NUCLEAR MANAGEMENT AND RESOURCES COUNCIL

1776 Eye Street, N.W. • Suite 300 • Washington, DC 20006-2496
(202) 872-1280

Robert W. Bishop
Vice President &
General Counsel

March 31, 1993

(4)

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

ATTENTION: Docketing and Service Branch

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

Dear Mr. Chilk:

These comments are submitted by the Nuclear Management and Resources Council, Inc. ("NUMARC")[1] on behalf of the nuclear industry in response to the notice for comments on the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") proposal to amend its regulations pertaining to treatment of proprietary and copyright information submitted to the NRC. *"Availability of Official Records"* - Proposed Rule, 57 Fed. Reg. 61013 (December 23, 1992).

The industry's detailed comments are provided in the Attachment to this letter. In summary, the industry believes that the proposed rule does not properly recognize the important public policy interest in the protection of proprietary information. This interest was recognized by Congress when it incorporated Exemption 4 in the Freedom of Information Act and has assumed even greater importance in our current economic and competitive environment. Although the Commission must ensure compliance of its proprietary information regulations with the Freedom of Information Act, the Federal

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[1]NUMARC is the organization of the nuclear power industry that is responsible for coordinating the combined efforts of all utilities licensed by the NRC to construct or operate nuclear power plants, and of other nuclear industry organizations, in all matters involving generic regulatory policy issues and on the regulatory aspects of generic operational and technical issues affecting the nuclear power industry. Every utility responsible for constructing or operating a commercial nuclear power plant in the United States is a member of NUMARC. In addition, NUMARC's members include major architect/engineering firms and all of the major nuclear steam supply system vendors.

Advisory Committee Act and the Sunshine Act, the method proposed by the NRC to fulfill its statutory responsibilities is flawed and goes well beyond what those statutes require. The proprietary information protection established by those statutes would be seriously compromised, with significant adverse consequences, if the proposed rule is adopted. Failure to provide effective protection against public disclosure of proprietary information will tend to (1) adversely impact competition and competitive commercial positions; (2) endanger the competitive position of U.S. companies in the world market of nuclear power reactor technology; (3) limit the availability of technical information that would be provided to the NRC and thus potentially impair the NRC's review process; and (4) discourage research and development by private parties. Inadequate disclosure protection can also adversely affect the national security interest underlying the technology transfer constraints contained in 10 CFR Part 810. We believe that alternatives to the proposed rule can be adopted that will comport with the law and, at the same time, furnish appropriate protection for proprietary information.

Specifically, the industry believes that the Commission should adopt procedures to provide for and govern presubmission review of requests that information be protected from disclosure as proprietary information. A presubmission review would consist of submitting asserted proprietary information for the sole purpose of NRC review and determination on the proprietary claim. The asserted proprietary information would be put to no other agency use, and given no further internal distribution, until the NRC decides the proprietary claim. Such procedures for advance proprietary information determinations would be in line with the Commission's direction in the Staff Requirements Memorandum on SECY-92-341 ("SRM") that additional procedural safeguards should be provided to persons submitting proprietary information. Adoption of the presubmission review procedures that the industry here proposes will alleviate many of the problems that would be created by each of the three proposed new exceptions to the right of withdrawal. Further, we believe that NRC procedures dealing with proprietary information should implement (1) Executive Order 12,600, *Predisclosure Notification Procedures for Confidential Commercial Information* (52 Fed. Reg. 23781, June 25, 1987), and (2) the recent court decision in Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, _____ U.S. _____ (1993).

The industry believes that if proprietary information is to be discussed at a Commission meeting, the meeting should be closed in accordance with the provisions of the Sunshine Act, and there should be no discussion of proprietary information at an open Commission meeting. Inadvertent disclosure of proprietary information at an open meeting should not result in such information being included in the minutes of the open meeting or otherwise released.

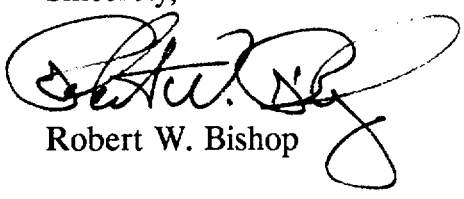
With respect to the proposed changes governing copyrighted information submitted to the Commission, the changes discussed in the Supplementary Information contained in the Federal Register Notice (57 Fed. Reg. at 61014-15) are reasonable but are not properly reflected in the language of the proposed rule. The language currently proposed is overly broad and needs to be modified to reflect the description of the intent of the proposed rule as set forth in the accompanying Supplementary Information.

In addition, we believe that the proposed revisions relating to the marking of proprietary information are unnecessarily prescriptive and are not needed to achieve the NRC's goal of ensuring the proper identification of proprietary information.

Finally, the industry believes that any amendment to Commission regulations concerning proprietary information or copyrighted material needs to contain transition provisions to deal with the considerable amount of such information and material currently at the NRC. It is neither practicable nor fair to modify the rules dealing with property rights in proprietary and copyrighted materials in a way which substantially undermines their protection without affording the owners of such material currently in the NRC's possession the opportunity suitably to protect them before the new rules go into effect.

The industry appreciates the opportunity to provide these comments. Protection of proprietary information is an important public policy and is necessary to encourage research and development and assure competitiveness of U.S. companies both at home and abroad. We urge the Commission to carefully consider the concerns expressed herein and the accompanying recommendations before adopting final regulations modifying the current rules governing treatment of proprietary information. We would appreciate the opportunity to answer any questions the Commission or NRC staff may have concerning this important matter.

Sincerely,



Robert W. Bishop

RWB:bjb

c: Chairman Ivan Selin
Commissioner Kenneth C. Rogers
Commissioner James R. Curtiss
Commissioner Forrest J. Remick
Commissioner E. Gail de Planque
James M. Taylor, Executive Director for Operations
William C. Parler, Esq., General Counsel

Attachment

AVAILABILITY OF OFFICIAL RECORDS

Proposed Rule
57 Fed. Reg. 61013 (December 23, 1992)

Detailed Comments

Nuclear Management & Resources Council, Inc.

March 31, 1993

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I. EXCEPTIONS TO THE RIGHT OF WITHDRAWAL

A. Background

The NRC is proposing to amend 10 CFR § 2.790(c) to add three additional circumstances where information claimed to be proprietary and submitted to the NRC would not be returned to the owner of such information if the NRC either determined that the information is not proprietary or determined that although the information is proprietary it should nonetheless be disclosed after balancing "the right of the public to be fully apprised of the basis for and effects of" a proposed Commission action and the "concern for protection of a competitive position" of the owner of such information. In addition to the current exception to the right of withdrawal when information has been submitted in a rulemaking proceeding and subsequently forms the basis of a final rule, the Commission now proposes that proprietary information not be returned (1) if it has been made available to or prepared for a Federal Advisory Committee (the "Advisory Committee exception"), (2) if it has been requested pursuant to a Freedom of Information Act request (the "FOIA exception"), or (3) if it was discussed at an open Commission meeting held in accordance with the Commission's Sunshine Act regulations (the "Commission Meeting exception").

In addition, the proposed rule would require specified marking of each page of any information submitted to the NRC that the submitter considers company confidential or proprietary information. Finally, the proposed rule would modify current NRC regulations with respect to the treatment of information submitted to the NRC that is marked or designated as copyrighted material.

B. Protection of Proprietary Information -- Legal and Public Policy Bases

NRC protection of proprietary information is mandated by the Atomic Energy Act of 1954, as amended (the "AEA"). Section 103 of the AEA requires the NRC to protect proprietary information from public disclosure (including disclosure to competitors and foreign entities) except under very limited circumstances. The proprietary information provisions of 10 CFR § 2.790 were adopted by the Commission to implement that statutory requirement and the other legislative enactments affording protection to proprietary information. The underlying public policy interests expressed in these statutes are the protection of substantial property rights and the strengthening of a competitive economy.

The legislative, judicial and public policy bases for protection of proprietary information are manifold and deep-rooted. They are found in (1) the policy expressed in Section 1(b) of the AEA to "strengthen free competition in private enterprise"; (2) the responsibilities of the Commission as mandated by § 103(b) of the AEA; (3) the court interpretations of Congressional intent, which speak of the "longstanding congressional

policy which disfavors disclosure of proprietary information," (see Westinghouse Electric Corporation v. NRC, 555 F.2d 82, 92 (3d Cir. 1977)); (4) the common law policy, as reflected in the law of at least 36 states, to protect trade secrets, as well as numerous state criminal law sanctions designed to protect trade secrets (see Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974)); (5) the policy of Congress against public disclosure of proprietary information, as reflected in at least 27 statutes enacted by Congress to protect such information from disclosure; (6) the imposition of criminal sanctions by Congress in support of this policy (i.e., 18 U.S.C. § 1905); and, of course, (7) the express exception contained in the FOIA to ensure protection of proprietary information (5 U.S.C. § 552(b)).

One of the principal reasons for the protection of proprietary information is to prevent disclosure of such information to competitors and would-be competitors of the owners and licensees of that information, which would impair the valuable property rights intrinsic to that information. Equally important is the need to protect the competitive position of the United States and its industry in the world marketplace. This need is particularly relevant to nuclear technology. As a result of decades of pioneering work, the United States and its nuclear industry brought reactor technology to commercial fruition. The results of this research, development and commercialization have brought many benefits to this country: (1) the sale of U.S. reactors and the licensing of U.S. technology abroad, which contributes significantly to this country's balance of payments; (2) the existence of a highly developed nuclear power generation technology, which contributes to the national goal of energy self-sufficiency and the reduction of dependence on the energy resources of other nations; and (3) a major source of employment in this country at a time when the nation is experiencing significant unemployment and the shift of U.S. jobs to foreign nations.

To the extent that foreign companies can secure reactor technology developed at great cost by U.S. firms simply by making copies of documents containing proprietary information in the NRC's Public Document Room, they reap a significant competitive advantage vis-a-vis U.S. companies that have made significant investments to develop the technology and their licensees who have purchased those rights. U.S. companies enjoy no comparable access abroad in that foreign entities are not required to provide similar disclosure of their information. Not only would the substantial private investment in the U.S. to develop nuclear technology here be at risk, but the significant public investment made by the U.S. Government through funding of research and development (e.g., the advanced light water reactor program) would also be at risk. Those investments will be significantly compromised by regulations which provide for inappropriate disclosure of propriety information.

For these reasons, failure to provide adequate protection of proprietary information by the NRC would jeopardize the position of U.S. companies vis a vis their domestic competitors, and U.S. companies would be deprived of the opportunity to compete on an equal footing with their foreign competitors in selling their products or

licensing their technology. This would have a detrimental effect on those U.S. companies and on the U.S. economy. Further, inappropriate disclosure is more likely to occur if a party is hampered in its efforts to withdraw proprietary information that the agency declines to protect, and thereby effectively loses control over the information.

C. Presubmission Review Procedures

The proposed rule would add three additional situations where a person submitting proprietary information would have no subsequent right to withdraw the information. The proposed exceptions considerably increase the likelihood that proprietary information would not be adequately protected. The increased danger of inappropriate disclosure was recognized in the SRM on SECY-92-341 in its endorsement of the need for timely NRC proprietary determinations and the Commission's further directive that NRC internal procedures be modified to "provide for return of the document to the submitter where (a) the NRC denies the submitter's request for proprietary treatment, (b) the submitter requests that the document be returned, (c) the NRC does not need the document to carry out its responsibilities, and (d) the document is not 'captured' by any pending FOIA request." As noted by the Commission, "[t]hese procedures would provide for return of the document before the agency relies on the document as the basis of a final rule, the staff submits the document to an advisory committee, or the document is considered by the Commission in an open Commission meeting under the Government in Sunshine Act."

The steps directed by the SRM, while a constructive partial response to the problems created by the proposed exceptions, are inadequate to provide the necessary protection. First, internal staff procedures do not have the force and effect of regulation, and hence do not provide the requisite degree of stable and predictable protection; such procedures should be made part of the revised regulation. Moreover, the requirement in the proposed procedures whereby the NRC would return the document (except for the FOIA and Advisory Committee exceptions) where the "NRC does not need the document to carry out its responsibilities" is vague and overly broad and could greatly limit the effectiveness of the proposed procedures. Where proprietary documents are voluntarily submitted, this requirement is simply inappropriate. Where documents are not voluntarily submitted, retention should be limited to that portion of the document which is needed by the NRC to carry out its statutory responsibilities, and the staff should be required to document the need that justifies non-return of that information. Thus, a provision should be added to the NRC's regulations to state that where information in a document not voluntarily submitted is needed for the NRC to carry out its statutory responsibilities, such information shall be specifically identified by the NRC, the reason for the need shall be stated, and only such specific information shall not be returned.

Beyond the foregoing, however, what is also required is a true presubmission review procedure, under which a document does not become an "agency record," and

hence is not (1) subject to the FOIA exception, (2) submitted to an advisory committee, or (3) considered by the Commission in a Sunshine Act meeting, until after a determination has been made as to its proprietary status. Only "agency records" are subject to FOIA requests and fall within the ambit of the Advisory Committee Act and Sunshine Act. By determining proprietary status before a document becomes an agency record and is available for regulatory use by the agency, the document will not be inappropriately "captured" by any of the three exceptions proposed in the regulation.

Although the term "agency record" is not defined in the FOIA, federal court decisions have given explicit meaning to that phrase. Fundamentally, two requirements must be satisfied for a document to become an agency record. First, the agency must either "create or obtain" the document. Forsham v. Harris, 445 U.S. 169, 186 (1980). Second, the agency must be in control of the document. Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 157 (1980); Forsham v. Harris, supra. See also United States Department of Justice v. Tax Analysts, 492 U.S. 136, 144-6 (1989). Further, the case law suggests that a document not generated by the agency but obtained from a third party must be "used" by the agency to become an agency record. See Kissinger, 445 U.S. at 157; Bureau of National Affairs v. Department of Justice, 742 F.2d 1484 (D.C. Cir. 1984); General Electric Company v. NRC, 750 F.2d 1394, 1400 (7th Cir. 1984).

An effective presubmission review procedure should be established by the Commission so that proprietary documents do not come under the control of the NRC (i.e., do not become available for NRC use) until after a review has been performed and the NRC has determined whether the information was properly categorized as proprietary. Under such a regime, any person considering the submission of what the person considers to be proprietary information could request a presubmission review to determine the proprietary status of the document. The person requesting the review would be required to state why the data or information is proprietary in the same manner as currently provided for in NRC regulations. The subject document would be provided to and reviewed by the NRC (at a special NRC office or, where the circumstances warranted, at the premises of the requester) for the sole purpose of determining whether it is appropriately classified as proprietary. No use would be made by the NRC of the document in connection with its nuclear safety regulatory functions in that the sole purpose of the presubmission review would be to determine whether the NRC would accord proprietary protection to the document if and when the document were to be submitted to the agency in support of a request for substantive regulatory action or for some other regulatory use.

The regulations of two agencies -- the Food and Drug Administration ("FDA") and the Environmental Protection Agency ("EPA") -- provide for presubmission review of requests for confidential treatment of proprietary information. Both agencies deal with matters related to public health and safety and both receive significant amounts of information -- much of it of a confidential nature -- from private parties. The regulatory

regimes which they have adopted for presubmission reviews are similar, and should provide the Commission with useful precedent. The applicable FDA provisions for prior review are contained in 21 CFR § 20.44; the applicable EPA provisions are in 40 CFR § 2.206. Under both the FDA and EPA regulations, documents for which proprietary protection is sought are sent to the agency with a request for a determination as to confidentiality. The person submitting the request may withdraw the documents if the request for proprietary treatment is denied.

In a case where a document actually had been obtained by the FDA, placed in its unrestricted files, and used by its staff in preparation for a proposed inspection, a District Court found that the FDA presubmission review regulation, which would have found the document not to be an "agency record" and allowed the originator to withdraw the document, violated FOIA and thus was invalid. Teich v. Food and Drug Administration, 751 F. Supp. 243 (D. D.C. 1990). The Court in the Teich case, applying the requirements established in Tax Analysts that, to be an "agency record," a document must be one obtained by the agency and in its control, found that both requirements existed. We do not read this district court decision as a per se preclusion of an appropriately implemented presubmission review process and believe such a process can be structured and applied so as to be fully compatible with relevant Supreme Court decisions.

A regulation allowing for presubmission review by the NRC, with a right of withdrawal, should be valid even if the document actually is sent to the NRC, so long as it is furnished for proprietary review only (i.e., it is not coupled with any request for substantive regulatory action). In appropriate cases, the NRC could perform its presubmission proprietary review of a document at the offices of the requester or at some other non-NRC facility; again, this review would be limited to a determination of proprietary status. In either circumstance (review at a special NRC location or at the requester's premises), no copies of the document would be taken by the NRC from the reviewing location until it had been determined that the document was proprietary or until the requester agreed to furnish the document for regulatory use as non-proprietary. Thus, at no time would the NRC use the document until after its proprietary status had been determined and the requester had determined whether and, if so, when to submit the document for regulatory use.

While we believe that an appropriately structured presubmission review process would not result in "agency record" status for documents under such review, in any event the documents would have been submitted on a voluntary basis and thus be entitled to protection under the standard prescribed for voluntary submittals in Critical Mass.

In summary, the industry recommends that the NRC adopt provisions which would allow alternative methods for presubmission review. In that manner, the objective of the SRM on SECY-92-341 will be achieved and appropriate protection, consistent

with statutory requirements, will be accorded to persons who seek to submit proprietary information to the Commission.

D. Comments on the Proposed Specific Exceptions to the Right of Withdrawal

1. The Advisory Committee Exception

The first proposed exception would provide that a document submitted to the NRC will not be returned and may not be withdrawn if it has been prepared for or made available to an NRC advisory committee. (Proposed § 2.790(e)(1)(ii)). Adoption of the presubmission review procedures discussed above will alleviate much of the problem otherwise created by this proposed exception. As noted by the Commission in the Federal Register notice containing the proposed rule, a copy of many documents submitted to the NRC is provided routinely to the Advisory Committee on Reactor Safeguards ("ACRS") and the Advisory Committee on Nuclear Waste ("ACNW") without any consideration having been given to whether the information provided may have been proprietary or was necessary for the Committees' deliberations. In this situation, it is especially important that presubmission review procedures be adopted.

The Commission also should amend its regulations to make it explicit that proprietary documents utilized by the ACRS, the ACNW or other Commission advisory committees are not to be publicly disclosed by those entities either. The Federal Advisory Committee Act specifically authorizes this. Section 10(b) of FACA begins: "Subject to section 552 of Title 5, United States Code, the [documents] which were made available to or prepared for or by each advisory committee shall be available for public inspection ...." Section 552 of Title 5 is, of course, the provision of the Administrative Procedure Act containing the FOIA and Exemption 4 that provides for the protection of proprietary information from disclosure. FDA regulations relating to the advisory committees of that agency provide a useful example of such an explicit disclosure constraint. (See 21 CFR Subparts B and D.)

2. The FOIA Exception

The second proposed exception would provide that when information contained in a document submitted to the NRC has been requested pursuant to the FOIA, the document will not be returned to the submitter. (Proposed § 2.790(c)(1)(iv)). The industry believes that the position set forth in SECY-92-341 (i.e., that this result is required by the FOIA) is not correct and that, at best, the state of the law in this area is ambiguous.

SECY-92-341 cites the case of General Electric Co. v. NRC, 750 F.2d 1394 (7th Cir. 1984) in support of its position that a FOIA request results in the "capture" of a document by the agency. In that case, which involved disclosure of the GE "Reed Report," the NRC argued that the provision in its rules for return of a document as to

which a request for withholding has been made does not apply once a FOIA request has been filed. The Seventh Circuit held that the NRC had interpreted its regulation, § 2.790(c), to mean that the right of return is not applicable once a FOIA request is filed and that "this is a reasonable interpretation [by the NRC] of its own regulation." 750 F.2d at 1399. The Court did not hold that this result was mandated by FOIA, suggesting in dictum only that a wholesale right of withdrawal "would certainly violate the spirit, and maybe even the letter," of FOIA. The Court's dictum was addressed to a postulated worst-case hypothetical which plainly goes beyond the limited withdrawal right currently afforded by § 2.790(c).

SECY-92-341 failed to note, or make any reference to, Westinghouse Electric Corporation v. NRC, 555 F.2d 82 (3d Cir. 1977), where the NRC, in a case similarly involving the validity of § 2.790, took the opposite position from its position in the General Electric case as respects the interpretation of § 2.790(c) -- namely, that there was an absolute right of withdrawal by a submitter of proprietary information except for the limited case of a document submitted in a rulemaking which subsequently forms the basis of the final rule. This right of withdrawal afforded by the NRC was one of the key points repeatedly made by the NRC in its brief to the Third Circuit and in oral argument in the Westinghouse case. The Third Circuit made reference to that right several times in its opinion and, at one point, referred to the "absolute right" of return, with the one exception noted for a document that formed the basis of a final rule.

Thus, the most that can be said is that there is a split in the Circuits, and that the NRC has been on both sides of the issue. Given that situation, the industry believes that the public policy underlying FOIA Exemption 4 should be honored and the NRC regulations should continue to provide that the submitter of information has the ability to reclaim its information prior to disclosure.

In sum, we believe that the so-called FOIA exception is not dictated by the requirements of that Act and that § 2.790(c) can and should be maintained in its current form. However, if the Commission chooses to modify § 2.790(c) regarding disclosure under FOIA, it should narrow the exception contained in the proposed rule. Where a decision is made that a document submitted to the NRC is proprietary, the balance between disclosure and withholding struck by the Congress in establishing FOIA Exemption 4 should be honored, and there should be no further balancing by the NRC of public and private interests; no disclosure should be allowed. In this situation, there can be no conflict with the FOIA because once the Commission has found that a document is proprietary, the FOIA mandates withholding from public disclosure.[1] We would emphasize, however, that this issue and much of the problem otherwise created by

[1]See the discussion below of why Commission balancing is not appropriate once a FOIA exemption determination has been made.

the proposed FOIA and other exceptions would be alleviated by adoption of the presubmission review procedures discussed earlier.

3. The Commission Meeting Exception

The third proposed exception would provide that if proprietary information for which a request for withholding has been made "was discussed at an open Commission meeting held in accordance with 10 CFR part 9, subpart C," the document containing the information will not be returned. (Proposed § 2.790(c)(1)(iii)). In our view, such a course is neither appropriate nor necessary.

As an initial proposition, we submit that there should be no disclosure of proprietary information at an open meeting of the Commission. If proprietary information is to be discussed at a Commission meeting, which in our experience is a very rare event, the meeting should be closed pursuant to the provisions of the Sunshine Act, 5 USC § 552b, so that confidentiality of proprietary information can be preserved. Thus, there should be no need for a Commission meeting exception to the proprietary rules. In the event that proprietary information is inadvertently mentioned at an open Commission meeting, there is nothing in the Sunshine Act that requires that the information be included in the public record of the meeting or be subject to further disclosure. It is not acceptable, and it is not the law, that rights to proprietary information are lost because of inadvertent disclosure of such information at an open Commission meeting. If there is such inadvertent disclosure, the transcript of the open meeting should not include the proprietary information which was discussed at the meeting.

In addition, there is a significant difference between the wording of the proposed regulation and the discussion of it in the Supplementary Information contained in the Federal Register notice. The proposed regulation refers to the situation where the "information... was discussed at an open Commission meeting held in accordance with 10 CFR Part 9, Subpart C." However, the Supplementary Information states that the exception "would relate to documents considered in connection with an open Commission meeting held in accordance with the Commission's Sunshine Act regulations." There is an obvious difference between the narrower "information ... discussed at an open Commission meeting" and the broader "would relate to documents considered in connection with an open Commission meeting." The latter language is vague and unbounded, and raises numerous questions. The former language -- the language of the proposed regulation itself -- is more precise. We believe the language in the proposed regulation relates to specific proprietary information actually discussed at an open Commission meeting and that the proposed withdrawal exception is intended to apply to that information only. If the subject exception is maintained, this matter needs clarification so that the overly broad description in the Supplementary Information is not imputed to the language of the regulation itself.

In discussing this proposed exception, the Supplementary Information states, "[A]fter balancing the interests, if the Commission determines to release the information, there is no reason to provide for its return to the submitter, except for [extraneous material easily segregated]." The Commission, however, never reaches the balancing test unless it first has concluded that the information is proprietary and falls within FOIA Exemption 4. Once this conclusion is reached, there is no conflict between the FOIA and return of the information, and there is no reason under the FOIA for the Commission not to return the information.

Moreover, we submit that disclosure of proprietary information based on the balancing test referred to here, and which applies elsewhere in the present § 2.790, is neither within the authority of the Commission nor otherwise appropriate. With respect to Commission authority, Congress already has achieved the public policy "balance of interests" in the provisions of FOIA and has decided that "trade secrets and commercial or financial information obtained from a person and privileged or confidential" are entitled to withholding from public disclosure. The relevant case law affirms that Congress has struck what it deems to be the equitable public policy balance and that, with one exception not here relevant, the courts and agencies are not to become involved in a new balancing that would upset the determinations made by the Congress. See, e.g. Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971); Getman v. N.L.R.B., 450 F.2d 670, 674 (D.C. Cir. 1971); Wellford v. Hardin, 444 F.2d 21, 24-25 (4th Cir. 1971).

With respect to the appropriateness of a Commission balancing test after determining information is proprietary, we note that for involuntarily submitted material to be proprietary, the test requires a likelihood of substantial competitive harm. Thus, for the Commission to perform a balancing test and release information after finding the material to be proprietary, the Commission would be releasing information in the face of the fact that it had previously determined that substantial competitive harm is likely to ensue. We submit that this is an inappropriate result. With respect to voluntarily submitted information, the recent Court decision in Critical Mass makes the test solely one of whether the information is customarily held in confidence, and no "balancing test" at all is appropriate.

E. Further Necessary Modifications to § 2.790

1. Predisclosure Notification Procedures

Predisclosure notification procedures should also be incorporated into NRC regulations as provided by Executive Order 12,600 of June 23, 1987, *Predisclosure Notification Procedures for Confidential Commercial Information*, 52 Fed. Reg. 23781 (June 25, 1987). That Order, which applies to all executive departments and agencies subject to the FOIA, requires that predisclosure procedures be established to notify submitters of records containing confidential commercial information whose records are requested under the FOIA when the agency determines it may be required to disclose

the records. First, the procedures must afford the submitter an opportunity to object to disclosure. The agency is then required to give careful consideration to all specified grounds for nondisclosure and, if it elects nonetheless to disclose the documents, it must give the submitter, in advance of disclosure, a written statement briefly explaining why the submitter's objections are not sustained. Further, the submitter must be notified by the agency of any FOIA suit seeking to compel disclosure so that the submitter can pursue what additional steps it might deem appropriate.

Chapter NRC-0211 of the NRC Manual, entitled "Freedom of Information Act," contains provisions for processing requests for proprietary information. The procedures set forth in that chapter do not fully comport with the provisions of Executive Order 12,600 and, in any event, are not reflected in the agency's regulations, as specified by the Executive Order. Under Section E3 of Chapter NRC-0211, documents marked proprietary are provided to the NRC Division of Freedom of Information and Publication Services ("DFIPS"). The DFIPS, the Office of General Counsel ("OGC") and the cognizant NRC office each review the documents for which proprietary information protection is sought, and if the proprietary claim is rejected, the DFIPS advises the submitter that the NRC does not consider the withheld information to be proprietary and that the information will be released within fifteen days. These provisions do not afford the submitter an adequate opportunity to object to disclosure and do not require a written statement as to why the submitter's objections to disclosure were not sustained. Further, these provisions do not require the NRC to notify the submitter of information if any FOIA suit is filed seeking to compel disclosure. Moreover, we question whether a fifteen-day notice period is a "reasonable number of days," as prescribed by the Executive Order, within which the submitter can seek court intervention.

The industry believes that the Commission should adopt regulations to implement the predisclosure notification regime prescribed by the Executive Order. The regulations could be based in part on the provisions of NRC Manual Chapter NRC-0211, but should be expanded to include the provisions contained in the Executive Order. Such regulations would be cumulative to those which provide for presubmission review of documents where a proprietary claim is asserted and, taken together, would enhance the protection properly to be accorded proprietary information.

2. Rule Change Required by Critical Mass Energy Project v. NRC

10 CFR § 2.790 should be modified to reflect the en banc decision of the United States Court of Appeals for the District of Columbia Circuit on August 21, 1992, in Critical Mass. In that case, Critical Mass Energy Project sought the release of INPO reports which had been voluntarily submitted to the NRC with the understanding that they would not be released to the public. The Court of Appeals revisited its decision in National Parks and Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974), in which the Court had established a two-part test for determining when financial or commercial information in the government's possession was to be treated as confidential

under FOIA Exemption 4. In Critical Mass, the Court reaffirmed the National Parks two-part test but confined its application to information that persons are required to provide to the government. The Court held that where information sought to be released is given to the government voluntarily, it will be treated as confidential under FOIA Exemption 4 if it is the kind of information that the provider would not customarily make available to the public. In so holding, the Court said:

> We know of no provision in FOIA that obliges agencies to exercise their regulatory authority in a manner that will maximize the amount of information that will be made available to the public through that Act. Nor do we see any reason to interfere with the NRC's exercise of its own discretion in determining how it can best secure the information it needs. So long as that information is provided voluntarily, and so long as it is the kind that INPO customarily withholds from the public, it must be treated as confidential. (975 F.2d at 880, emphasis added.)

The regulation governing the treatment of trade secrets and commercial or financial information submitted to the NRC, 10 CFR § 2.790, makes no distinction between submission of such information which has been compelled by the NRC and submission of information on a voluntary basis. NRC regulations should be revised to be consistent with the Critical Mass decision. Specifically, Section 2.790(b)(3) should be revised to reflect the National Parks two-part test for information required to be submitted, and the Critical Mass test for information voluntarily submitted to the NRC. Further, Sections 2.790(b)(2) and 2.790(b)(5) also should be revised to reflect the Critical Mass standard for agency treatment of information which is voluntarily submitted, i.e., if that information is of a type which is customarily not released to the public, it must be afforded Exemption 4 treatment by the agency.

3. Assuring Compatibility with 10 CFR Part 810

The Commission must also ensure that its disclosure regulations and their implementation are compatible with the national security objectives and related technology access constraints of 10 CFR Part 810. The Department of Energy's Part 810 regulations -- which implement Section 57b. of the Atomic Energy Act -- govern transfers to non-U.S. recipients of U.S.-origin nuclear technology which is not "public information," with specific constraints on making such technology available to proliferation-suspect countries. Clearly, making "public information" out of otherwise proprietary materials through a "balancing test" -- indeed, denying proprietary status to nuclear technology which a submitter would not customarily make available to the public -- holds the potential for conflict with Part 810 national security objectives. In short, there may be

national security interest considerations in non-disclosure that would be compromised by the amendments to the rule as currently proposed.[2]

F. Transition Provisions

In the past there have been countless submittals of information to the NRC where information has been identified by the submitter as proprietary. NRC practice generally has been to protect the information from disclosure while it determines the validity of the proprietary claim. Thus, there currently are at the NRC documents as to which a proprietary claim has been asserted where there has not yet been a determination of the validity of that claim. If the Commission adopts revisions to § 2.790, there should be a transition provision to protect proprietary information previously submitted to the NRC as to which a proprietary determination has not yet been made. Otherwise, owners of such information who submitted it to the NRC in good faith with the understanding that the information could be withdrawn if it was subsequently determined not to be proprietary will have had the groundrules changed and may be deprived of their property without due process. In addition, unless the proposed provisions relating to marking of proprietary documents are changed and made less prescriptive, transition provisions relating to marking of documents will also be needed with respect to proprietary documents previously submitted to the NRC.

II. MATERIAL SUBJECT TO COPYRIGHT PROTECTION

The proposed revisions to § 2.790 also would modify Commission regulations relating to submittal of information bearing a copyright notice. The industry supports the thrust of the proposed revision as that revision is explained in the Supplementary Information. Unfortunately, the language in the proposed revision (Proposed § 2.790(e)(1) and (2)) is significantly different from the description of the proposed change contained in the Supplementary Information. The Supplementary Information states that "the proposed regulation provides notice that the submission of a document to the NRC in connection with NRC licensing and regulatory activities authorizes NRC to reproduce and distribute copies required for its regulatory and public information responsibilities." 57 Fed. Reg. at 61014. It also states that the proposed rule provides

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[2]It is noteworthy that Section 57b. expressly provides that "[a]ny trade secrets or proprietary information submitted by any person seeking an authorization [thereunder] shall be afforded *the maximum degree of protection allowable by law*." (Emphasis supplied.) Thus did Congress, in 1978, express a public policy judgment that proprietary information required to be submitted as part of a Section 57b. authorization request (i.e., any information which may "directly or indirectly" aid the production of special nuclear material outside the United States) should not be made public solely as a result of such submittal and, indeed, that, in order safeguard the national security, agency discretion must be exercised in favor of protecting such information.

that such document submission "is deemed to be a representation to the NRC by the submitter that the submitter has the authority to submit the document and to authorize the NRC to make copies of the document, whether or not the document bears a copyright notice." These descriptions are reflected in the language of the proposed regulation.

However, other discussion in the Supplementary Information as to what is intended to be accomplished by the proposed regulation is not reflected in the proposed rule. For example, the Supplementary Information states:

> The proposed regulation authorizes only the NRC to copy and distribute the document and does not extend these rights to other persons receiving copies from NRC. The proposed rule provides that if the document bears a copyright notice or is accompanied by an explicit statement that the document is protected under the copyright law, a notice would be placed on the document indicating that the NRC has the authority to copy the document; however, all copyright markings contained on the submitted document would be retained.

This description of what the proposed rule is to provide is not reflected in the actual wording of the proposed regulation.

Similarly, the Supplementary Information states:

> However, with respect to distribution of documents to the general public, only one copy per request will be made of documents bearing a copyright notice or documents accompanied by an explicit statement indicating that the document is protected under the copyright law.

Again, this description is not reflected in the actual wording of the proposed regulation.

The language of the proposed regulation should reflect the intent of the NRC as described in the Supplementary Information. Further, as currently written, the proposed regulatory language is ambiguous and difficult to understand. Moreover, the language actually proposed in the rule (as distinct from the description in the Supplementary Information) appears to violate the Federal Copyrights Act, 10 U.S.C. § 101 et seq., and to be unauthorized by any statutory authority possessed by the Commission. If the language is properly revised to be consistent with the NRC's intent as described in the Supplementary Information, we believe the revised provisions relating to copyrights would be reasonable. However, as the law applicable to copyrights is within the special competence of the Registrar of Copyright in the Library of Congress, we recommend

that the NRC seek comment from that office before adopting any final rule related to the copying, external distribution and other treatment of copyrighted materials.

III. MARKING OF PROPRIETARY INFORMATION

The proposed regulation would require that a person proposing that a document, or part thereof, be withheld from disclosure as proprietary "shall mark the first page of the document and every other page containing this [proprietary] information 'Confidential Information Submitted Under 10 CFR § 2.790' or 'Proprietary Information Submitted Under 10 CFR § 2.790.'" (Proposed § 2.790(b)(1)). In contrast, current Commission regulations only require that the submitter "identify the document or part sought to be withheld." (§ 2.790(b)(1)(i)). Although no consequence is set forth from the failure to use the exact language of the proposed regulation, it could be inferred that the consequence is forfeiture of the proprietary status of the information -- an unjustifiable result. The proposed new regulation is unnecessarily prescriptive.

Other agencies do not impose the prescriptive type of notice which is embodied in the proposed Commission regulation. For example, the EPA regulations provide that a proprietary claim may be asserted by the submitter of a document "by placing on (or attaching to) the information, at the time it is submitted to the EPA, a cover sheet, stamped or typed legend, or other suitable form of notice employing language such as *trade secret, proprietary* or *company confidential.* Allegedly confidential portions of otherwise nonconfidential documents should be clearly identified." 40 CFR § 2.203(b) (emphasis added). The FDA does not specify even this general language. See 21 CFR § 20.44.

There appears to be no justification for the very specific and prescriptive wording which the proposed NRC regulation would require. As described in the Supplementary Information, the reason for the new provision appears to be to ensure that information which a submitter seeks to be withheld from public disclosure is not placed in the NRC Public Document Room when the mail containing such information is opened. 57 Fed. Reg. at 61014. This goal can be accomplished by utilizing more general language, like that of the EPA, requiring that the proprietary claim be clearly identified but allowing some variation depending on the practice of each submitter and the nature of the document being submitted. Any submitter of proprietary information will have an obvious interest in making sure that the information is properly marked, and this self-interest, coupled with a nonprescriptive, generalized requirement, will accomplish the goal which is apparently sought by the Commission in the proposed regulation.