

MARCH 6, 1972

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

IN THE MATTER OF)

CONSUMERS POWER COMPANY)

MIDLAND PLANT UNITS 1 AND 2)

DOCKET NOS. 50-329
50-330

BRIEF OF
SACRAMENTO VALLEY ET AL. INTERVENORS IN OPPOSITION
TO WESTINGHOUSE ELECTRIC CORPORATION'S MOTION
FOR RECONSIDERATION OF ORDER DENYING
WESTINGHOUSE'S MOTION TO QUASH THE SUBPOENA

INTRODUCTION

The Westinghouse Brief has demonstrated that its legal argument is as incredible as it likes us to believe a LOCA is -- and both arguments are without foundation.

First of all, the myth of any sensible or reasonable claim of proprietary has been exposed; it is clear that Westinghouse is taking the position that it is entitled to withhold the subject reports¹ without regard to their character, merely because it claims an aura of confidentiality. At page 4 of its Brief, Westinghouse states:

¹ For a description of the reports which are the subject of the pending matter, see footnote 1, page 2 of the Westinghouse Brief dated January 15, 1972, hereafter referred to as the Westinghouse Brief.

"If inquiry is to be made into the proprietary matters of the reports, the test to be applied is whether the material is customarily held in confidence by the originator. . ."

And, although Westinghouse admits that the Board requested it to file and serve arguments and supporting data (W. Br., p. 2), it is clear that no supporting data has been supplied. Thus, the Weiserann affidavit is no more than a statement of the legal test asserted by Westinghouse. Mr. Weiserann's remarks are nothing more than in the nature of "sworn legal testimony."

Moreover, when one reviews the original Certification of Questions to the Appeal Board dated August 18, 1971, the statements made by the Board with respect to the test of proprietary clearly reject out of hand the Westinghouse test. Thus the Board stated (and later admitted the obvious that the statement was without any underlying evidentiary support or developed at a hearing):

"The information seems clearly to have been the product of Westinghouse research and development, and Westinghouse competitors would seem likely to reap at least some advantages from the disclosure of the material." (August 18, 1971 Certification, page 5.)

Thus, on its Motion for Reconsideration, Westinghouse asserts a legal test which goes even further than the Board went in August.

Moreover, when one understands that the Appeal Board in its Memorandum and Order of September 21, 1971 erroneously concluded that the Board had made an evidentiary judgment as to the issue of proprietary, the Board promptly issued a subpoena to Westinghouse and ordered a hearing on the merits of the claim. Westinghouse's Brief essentially argues that at such a hearing, no one could dispute the aura of confidentiality and so as a matter of law, it is entitled to relief now before the hearing. In order for Westinghouse to prevail now, it must be correct in its legal test (which it is not) and the Weisemann Affidavit must be uncontested (which it is not).

Viewed in the proper context, the writing of the Westinghouse Brief as well as the requirement upon Interveners to prepare and file this Brief has been a waste of time. We are now more than eight months after the original claim of proprietary and as a result of maneuvers and obfuscation by Westinghouse, we are at a point where the issue remaining (and indeed the only issue raised by the Westinghouse claim some months ago) is whether, in fact, (a) the information contained in the reports is protectable; (b) whether, if protectable, its release would result in a defined competitive injury to Westinghouse; and (c) assuming a positive answer as to the first two items, it is in the

public interest,² upon appropriate balancing to sustain the claim of proprietary.

Westinghouse ignores the applicable law and tries to foster and shape a test of proprietary insupportable as a matter of law and, in fact, a test resulting in Westinghouse being the judge of its own cause.

We shall demonstrate below that the appropriate test as to whether information is proprietary encompasses an examination of the information itself, its relationship to the open literature, the competitive effect, if any, of its disclosure and the public interest in having the information available for public scrutiny. Accordingly, whether the appropriate test is the traditional common law privilege of protecting trade secrets (the test we believe appropriate), or whether the test is a function of an interpretation of the Freedom of Information Act, the results are parallel. That is, Westinghouse may not gain the protection

²

In this connection, we call attention to the Appeal Board's decision of September 21, 1971 at page 9 where it states:

"In either case, in considering a request for production of proprietary information, the Licensing Board should weigh the detrimental effects of disclosure against the demonstrated need for production." (Emphasis supplied.)

It is clear that the Board can weigh nothing without a hearing.

it seeks without a factual examination of the information itself and the effect of its disclosure vel non.

Although Westinghouse spends an inordinate amount of time in its Brief arguing for a demonstration of good cause, relevance, and need, the only issues before the Board are the appropriate test of proprietary and the timing of a hearing as to the merits of Westinghouse's claim of privilege pursuant to that test.

There can be no question that the reports sought are relevant. The reports deal with a generic area of nuclear safety, that is, iodine spray removal systems and chemical additives thereto; and it is clear that Intervenor's are not seeking the documents to make a comparative investigation. This was made clear in our December 10, 1971 Response to Westinghouse's Motion to Quash.

Moreover, both the Board and the Appeal Board have already held that the reports are relevant. Thus the Board in its Certification of August 18, 1971 stated at page 4:

"There can be no serious question of relevance in this case [with respect to the subject documents]. . ."

And the Appeal Board stated at page 3 in its September 21, 1971 Order:

"If the applicant sustains its burden of proof in this regard, it will have satisfied those requirements and it will be unnecessary to consider the spray system of another reactor as proposed by Intervenor."

The corollary of the Appeal Board's statement supports our position that one of the methods available to Intervenor to demonstrate that Applicant has not sustained its burden is to show a contrary conclusion by another vendor. This can be done without making any comparisons but by merely challenging the conclusions of Applicant by the introduction of a contrary position.

Viewed in this light, questions of good cause and relevance have already been decided in favor of Intervenor. Insofar as need is concerned, we have two comments to make.

First of all, Dr. Gordon Burley, the eminent authority on iodine spray removal at the Atomic Energy Commission, testified in the Point Beach proceeding with respect to the documents under consideration here that as a scientist, in order to have a complete and total understanding of the iodine spray removal system, it was necessary (i.e., need) to have access to the Westinghouse reports here claimed proprietary in addition to the open literature. Thus, Dr. Burley was asked the following questions and gave the following answers at pages 2194-95 of the Transcript in the Point Beach proceeding, Docket No. 50-301:

Q. No, that is not my question.

In your responsibility as in charge of this generalized program, iodine spray removal,

you are continuing to update your knowledge of that. Have you restricted yourself in your thinking, in understanding this whole field, to just the open literature or have you also considered the Westinghouse and B&W work?

A. I have considered all the D&W and Westinghouse reports insofar as they apply to their particular system.

Q. Now, if I had need or a scientist had need to make a thorough understanding of the state of the art as of today, to try to review judgments made by the AEC or various of the vendors, would it be valuable to have, in addition to the open literature, the information contained in the Westinghouse and B&W reports, if I wanted to have a total understanding?

A. I would say yes.

Insofar as "need" for the documents is concerned, Intervenorers contend that they are entitled to have access to information at least as great as was available to other persons whose opinions and viewpoints are being considered in this hearing. Moreover, because of the nature of a public

hearing, Intervenor's are entitled to all assistance and information which is relevant, so that their case can be prepared in a reasonable manner of their choosing. Finally, if Dr. Burley would like all of the information to be used in his analysis, then the Intervenor's can be accorded no lesser right.

Secondly, we believe the question of need is a straw man. If the reason supporting a decision of no need is that the information is available in the public literature (an argument made by Westinghouse and apparently adopted by the Board), it follows under the correct test of propriety that the material is not protectable because of the fact that it is duplicated in the public literature.

Once relevance has been demonstrated (and we believe it has been), the question of need falls by the wayside. Thus, if need is at issue, we believe that the realities of the situation and Dr. Burley's testimony satisfies the requirements; on the other hand, under our view of the law, if we lose upon the issue of need because the information is duplicated in public literature, Westinghouse must lose its position because information in the public domain

cannot be proprietary.³

³ Finally, we would point out that if Freedom of Information Act principles are to be applied in this proceeding, the question of need is totally irrelevant. The Act does not place any burden to demonstrate a need for the information upon the requesting party. See Washington v. Cameron, 411 P.2d 696, 705 (D.C. Cir. 1969) where the Court stated:

" . . . Under the Freedom of Information Act, any member of the public is entitled to have [the information] without regard to need."

It would be a curious application of equity that Intervenorors would be entitled to the information if they made a Freedom of Information Act request without a showing of need, whereas in a hearing where Intervenorors have a valid interest to protect, they are limited in their access to information by a more stringent standard. This line of argument obviously reveals the suspicion that if the Rules of Practice in Part 2 attempt to embody Freedom of Information Act principles, while, in effect, engrafting an amendment, then they are illegal. We would also point out in passing that the Freedom of Information Act places the burden of proof with respect to withholding information upon the agency or the holder of the information. 5 U.S.C., §552 (a)(3) (1972). Thus, to the extent that the Rules of Practice or Part 9 switch that burden around by placing an affirmative obligation upon Intervenorors, the Rules of Practice or Part 9 must fall. We raise these points only to support our argument that the "need" issue is a red herring. However, we also state that if the Board bottoms a decision in favor of Westinghouse upon the basis of need and burden of proof contrary to the Freedom of Information Act, a curious, and, we believe, illegal result will have been reached.

THE FREEDOM OF INFORMATION ACT IS INAPPLICABLE. THE APPROPRIATE TEST FOR PROPRIETARY REQUIRES THE CLAIMANT OF THE PRIVILEGE TO PROVE THAT THE INFORMATION SOUGHT TO BE WITHHELD IS A TRADE SECRET UNAVAILABLE TO OTHERS SKILLED IN THE ART, THAT ITS RELEASE WOULD HAVE A DEFINED AND SERIOUS COMPETITIVE INJURY TO THE CLAIMANT AND THAT ON BALANCE (ASSUMING SUCH INJURY) THE WITHHOLDING OF PRODUCTION IS IN THE PUBLIC INTEREST

The Freedom of Information Act applies when one seeks documents from an agency as a matter of right and not in the context of a litigated matter. While the Freedom of Information Act may give Intervenor rights to seek information (whether they are within or without ^{a litigated} controversy), the matter under discussion here is a discovery matter wherein Intervenor moved for relevant information in the hands of a non-party witness pursuant to traditional and common law principles of fairness.

Intervenor's Motion and the Board's issuance of the subpoena was made pursuant to section 2.720 of Part 2 of the Rules of Practice. That section states in pertinent part that:

"The officer to whom application is made may require a showing of general relevance of the testimony or evidence sought, and may withhold the subpoena if such a showing is not made, but he shall not attempt to determine the admissibility of evidence."

The subpoena was issued because a specific showing of relevance was made and acknowledged by the Board.* Moreover, the

* See supra, p. 5

Board may never have to determine admissibility since Intervenor: at the moment are only requesting that the reports be produced and that Intervenor: be permitted to use them in the context of cross-examination. The question of admissibility will only arise if Intervenor: at a later date choose to introduce the reports or a part thereof into evidence.

Section 2.720 permits the person subpoenaed very limited rights. Thus, he may move to quash or modify the subpoena if it is unreasonable and requires evidence not relevant to any matter at issue, or he may ask for the subpoena to be conditioned on just and reasonable terms. Westinghouse has not taken either of these routes but rather is trying to exclude altogether all of the reports.

The subpoena has not been demonstrated to be unreasonable, although Westinghouse has made the bare claim. It is no burden upon Westinghouse to produce the information, and, in fact, all it has to do is mail the reports to Intervenor: . We cannot see any basis for a claim of unreasonableness. Additionally, Westinghouse has not asked for a denial of the subpoena upon any conditions, such as, for example, that the persons present during the hearing when the reports are used are sworn to secrecy. Westinghouse merely makes the broad claim that it is a powerful factor in the nuclear industry and just does not want anybody poking around in its business.

It is well known that the specific section under discussion, that is, section 2.720, is almost a chinese copy of Federal Rule of Civil Procedure 45 dealing with subpoenas. Under the Federal Rules of Civil Procedure, the burden of proving that a subpoena is oppressive or unreasonable is upon the party to whom the subpoena is directed. Goodman v. U.S., 369 F.2d 166-169 (9th Cir. 1966). Indeed, a subpoena can only be quashed upon a showing that it is unreasonable or oppressive.⁴ Ibid; and Sullivan v. Dickson, 283 F.2d 725 (9th Cir. 1960). Moreover, the burden is particularly heavy to support a motion to quash as contrasted to some more limited protection. Horizons Titanium Corp. v. Norton Company, 290 F.2d 421, 425-6 (9th Cir. 1961) (a case which vacated an order quashing a subpoena and ordered production even though the material sought was "trade secrets" and was sought by a competitor); Westinghouse Electric

⁴ Insofar as there is any burden or oppressiveness in requiring Westinghouse to submit the reports to Intervenor, we call attention to the testimony of Mr. Weisemann given at the Nation ECCS Hearings, Docket No. RM-50-1 (Tr. 3828-3839) that Westinghouse has a general policy of regularly releasing reports claimed proprietary in the ordinary course of its business, albeit pursuant to protective agreements. The burden Westinghouse claims is obviously that intervenors request the reports without entering into a proprietary agreement. Viewed in this light, the burden argument is no more than additional but transparent support for Westinghouse's contrived legal test on proprietary.

Corporation v. City of Burlington, Vermont, 351 F.2d 762, 767 (D.C. Cir. 1965); and 5 Moore's Federal Practice, par. 45.05.

Westinghouse thus argues that release of information in the face of a claim of proprietary is oppressive. If it fails to make proof (which it has), the Westinghouse motion must be rejected.

At common law, persons who have developed unique information, that is, information in the nature of a trade secret, were entitled to appropriate protective measures in connection with its release during the course of litigation. There was and is no absolute right to withhold information relevant and necessary to a hearing, and the most a party subpoenaed could claim is that it is entitled to some in camera relief or some procedure whereby competitors are sworn to secrecy and agree not to use the information disclosed. The most Westinghouse could ever gain, if it is successful in its motion and is permitted to submit actual support, is some form of in camera protection. See Cohn and Zuckman, FCC v. Schrieber: In Camera and the Administrative Agency, 56 Geo. L.J. 451 (1968).⁵

⁵ See also footnote 13 at page 28 of the Westinghouse Brief. It is obvious that Westinghouse is aware of the lack of "ductility" of its legal argument.

Our legal position is quite simple. Under the applicable law, unless Westinghouse can demonstrate that its information is in the nature of a trade secret, that disclosure of the trade secret would create a serious and direct competitive injury to Westinghouse, and that on balance the public interest would be served by withholding the information, the documents must be produced forthwith.

A. Trade Secret - Proprietary

In order to be a trade secret and entitled to protection, the information must exhibit a quantum of novelty and originality, be unpublished elsewhere, and provide a competitive advantage over competitors who do not know or use it.

There are three well recognized tests applicable to the matter at issue. Proof that Westinghouse falls into any one of the categories is sufficient to reject the claim of proprietary. In fact, the documents at issue fall into all three categories.⁶ These are:

⁶ In the stating of the applicable legal test, Intervenorers are also setting forth a factual argument in the nature of admissions by the Regulatory Staff and Westinghouse, albeit in other proceedings. We make this factual showing not because we believe the Board can decide the matter (unless it rejects the Westinghouse argument) without a hearing. Rather, we make this argument to demonstrate that the "facts" contained in the Weisemann Affidavit are not representative of the controlling facts and are hotly contested. We believe, however, that the facts which we have submitted are in the nature of admissions against Westinghouse and the Regulatory Staff and thus may be used by the Board to rule against Westinghouse on the merits and without a hearing.

1. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret, and widespread publication and advertising will destroy any right of action to preserve as a secret that which is disclosed. (The starting point is always whether, in fact, the information is a trade secret. Van Products Co. v. General Welding, 147 U.S.P.Q. 221, 229 (Penn. Sup. Ct. W.D. 1965).)

2. To have a protectable trade secret, a technological development or discovery must constitute a contribution beyond application of mere ordinary skill. Thus, it must be of a character which does not occur to persons in the trade with knowledge of the state of the art or which cannot be evolved by those skilled in the art from the theoretical description of the process, or compilation or compendium of information or knowledge. Sarkes Tarzian Inc. v. Audio Services Inc., 166 F.Supp. 250, 255-259 (S.D.Cal. 1958).

3. Technology published by third parties in the literature or matters generally known or known and used by others in the industry are not protectable. Sarkes Tarzian, supra.

A simple exploration will demonstrate that Westinghouse fails to meet any of these well recognized tests of

trade secret-proprietary.

First of all, Westinghouse disseminates the subject reports broadly to the utility industry and to the Atomic Energy Commission. The Atomic Energy Commission regularly confers with national laboratories in the course of its business which provide a further dissemination of the information. Moreover, as Mr. Weisemann testified at the National ICCS Hearings, Westinghouse regularly submits reports claimed proprietary to potential purchasers, that is, utilities who are evaluating whether to purchase a Westinghouse reactor or a competitor's reactor. (See generally Weisemann testimony, Docket WM-50-1, Tr. 3693-3922.) Westinghouse is charged with the knowledge that utilities are making evaluations in order to determine which reactor they will purchase, and Westinghouse is as a matter of law charged that the logical consequence of its business practices.

The information contained within the subject reports are matters of general knowledge, are known and used by others in the industry and were not developed by Westinghouse. Moreover, anyone with the knowledge of the state of the art could reproduce the information contained in the reports claimed proprietary from the description of the process or from a compilation of publicly available information and knowledge.

The reports under consideration here were the subject of discussion with Dr. Gordon Burley during his cross-examination at the Point Beach proceeding (Docket No. 50-301). At that proceeding, Dr. Burley was asked whether the information contained in the subject reports was unique, specifically developed by Westinghouse, or novel in a scientific sense, or, given first principles, one skilled in the art could not derive the information contained in the reports. With respect to each matter, Dr. Burley said "no" and pointed out that much, if not all, the information contained in the reports was available in one form or another in the public literature.⁷ See transcript of proceedings of January 8, 1972 in the Point Beach proceeding, Docket

⁷ During Dr. Burley's cross-examination, WCAP 7198-L entitled "Evaluations of Protective Coatings for Use in Reactor Containment" was not discussed. However, it is clear that if he had been asked the same questions about that report as he was asked about WCAP 7153-L and WCAP 7499-L, he would have come to the same conclusions, that is, that there is no discovery or novelty contained in WCAP 7198-L and that any person skilled in the trade could duplicate the information contained therein. See ORNL-TM-3104, "Evaluation of Burgess-Forbes Faint Company Protective Coatings for Nuclear Plant Application," January 1971; ORNL-TM-2412 Part V, "Design Considerations for Reactor Containment (Spray Systems: Protective Coatings Tests"; and "Nuclear Safety Program Annual Progress Report: for the period ending December 31, 1969, ORNL-4511 (March, 1970); and a similar report for the year ending December 31, 1970, ORNL-4647 (May 1971), all of which are public documents containing much, if not all, of the so-called "secret" information in WCAP 7198-L.

No. 50-301, Tr. 2170-74, 2178-85 and 2192-95.⁸

We refer the Board to a series of cases and law review articles which support the positions taken herein. See FCC v. Schriber, 381 U.S. 279 (1965); Lear v. Atkins, 395 U.S. 653 (1969); Kane, Limitations on the Law of Trade Secrets, 53, No. 3 Journal of the Patent Office Society 162 (March 1971) and cases cited therein; Gellhorn, The Treatment of Confidential Information by the Federal Trade Commission: Pre-trial Practices, 36 Univ. of Chi. L. Rev. 113, 119 (1968-1969); Gellhorn, The Treatment of Confidential Information by the Federal Trade Commission: The Hearing, 116 U. Pa. L. Rev. 401 (1968); Cohn & Zuckman, FCC v. Schriber; In Camera & the Administrative Agency, Geo. L. J. 451, 462-4 (1968) & 20 Administrative L. Rev. Articles beginning at pages 1, 49, 55, 249, 455 (1967-68).

B. Competitive Injury

If Westinghouse is successful in making a factual showing of proprietary within the limits of the test set forth in A. above, it must then demonstrate that release

⁸

For convenience of the Board, these transcript pages are reproduced hereto as Exhibit A. Counsel for Westinghouse was present during Dr. Burley's cross-examination and did not choose to question him on this issue. Accordingly, Westinghouse has already had "a day in court."

of the protectable information would result in clearly defined, serious competitive injury. The logic of this requirement is inescapable. A privilege which prevents the free and open consideration of information is to be narrowly construed to protect only valid interests of the holder or originator of the information. The privilege thus attaches in order to protect the holder or originator in advance from injury which may later prove to be irreparable if the information is disclosed. It follows, therefore, that trade secret information, the disclosure of which for one reason or another would not result in any injury, is not protectable since, as a matter of law, the holder or originator does not need the claim of privilege to protect him from injury.

It is our position that Westinghouse must demonstrate that the claimed proprietary information is of a nature so sensitive that its release would result in a clearly defined injury to Westinghouse in the marketplace. Westinghouse asserts that conclusion in the Weisemann Affidavit but makes no effort to offer the Board or the parties any supporting data upon which to analyze the conclusion. See a case directly in point, FCC v. Schreiber, 381 U.S. 279, 295 (1965) where the Supreme Court in an identical situation rejected the argument of the person

subpoenaed and stated: "No factual showing was made; there was only the argument."⁹ Thus the argument contained in the Weisemann Affidavit, that is, that the information is confidential and that its release would involve competitive injury, was made by Schreiber some years earlier. The Supreme Court affirmed the FCC's rejection of the Schreiber argument. 381 U.S. at p. 295-296. See also Gellhorn, op. cit. supra, 116 Univ. of Pa. L. Rev. at pp. 411-422.

Upon hearing, if Westinghouse chooses to introduce evidence, the test of competitive injury is rigorous and the burden is upon the claimant of the privilege. Davis, Administrative Law, section 8.09. The test is that one must demonstrate that a clearly defined and serious injury to his

⁹ As a matter of fact, it is obvious that Westinghouse is very chary to make such proof since their legal test is framed solely in terms of the confidential nature of the information. In a sense, therefore, the Westinghouse test is inconsistent. On the one hand, it urges that the release of information would result in competitive injury but on the other hand, it carefully avoids making any proof in support of that bland assertion. Compare paragraphs 8(a) (b) (c) of the Weisemann Affidavit with the statement of the legal test at pages 4, 22, 23 and 24, Westinghouse Brief, where Westinghouse asserts that 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. It does not follow that disclosure of information in documents customarily held in confidence will automatically result in competitive injury to Westinghouse or competitive advantage to any of its competitors. Thus, even under the Westinghouse test, one must analyze the competitive effect.

business would result from public disclosure of the information sought and, therefore, good cause exists for holding such information confidential. Graber Mfg. Co. v. Dixon, 223 F.Supp. 1020, 1023 (D.C. D.C. 1963) cited with approval by the Supreme Court in Schreiber, 381 U.S. 279, 293, n. 20. (See also the excellent discussion in Cohn & Zuckman, op. cit., supra, 56, Geo. L. J. at 462-64 and the cases cited therein.)

C. Withholding of Information In Not In the Public Interest

If upon hearing Westinghouse demonstrates that the information contained in the reports rises to the height of a trade secret and proves that release of the information would result in a clearly defined, serious competitive injury, Westinghouse must also prove that the public policy for free and open hearing is not subserved by the withholding of the information.

We have earlier alluded to the Appeal Board's Memorandum and Order of September 21, 1971, which correctly states that a balancing test is required in the production of information claimed proprietary. See Memorandum of Appeal Board in Docket No. 50-329 and No. 50-330, September 21, 1971 at page 9. All of the law review articles cited above and FCC v. Schreiber supports that position, plus the position that private interest is not to be accorded

any great weight when the public interest is clearly defined and important. We urge the Board to review the principles embodied in those authorities.

We would add the following.

1. The AEC is required to hold a public hearing at the construction permit stage. The legislative history of the 1962 Amendment to the Atomic Energy Act makes it clear that a construction permit hearing was made mandatory because of a Congressional determination that the public should be fully informed about nuclear safety. Additionally, Congress set forth a policy concerning the release of scientific information, which policy is contained in Section 141 of the Act. In pertinent part, this section provides that the following principle shall govern the Commission in the release of information:

"The dissemination of scientific and technical information relating to atomic energy should be permitted and encouraged so as to provide that free interchange of ideas and criticism which is essential to scientific and industrial progress and public understanding and to enlarge the fund of technical information."

The public policy at stake here is that declared by Congress when it provided for mandatory public hearings encouraging the free dissemination of information. The private interest at stake here is that of Westinghouse which claims, without factual support, that its information, acknowledged to be

available in the public literature, must be kept secret because it has determined that it should bear the stamp of confidentiality. The motivation behind the Westinghouse claim is not clear. However, a comparison of the interest it seeks to protect, based upon the state of the record, with the principles inherent in the public policy toward public disclosure clearly demonstrates that the Westinghouse position is gross.

While we acknowledge that under certain, narrowly defined circumstances a trade secret having significant competitive advantage may be so protectable that its disclosure would not be in the public interest, we fail to see, however, how the subject reports fall into such a category.

2. Moreover, in light of the acknowledged competitive situation in the reactor-vendor marketplace and assuming that the documents are trade secrets and that their release would create a competitive disadvantage to Westinghouse, we contend that it is in the public interest to do so.

An additional, well recognized public policy of the United States at issue here is the enhancement of competition. This principle is embodied in the Sherman Antitrust Act and judicial precedent. 15 U.S.C. §§1 and 2 (1972); Lear v. Atkins, 395 U.S. 653, 677 (1969) (concurring opinion of Justices Black and Douglas and the Chief Justice).

It is our position that the dominance of Westinghouse in the reactor marketplace is such that it is in the public interest to release the subject reports even if their disclosure would result in competitive injury to Westinghouse and the reports are trade secrets. Stated another way, this Board may not uphold Westinghouse's private interest if in doing so it enhances Westinghouse's apparent monopolistic market power.

Public reports by the AEC¹⁰ of market statistics in the reactor industry demonstrate that Westinghouse is far and away the leader of the industry. Depending upon an analysis of the geographic and product markets, Westinghouse may very well have and be exercising illegal monopoly power in violation of section 2 of the Sherman Act.

As of the end of the calendar year 1971, of the four major reactor-vendors accounting for almost 99 percent of the reactor-vendor market, Westinghouse had a commanding competitive position. As of the end of 1971, Westinghouse had 41 reactor units operable, under construction, or on order, accounting for 41,806 MWe. Its three competitors

¹⁰

The information and statistics used in this portion of the Brief are taken from published statistics of units operable, under construction, or on order published by the AEC Division of Industrial Participation.

were in the following position: B&W had 16 units operable or under construction, accounting for 13,430 MWe; Combustion Engineering had 13 reactor units operable, under construction, or on order, accounting for 11,570 MWe; while GE had 43 units operable, underconstruction, or on order, accounting for 36,183 MWe.

If the product market, in anti-trust terms, was PWRs and BWRs, Westinghouse maintains 41 percent of the market. However, there is ample authority that the relevant product market is PWRs (See U.S. v. DuPont De Nemours & Co., 351 U.S. 377 (1955)), in which event Westinghouse's share of the market of units operable, under construction, or on order as of the end of the calendar year 1971 is 63 percent. To demonstrate the recent surge of Westinghouse in the market, one need only look at the reported sales of Westinghouse for the period ended September 30, 1971. During that nine-month period, Westinghouse sold 11 reactors with MWe value of 10,704, while Combustion Engineering sold none, B&W sold 2 for a 1,800 MWe value, and GE sold 4 with a MWe value of 4,452. Again, if one assumes that the relevant market is PWRs and BWRs, Westinghouse has approximately 63 percent of the market; or in other words, a percentage of the broadest market identical to its percentage of the PWR market through the end of 1971. Moreover, when one looks merely at the PWR

sales for the period ended September 30, 1971, Westinghouse's share of the market is a commanding and monopolistic 86 percent. See the famous opinion of Learned Hand, U.S. v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

We end this portion of the brief by asking the Board the following questions. If competition is a healthy and a necessary ingredient to nuclear safety, should this Board permit Westinghouse successfully to make a claim of proprietary under circumstances wherein the Board will be assisting Westinghouse in maintaining a competitive stranglehold on the marketplace? Or should this Board in the public interest and given the public policy of free and open hearings as well as the policy of competition embodied in the Sherman Antitrust Act reject the Westinghouse claim?¹¹

¹¹ We call the Board's attention to paragraph 8 of Exhibit B hereto. This Exhibit is the normal form of protective agreement commonly used by Westinghouse in connection with its claims of proprietary. (See testimony of Weisemann, Docket RM-50-1, Tr. 3844-3848.) The agreement requires persons who are consultants to Westinghouse to promise never to work for or represent a competitor. Thus the very use of the proprietary agreement is an anti-competitive act.

EVEN IF THE TEST TO BE APPLIED TO
DETERMINE PROPRIETARY IS THE TEST
EMBODIED IN THE FREEDOM OF INFORMATION
ACT, WESTINGHOUSE MUST NEVERTHELESS
PROVE THAT THE INFORMATION IS OF A
UNIQUE OR SPECIAL CHARACTER IN THE
NATURE OF A TRADE SECRET, THAT RELEASE
OF THE INFORMATION WOULD RESULT IN A
COMPETITIVE DISADVANTAGE AND THAT THE
PUBLIC INTEREST IS NOT COMPROMISED BY
WITHHOLDING THE INFORMATION

We do not see that the test embodied in the Freedom of Information Act is significantly different from the common law test which we have discussed in the previous section. The only difference might be that any requirement of need for documents is expressly eliminated and that the Freedom of Information Act statutorily codifies the fact that the burden of proof is upon the Agency. See supra p. 9 n. 3.¹²

A bare claim of confidentiality is not sufficient to meet the requirements of the Freedom of Information Act test. This is supported by the case law, other AEC rulings, and by Westinghouse itself.

¹² Westinghouse argues at Page 19 of its Brief that a subpoena for documents directed to it is the same as a subpoena or request for documents directed to the agency in possession of the documents. While we do not agree with this phantasmagorical conclusion, we would point out that if Westinghouse is to adopt whatever benefits it sees in the Freedom of Information Act, it must also be charged with the liabilities: that is, need is not an issue, and Westinghouse carries the burden of proof. Since 10 C.F.R. Part 9 is no more than an implementation of the Freedom of Information Act, (10 C.F.R. (Cont'd on p. 28)

Westinghouse implicitly admits this by virtue of the fact that the Weisemann Affidavit, no matter what it intends to do, does not stop at merely arguing that the information is customarily held in confidence. Thus, paragraph 8 of the Weisemann Affidavit sets up the test for determining whether information is to be classified proprietary by Westinghouse. The subparagraphs of paragraph 8 do not deal with whether a document is customarily held in confidence. Rather, the test embodied in paragraphs 8(a) through (f) of the Weisemann Affidavit are in reality a restatement of a portion of the traditional common law test, that is, that

12 (Cont'd from p. 27)

§9.1) Part 9 may not be construed inconsistent with the Act. Westinghouse's argument may be bottomed in 10 C.F.R. §9.4 which provides:

"Any identifiable record, whether in the possession of the AEC, its contractors, its subcontractors, or others, shall be made available for inspection and copying pursuant to the provisions of this part upon request of any member of the public."

Thus, if the Freedom of Information Act reaches documents in the possession or under the control of the AEC and Westinghouse is within the meaning of the word "others," then there might be some support for the Westinghouse argument. However, as is demonstrated in this section of our Brief, the test pursuant to the Freedom of Information Act is not satisfied by a bare showing that the documents in question are customarily held in confidence.

the information must be a variation of a trade secret and that its disclosure would result in competitive injury to Westinghouse. Thus, although Westinghouse's counsel urges in its Brief that the test is limited, Westinghouse itself, by virtue of the Weisemann Affidavit, contradicts that position.

Moreover, when this issue arose in the National ECCS Hearings and Westinghouse made an identical argument, that is, that the Freedom of Information Act test was satisfied by proof that the information was customarily held in confidence, Chairman Goodrich rejected the argument.¹³

"CHAIRMAN GOODRICH: I did not understand them [Westinghouse] to say that competitive advantage was the only element being the measure of reasonableness. They were talking about that in connection with the way in which Westinghouse has framed its view. Westinghouse really is talking about

¹³ Westinghouse submitted into evidence at the National ECCS Hearings an affidavit by Mr. Weisemann identical to the Affidavit at issue here.

distinguishing aspects of a process which it feels might give it competitive advantage.

I think the statute is clear.
The Freedom of Information Act - -

"MR. CHERRY:

Thus far there is nothing by Westinghouse in the record, sir. There's only their judgment that they agree with Mr. Cowan's assertion.

"CHAIRMAN GOODRICH:

Well that's correct. But we are dealing with Mr. Cowan's assertion because that is all we have in the record so far.

"MR. CHERRY:

Right.

"CHAIRMAN GOODRICH:

And I take it we're going to get to that. But since that's all we have to go by, my only comment is that the Board's original inquiry into this

area was undertaken because the Board believes that there should be something on the record to sustain a claim of proprietary beyond the mere assertion that one customarily holds it in confidence." (Docket RM 50-1, Tr. 3610-11)

Later on in the same proceeding when the Weisemann Affidavit was again under discussion in connection with another Westinghouse claim of proprietary, the Board again indicated that the character of information was important, since the Freedom of Information Act does not protect information just because it is held in confidence. In this instance, Mr. Cowan was arguing that WWP 7379-L (a document not here at issue but one which Westinghouse claims is proprietary), meets the test of paragraph 3(c) of the Weisemann Affidavit. Chairman Goodrich and Mr. Cowan had the following colloquy:

CHAIRMAN GOODRICH: Can you indicate why such tests [the tests embodied in WCAP 7379-L] could not be performed or have not been performed by any other persons or organizations as far as you are aware?

"MR. COWAN:

Mr. Chairman WCAP 7379-L relates to single-rod tests and single-rod tests have been performed by other organizations. These single-rod tests and the reports or the results here are not those of any other organization, however. There are other organizations that have performed single-rod tests and have come up with their own data.

"CHAIRMAN GOODRICH: Well, is there any basis for surmizing [sic] that the results of these tests have any unique quality that would distinguish them from information that probably ought to be in the public domain?"

(Docket Rm 50-1, Tr. 4443-44.)

As these quotations indicate, on one occasion, Chairman Goodrich indicated that mere assertion of confidentiality was not enough. On the other occasion, Chairmann Goodrich asked a question which supports the position earlier taken by us in this Brief (supra at p. 15) that one of the tests of proprietary is that:

" . . . it must be of a character which does not occur to persons in the trade with knowledge of the state of the art or which cannot be evolved by those skilled in the art from the theoretical description of the process or compilation or compendia of information or knowledge. Sarkes Tarzian, Inc. v. Audio Service, Inc., 166 F. Supp. 250, 255-59 (D.C.S.D. Cal. 1958)." Supra at p. 15.

On two occasions, therefore, Chairman Goodrich rejected the notion that customarily held in confidence is the test embodied in the Freedom of Information Act and specifically rejected the argument being advanced here by Westinghouse.

To set the matter to rest, the courts also reject out of hand the Westinghouse position.

In Bristol-Myers Co. v. F.T.C., 424 F.2d 935 (D.C. Cir. 1970), the Court of Appeals for the District of Columbia had occasion to interpret the trade secret exemption contained in the Freedom of Information Act and relied upon by Westinghouse in support of its Motion. The Court of Appeals stated:

"The first exemption cited protects 'trade secrets and commercial or financial information obtained from a person and privileged or confidential.' 5 U.S.C. Section 552(b)(4). This provision serves the important function of protecting the privacy and competitive position of the

citizen who offers information to assist government policy makers. Nevertheless, the statutory scheme does not permit a bare claim of confidentiality to immunize agency files from scrutiny. The District Court in the first instance has the responsibility of determining the validity and extent of the claim, and insuring that the exemption is strictly construed in light of the legislative intent. The Court may well conclude that portions of the requested material are protected, and it may be that identifying details of secret matters can be deleted from a document to render it subject to disclosure. These judgments are possible only after careful consideration of the particular documents in question, and it is for this detailed analysis that we remand." Id. at pp. 938-39. (Emphasis supplied.)

It is clear in our judgment, in the implicit judgment of the Weinmann Affidavit, in the judgment of Chairman Goodrich and in the judgment of the Court of Appeals for the District of Columbia that the legal argument in the Westinghouse Brief is sheer nonsense.

The objective of the Freedom of Information Act was toward free disclosure of information and not toward restrictions upon disclosure. The Westinghouse legal test would permit it to withhold any information it wished to withhold and no one would be able to review its claim probably beyond the bare fact of whether the document is "extrinsically held in confidence." The adoption of the Westinghouse test would render the Freedom of Information Act

a nullity and would be "just bad law." Under no rational theory can the Westinghouse test be supported.

We refer the Board generally to the legislative history of the Freedom of Information Act: H. Rep. No. 1497, 89th Cong. 2d Sess. May 9, 1966; S. Rep. No. 813, 89th Cong. 1st Sess. October 1, 1965; and two Law Review articles which we believe support our position: Note, Freedom of Information: The Statute and the Regulations, 56 Geo. L.J. 18 (1967); and Davis, The Information Act: A Preliminary Analysis, 34 U. Chi L. Rev. 761 (1967). See also Grumman Aircraft Engineer Corp. v. Renegotiation Bd., 425 F.2d 578 (D.C. Cir. 1970) (a case which also supports the proposition that the confidentiality exemption in the Freedom of Information Act can only be applied after a factual inquiry); the Supreme Court's decision in Lear v. Adkins, 395 U.S. 653, 656 (1969) where the Court called attention to its recent decisions:

"... emphasizing the strong Federal policy favoring free competition in ideas which do not merit patent protection;"

and 8 Wigmore, Evidence Section 2285 (McNaughton Rev. 1961). See also Consumers Union of U. S. v. Veterans Administration, 301 F. Supp. 796, 802-07, (D.C. S.D.N.Y. 1969).

We wish to state once again that we believe under the circumstances here presented the appropriate test to be applied to the Westinghouse Motion is that set forth in the previous section of our Brief. However, we believe that if Westinghouse wishes to embrace the Freedom of Information Act, it fares no better since that Act requires similar proof as to the nature of the information, the competitive consequences from its disclosure, and a comparison of the various competing interests in connection with the ultimate issue of withholding or disclosing the information.

CUSTOMARILY HELD IN CONFIDENCE -
AN UP-TO-DATE REPORT

For some time now, we have been of the opinion that the test urged by Westinghouse here and in other AEC proceedings, that is, that material is protectable if customarily held in confidence, is a sham. We fully believe that the test conceived by Westinghouse is not a sincere statement of Westinghouse's view of the law, but rather is a market tool used by Westinghouse to convince its customers and potential customers that it really has "secrets."

We fully believe that an adequate investigation of the Westinghouse policy will demonstrate that, in fact, Westinghouse does not generally hold in confidence documents it claims proprietary and that the test is the result of a corporate judgment that if Westinghouse vigorously asserts such a position, utilities will "buy the myth" created by such an effort and believe that Westinghouse's research and development is superior to that of its competitors.

We have an instance which fully supports our belief that the "customarily held in confidence" test is, in reality, a sham.

Attached as Exhibit C to this Brief is an Affidavit of counsel setting forth the foundation for attachments 1 and 2 to the Affidavit. We believe the Board should very seriously examine the Affidavit and its attachments. In summary fashion, these materials point out the following:

1. Westinghouse claims, pursuant to its customarily held in confidence test that WCAP 7495-L Vols. 1 and 2 are proprietary. The reports are dated April, 1970.
2. The information Westinghouse claims protectable in the reports has to do with the parameters and certain identifying factors of certain rod transient burst experiments. Westinghouse does not claim that the results of the

experiments are proprietary but merely certain critical descriptions of the experiments. See WCAP 7495-L, Volumes 1 and 2 on file with the Atomic Energy Commission; and attachment No. 2 to Exhibit C hereto;

3. Attachment No. 1 to Exhibit C is a report of a routine industry meeting on fuel rod failure where Mr. Miller of Westinghouse disclosed information which is now claimed to be proprietary and customarily held in confidence. Page 3 of this report under the caption "R. J. Miller (Westinghouse-NFD)" sets forth a description of certain critical parameters of the rod burst experiments including internal pressures which Westinghouse claims in WCAP 7495-L are proprietary. The letter is a summary of the meeting written by Mr. Rittenhouse. The meeting had among its attendees not only a representative from Westinghouse but also a representative of each of its three major competitors.

4. A comparison of the information in the subject letter with the WCAP 7495-L report will demonstrate that the information Westinghouse claims customarily held in confidence was in fact released to its competitors.

We hasten to point out WCAP 7495-L is not the subject of the instant Motion. The relevance, however, of

Affidavit of counsel and its attachments (Exhibit C hereto) is that they provide a cogent example that Westinghouse does not, in fact, customarily hold in confidence information it claims proprietary.

Whatever the reason or explanation of the facts surrounding WCAP 7495-L and the Rittenhouse letter, it is clear that this Board may not approve the test Westinghouse urges. Not only would such a test prevent any objective review but it would leave Westinghouse as the judge of its own cause and open the door to abuses of the proprietary privilege of the kind revealed by Exhibit C hereto.¹⁴

CONCLUSION

We believe that we have correctly set forth the state of the law with regard to the test of proprietary at the common law and pursuant to the Freedom of Information Act. The authorities demonstrate that there must be a factual analysis surrounding any claim which results in the

¹⁴ We note in passing that the Affidavit of Mr. Weisemann does not prove that the documents which are the subject of this Motion were submitted in confidence to the Commission and received in confidence by the Commission. Thus, there is absolutely no competent proof in the record as to how or under what circumstances the Atomic Energy Commission received the reports or indeed whether it agrees that the documents in question are entitled to protection. Compare the testimony of Dr. Burley (Exhibit A hereto) which tends to show that the Atomic Energy Commission does not consider the documents in question proprietary.

prevention of a free and open discussion of relevant information at a public hearing.

Westinghouse has not cited one authority which is directly in point. On the other hand, each authority cited by Intervenors is directly in point, deals with the issue, and specifically interprets Exemption 4 of the Freedom of Information Act. There is no question but that the law requires a detailed factual analysis of the Westinghouse claim and an ultimate balancing of the private and public interests.

When Mr. Weisemann was questioned at the National ECCS Hearings regarding the Westinghouse test and the substance of his Affidavit, he was asked the following question and gave the following answer:

"BY MR. CHERRY:

"Q. Very well.

Now, Mr. Weisemann does Westinghouse's test with respect to proprietary include a balancing, if you will, between competitive advantage or disadvantage and the public interest?

"A. No."

(Docket RM 50-1, Tr. 3817, February 24, 1972.

The issue before the Board first arose in June, 1971. Westinghouse has had some eight months within which to present its views to the Board and submit supporting data. On at least two occasions in late 1971, Westinghouse was requested by the Board to submit factual support for its claim. Westinghouse refused to submit any such factual support and instead urged upon the Board its unusual view of the law.

We believe the Board, if it accepts our view of the law, has ample discretion to deny the Westinghouse Motion for Reconsideration and to order the documents produced for use at the Hearing without any further consideration of the matter. See FCC v. Schreiber, 381 U.S. 279 (1965). We believe that the facts set forth in the attached exhibits amply demonstrate that Westinghouse could not prove that the documents are proprietary under a proper view of the law.

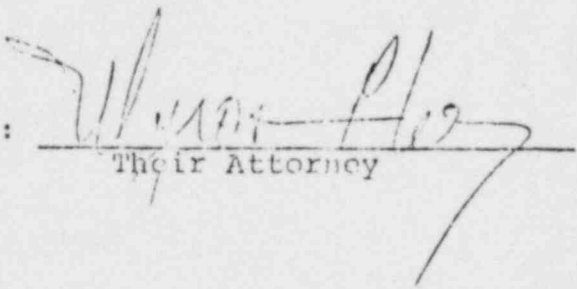
We urge the Board to overrule the Westinghouse Motion and reaffirm its issuance of the subpoena without further proceedings. We also believe that such a result is in accordance with the law and is fair reward for a Company

which, as Mr. Weisemann points out, has as a general corporate policy a disregard of "the public interest."

RESPECTFULLY SUBMITTED,

SAGINAW VALLEY ET AL.
INTERVENORS

By:


Their Attorney

Myron H. Cherry
Suite 3065
109 North Dearborn Street
Chicago, Illinois 60602
312/641-5575

CERTIFICATION

I certify that a copy of the Brief of Saginaw Valley et al. Intervenor in Opposition to Westinghouse Electric Corporation's Motion for Reconsideration of Order Denying Westinghouse's Motion to Quash the Subpoena and its attachments were mailed, postage prepaid, and properly addressed to Members of the Atomic Safety and Licensing Board, all counsel of record (including counsel for Westinghouse), and the Secretary of the Atomic Energy Commission, on March 6, 1972.

