (1966) p. 10 ("It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government"); S. Report No. 813, 89th Cong. 1st Sess. (1965) p. 9 ("This exemption is necessary to protect the confidentiality of information . . . which would customarily not be released to the public by the person from whom it was obtained"). For a general discussion of the Freedom of Information Act, see Note, Freedom of Information: The Statute and the Regulations, 56 Geo. L.J. 18 (1967).

See 10 C.F.R. § 9.1. Section 9.5(a) of the Regulations exempts from public disclosure various catagories of records, including:

> "(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential."[11]

Thus the Commission in its Regulation tracks the wording of the Freedom of Information Act in exempting the above mentioned reports from public disclosure.

Section 9.5(a)(4) goes on to provide the standards for determining matters which are subject to the exemption, as follows:

> "(a) The following types of records are exempt from public disclosure under Section 9.4:
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> . . .
>
> (4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential. Matter subject to this exemption is that which is customarily held in confidence by the originator. It includes, but is not limited to:

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[11] It should be noted that information falling in the catagories mentioned in § 9.5(a)(4) is generally referred to as "proprietary" information. Technically, proprietary information is only one type of such information. See, e.g. § 9.5(a)(4)(i). However, as used in this brief and by most persons in this area, proprietary information is understood to encompass all information of the type identified in § 9.5(a)(4), unless specifically noted otherwise.

> (i) Information received in confidence, such as trade secrets, inventions and discoveries and proprietary data;
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> (ii) Technical reports and data, designs, drawings, specifications, formulae, or other types of proprietary information which are generated or developed by the AEC or for the AEC under contract;
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> (iii) Statistical data or information concerning contract performance, income, profits, losses, and expenditures, if received in confidence from a contractor or potential contractor;
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> (iv) Information withheld pursuant to Sec. 2.790 of this chapter." (Emphasis added)

Thus, the Commission has adopted by regulation the test of "proprietary" which clearly was intended by Congress when it enacted the Freedom of Information Act, to wit: whether the material is customarily held in confidence by the originator.

In applying the foregoing legal standard to the Westinghouse reports here involved, we direct the attention of the Licensing Board to the affidavit of Robert A. Wiesemann of Westinghouse submitted with this brief. That affidavit, in addition to setting forth

the procedures used by Westinghouse in classifying documents as proprietary and the criteria and standards utilized in such determination, specifically states, with respect to the documents, "each of the documents is customarily held in confidence by Westinghouse and is not customarily made available to the public". (Emphasis added.) See also In the Matter of Consolidated Edison Company of New York, Inc. (Indian Point Plant Unit No. 2), Docket No. 50-247, Transcript pp. 2898-2904. Thus, the reports fit squarely within the exemptions and protection afforded by the Freedom of Information Act and the AEC Regulations.

Three other points should be made with regard to a consideration of the above reports as proprietary: (1) the inappropriateness of reviewing each statement within or section of a document as to which a claim of proprietary has been asserted to determine whether the document is proprietary; (2) the fact that certain information in the generally available literature may nonetheless be proprietary to Westinghouse in a specific time and situation context when and as also represented in a Westinghouse report; and (3) the implications of the fact that the reports were submitted to the AEC.

With respect to the first point, it would be

inappropriate for this Licensing Board to require Westinghouse to defend the proprietary status of the documents by an examination and comparison of particular statements within the documents to see if they are known or otherwise available to Westinghouse competitors. Such a procedure would require knowledge on the part of Westinghouse of all of the information known to its competitors, including proprietary information of such competitors. To require such an exercise would defeat the very principle at issue -- namely, the right to preserve as secret and confidential valuable proprietary information. See example No. 2, infra. p. 26. Further, the value to a competitor of the information contained in a report is a function not only of the information itself but also of the other knowledge and experience available to such competitor. Thus, the question of whether the reports are proprietary should be resolved solely by examination of whether the documents are customarily held in confidence by Westinghouse, and not by a procedure whereby the Licensing Board requires proof that others do not have available the material

contained in the reports.

With respect to the second point, it is possible that within the framework of a particular time and situation context, material may be proprietary to a person despite the fact that it is available in the general literature. Two examples illustrate this point:

Example 1: In 1967, Vendor X, in connection with an application for a license, submits a report on the adequacy of the grease which it proposes to use to lubricate a component. The report is not then submitted with a request to the AEC to keep it in confidence, and hence is not then considered proprietary. In 1971, Vendor X, having had four years of experience in actual use of the grease, submits the same report in connection with an application for a different license. That second submission could be accompanied by a request to keep the report in confidence and accord it proprietary treatment. What is proprietary is the fact that after four years of operating experience on a Vendor X plant, no change was needed in the grease to be used as a lubricant. Thus, although the information in the report is public by virtue of the

first submittal, the fact that no change has been made after four years of operation can only be protected by classifying the second submitted copy of the report as proprietary.

Example 2: Vendor X establishes, after a research project involving an expenditure of many dollars, that for the parameters of interest a simple textbook formula can be used to solve a difficult analytical problem for one of its plant systems. Prior to that time, Vendor X had used a complex, timely and costly computer code analysis to solve the problem each time it wanted to license a plant, and its competitors had done likewise. The submission by Vendor X of its report and the inclusion of the simple textbook formula as the way to solve the problem would be proprietary, notwithstanding the fact that the formula is in the public literature. The key is that competitors of Vendor X would have to expend similar energy, time and money to determine that the formula is applicable and hence to save the costly computer code analysis which they otherwise must run each time they wish to solve the problem.

Thus, it can be seen that determination of

proprietary as being that customarily held in confidence by the originator rests on a sound practical basis, since other tests, such as whether the fact is or is not publically available, will not suffice to protect information which may be commercially valuable.

The fact that Westinghouse submitted the reports to the Commission does not change the result. They were submitted and received in confidence for use in connection with applications involving Westinghouse reactors. See attached affidavit. Under § 9.5(a)(4), such information, when received in confidence by the Commission, is not to be disclosed. Hence, the Commission properly would have been required to refuse disclosure under § 2.744 if the issue of proprietary had been reached in connection with the request to the AEC for the reports. Since no need for the documents was found when this matter was

considered under § 2.744, this point is, of course, moot.[12]

In summary, the test of whether reports are proprietary is whether they are customarily held in confidence by the originator. Applying this test in conjunction with the facts set forth in the attached affidavit, it is clear that the reports here are proprietary to Westinghouse.[13]

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[12] A corollary follows from the above discussion. Westinghouse should not be required to release the reports to anyone other than the Licensing Board, and then only for the limited purpose of determining need, relevance and, when necessary, the proprietary character of the reports. See, e. g. § 2.744. To require Westinghouse to give up the reports to any person, including the Intervenors prior to their proprietary character having been determined, would violate the right of Westinghouse to maintain the secret and confidential nature of the reports to which it is presumptively entitled as the originator of the report.

[13] If the result is other than as indicated above, Westinghouse will want to present a brief and arguments as to the need for an in camera session to determine the proprietary nature of the reports and the need for in camera discussion of any material contained in the reports. Because this point has not been reached in the Midland proceeding, and should not be reached, the matter is not presented in this brief. Westinghouse also might desire to present evidence in such a hearing with respect to the damage which would result from disclosure. For a discussion of the in camera procedures in administrative hearings, see Cohn and Zuckman, FCC v. Schreiber: In Camera and the Administrative Agency, 56 Geo. L.J., 451 (1968).

III. As a Matter of Public Policy, the Reports of a Non-party Competitor Should not be Required to be Produced in the Present Hearing

Westinghouse respectfully submits that at issue here is more than the production of three proprietary reports. Rather, there is involved in this matter such questions as (1) whether it is proper in our competitive society to force one who is not involved in any manner in a hearing and who is a competitor to someone involved in that hearing to divulge trade secrets or commercial, privileged or confidential information, especially where the need for the information has been found not to exist; and (2) whether due process is found in a procedure whereby, without any finding of good cause, need or relevance, a non-party is put to the considerable burden of justifying why material which it customarily holds in confidence should not be released, especially where good cause, need and relevance must be established at the threshold if the documents involved are those of a party to the proceeding. There is every reason to believe that if the Intervenors obtain pro-

duction of these reports, they thereafter will seek production of similar reports on an ever-expanding scale. Indeed, in their letter to the Licensing Board dated August 10, 1971 the Intervenors moved for the following order:

> ". . . Intervenors herewith move the Board, pursuant to the Rules of Practice, for an Order issuing Subpoenas to Westinghouse Electric Corporation, General Electric Corporation and Combustion Engineering requiring each of them to produce, for use in connection with these dockets, all documents and reports, including patent applications and patent filings, whether claimed proprietary or not, dealing with each of their emergency core cooling systems, including but not limited to documents which make comparative analyses of any ECCS system with another."

This is in line with Intervenors position that all comparative technology should be reviewed. See supra, pp. 13-14.[14] The prospect of such an expanded discovery process clearly would constitute an unreasonable

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[14] Further, other intervenors in the Midland proceeding have requested the production of all documents which were consulted or relied upon by inter alia, the staff in its environmental analysis. Similar requests could be expected to follow regarding areas in which Westinghouse has documents on file.

burden on Westinghouse, as well as other reactor vendors, which should not be permitted.

There is, moreover, the prospect of reactor vendors being required to produce various documents, both proprietary and non-proprietary, in other hearings in which they have no legal interest whatsoever. As the number of complex AEC licensing proceedings continues to increase, the impossibility of producing, monitoring and protecting the dissemination of proprietary materials become apparent. Westinghouse readily makes available to all parties to hearings involving the licensing of Westinghouse reactors purchased by customers of Westinghouse, relevant information in the possession of Westinghouse relating to such reactors. Where this material is proprietary it is made available under suitable protective orders or agreements. There should not be allowed to develop, however, licensing proceedings in which several vendors and their documents are involved, because the end result will inevitably be to cause disclosure of proprietary information of one vendor to its competitors, and a comparison of the systems of different vendors.

A further unfortunate result which could follow from ordering production of the reports by the Board is that of discouraging research and limiting the knowledge of the existence of such reports. It is merely stating the obvious to note that the competitive incentive by a reactor vendor to undertake research is chilled by the prospect that such research can and will be made available to competitors. Moreover, it follows that making such a report known to the AEC, is inevitably discouraged if that report is thereafter made available to competitors or unauthorized persons.[15] Finally, if vendors are required to exchange technology via release of information in the context urder discussion, this would appear to be contrary to the basic policies underlying the antitrust laws. See Tr. 1560.

In summary, there are sound reasons of public policy not to require production and disclosure to a

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[15]For this reason, also, the protections afforded by § 2.720 should not be different from those set forth in § 2.741 or § 2.744.

competitor of the Westinghouse information in the present situation, in addition to the undue burden which would be placed on a non-party to the proceeding where no need or relevance has been found.

Conclusion

Westinghouse respectfully submits that the Licensing Board should grant the Motion for Reconsideration and, on reconsideration of the Motion to Quash Subpoena, should grant said Motion for the reasons that (1) no need or relevance has been found for requiring production of the documents in question; (2) the documents are proprietary to Westinghouse and under applicable law and regulations need not be produced; and (3) sound public policy reasons exist for not requiring a competitor-stranger to a hearing to disclose documents, especially where such disclosure will cause undue burden.

Respectfully submitted,

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Date Filed: January 15, 1972

AFFIDAVIT OF ROBERT A. WIESEMANN

COMMONWEALTH OF PENNSYLVANIA :
ss
COUNTY OF ALLEGHENY :

Before me, the undersigned authority, personally appeared Robert A. Wiesemann, who being by me duly sworn according to law, deposes and says that the averments of fact set forth in this Affidavit are true and correct to the best of his knowledge, information and belief:

(1) I am Manager, Special Licensing Projects for the Pressurized Water Reactor Systems Division, Westinghouse Nuclear Energy Systems, Westinghouse Power Systems Company, Westinghouse Electric Corporation, ("Westinghouse") and as such I am authorized to execute this Affidavit.

(2) I am familiar with the procedures utilized by Westinghouse for the classification of certain information as proprietary by Westinghouse and in particular by Westinghouse Nuclear Energy Systems, and the criteria and standards applied by Westinghouse and Westinghouse Nuclear

Energy Systems in determining whether information is proprietary. I also am familiar with the documents listed on Exhibit "1" to this Affidavit and designated as proprietary by Westinghouse.

(3) Each of the documents listed on Exhibit "1" has been classified by Westinghouse as proprietary in accordance with normal Westinghouse procedures with respect to such classification.

(4) Each of the documents listed on Exhibit "1" contains information constituting trade secrets or commercial information or privileged or confidential information, including proprietary data.

(5) Each of the documents listed on Exhibit "1" and matters set forth in each of said documents is customarily held in confidence by Westinghouse and is not customarily made available to the public.

(6) Each of the documents listed

on Exhibit "1" has been made available to the United States Atomic Energy Commission, in confidence with a request that the documents be withheld from public disclosure and each of the documents were received in confidence by the Commission.

(7) In determining whether documents are to be classified as proprietary the following procedure is used by Westinghouse: An initial determination as to whether a document or report should be classified as proprietary is made by the author of the report as the person most knowledgeable with respect to the content of its report, the nature of the sensitivity of information contained in the report, the state of the art and knowledge in the industry with respect to the subject matter of the report, and the usefulness of the information contained in the report with respect to the assisting competitors or giving

Westinghouse a competitive advantage relating thereto. Thereafter, if a preliminary determination has been made to classify a report as proprietary, that determination is reviewed by the management level supervisors of the originator of the report, and if such determination is approved upon review the report is classified as proprietary. In the event the preliminary determination of proprietary is not approved by the management level supervisors or in the event the preliminary determination is that a report is non-proprietary, the report is further reviewed by the cognizant managers, including the general manager of the division, where appropriate, and if upon such review the report is determined to be proprietary it is either classified as proprietary or returned to the author for modification to make it non-proprietary.

(8) In determining whether information

is proprietary the following criteria and standards are utilized by Westinghouse. Information is proprietary if any one of the following are met:

(a) It reveals the distinguishing aspects of a process (or component, structure, tool, method, etc.) whose exclusive use by Westinghouse constitutes a competitive economic advantage over other companies.

(b) It consists of supporting data, including test data, relative to a process (or component, structure, tool, method, etc.), the application of which data secures a competitive economic advantage, e.g., by optimization or improved marketability.

(c) Its use by a competitor would reduce his expenditure or resources in the design, manufacture, shipment,

installation, assurance of quality, or licensing a similar product.

(d) It reveals cost or price information, production capacities, budget levels, or commercial strategies of Westinghouse, its customers or suppliers.

(e) It reveals aspects of past, present or future Westinghouse - or customer-funded development plans and programs of potential commercial value to Westinghouse.

(f) It contains patentable ideas, for which patent protection may be desirable.

(9) Each of the documents listed on Exhibit "1" contains information in one or more of the categories listed in item 8 above.

(10) Each of the documents listed on Exhibit "1" is considered proprietary by Westinghouse because it contains information customarily held in confidence by Westinghouse. Each such document reports on research and development programs

including experiments, tests, analysis and development of analytical techniques, conducted by Westinghouse with respect to the subject matter of those reports, and each document sets forth in detail equipment, procedures, results and/or conclusions of such experiments conducted with Westinghouse monies and for its exclusive benefit. Further, the reports comprise information utilized by Westinghouse in its business which afford Westinghouse an opportunity to obtain a competitive advantage over its competitors who do or may not know or use the information contained in the reports.

Further the deponent sayeth not.

/s/ Robert A. Wiesemann
Robert A. Wiesemann

Sworn to and subscribed before
me this 14th day of January,
1972.

/s/ Rebecca A. Lorince
Notary Public

EXHIBIT 1

to

AFFIDAVIT OF ROBERT A. WIESEMANN

(List of Westinghouse Proprietary Reports)

1. WCAP-7153L, "Investigation of Chemical Additives for Reactor Containment Sprays"

2. WCAP-7198L, "Evaluation of Protective Coatings for Use in Reactor Containment"

3. WCAP-7499L, "Topical Report - Elemental Iodine Removal by Reactive Sprays"