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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of :
WISCONSIN ELECTRIC POWER COMPANY : Docket Nos. 50-266
: 50-301
: (Point Beach Nuclear Plant, : (OL Amendment)
Units 1 and 2) :

BRIEF OF WESTINGHOUSE ELECTRIC CORPORATION,
APPEARING SPECIALLY, CONCERNING THE
10 CFR §2.790(b)(5) BALANCING TEST

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Westinghouse Electric Corporation ("Westinghouse"), appearing specially in the above-captioned proceeding, files this Brief in response to the direction of the Atomic Safety and Licensing Board ("Board") to file a brief addressed to the question of the nature of the balancing tests set forth in 10 CFR §2.790(b)(5) between "the right of the public to be fully apprised as to the bases for and effects of" a proposed action and "the demonstrated concern [of an owner of proprietary information] for protection of a competitive position."^{1/}

^{1/}Tr. 1130-1134:

CHAIRMAN BLOCH: I would like to suggest . . . that there be a brief on the nature of the balancing test involved in our considerations

[That] brief can address whatever issues are considered relevant by the filing party to that issue, including our Question No. 2.

* * * *

This Brief also addresses the application of the balancing test to the facts of the present case and demonstrates that proper application must result in continuing to withhold from public disclosure the Westinghouse proprietary information here at issue.^{2/}

Background

In connection with consideration of an application by Wisconsin Electric Power Company ("WEPCO" or "Applicant") for license amendments authorizing the repair of steam generators at the Point Beach Nuclear Plant, Units 1 and 2, WEPCO

[Footnote 1 continued]

MR. COWAN [Counsel for Westinghouse]: Mr. Chairman, I assume that when you say the brief is on the balancing test, you are talking about the nature of the test and the facts here as they apply to that test.

* * * *

CHAIRMAN BLOCH: . . . What we are interested in is the application of the balancing test to the facts of this case and to general arguments concerning what circumstances might arise in which the release of proprietary information would or would not be appropriate in the public interest.

^{2/}During a March 4, 1982 telephone Prehearing Conference, the Board raised certain questions, two of which are addressed in this brief as part of the discussion. Those questions, denominated as questions "2" and "8" are:

2. Does a company have a legitimate proprietary interest in concealing tests performed by it in order to comply with governmental safety regulations in order to increase the regulatory barrier to competition by others? (Tr. 1102)
8. My understanding is that to this point you've never argued that there is a mosaic and that the disclosure of one piece of the puzzle will disclose the rest. Am I incorrect in that? Is there any evidence [on this]? (Tr. 1157)

submitted to the Nuclear Regulatory Commission ("NRC" or Commission") a steam generator sleeving report and related documents, containing proprietary information owned by Westinghouse. Pursuant to 10 CFR §2.790(b)(1), a request was made for withholding of the proprietary information in such report and documents, and an affidavit supporting such request was filed. (Affidavit (AW-80-53) of Robert A. Wiesemann, Manager, Regulatory and Legislative Affairs, Westinghouse Electric Corporation dated September 12, 1980 (hereinafter "Wiesemann 9/12/80 Affidavit").)

[Footnote 2 continued]

The other six questions raised by the Board in the March 4, 1982 Conference were either answered in testimony filed with the Board or were withdrawn by the Board. Other issues associated with the Westinghouse proprietary information in this case are not to be briefed at this time. See Tr. 1132-1134:

MR. COWAN: . . . There are some other legal issues, obviously, that have been raised, I assume that those are not to be included in this particular brief.

CHAIRMAN BLOCH: Could you give me an example, Mr. Cowan?

MR. COWAN: There is, for example, Mr. Chairman, and I think it has been briefed before, the issue of jurisdiction of the Board. There is the issue of whether this is a challenge to the Commission's regulations.

CHAIRMAN BLOCH: Absolutely. No, I agree that all of the issues which we have already decided in ways that are unacceptable to the parties need not be reraised at this time, and there certainly will be no rights waived

The NRC Staff has reviewed all Westinghouse proprietary information here at issue in accordance with the provision of 10 CFR §2.790(b) and has concluded that such information should be withheld from public disclosure (see "Testimony of [Staff Witness] Timothy G. Colbourn" dated February 25, 1982).

In October, 1981, Wisconsin's Environmental Decade ("Decade") challenged the grant of protection from public disclosure of certain portions of the Westinghouse proprietary steam generator sleeving report relating to test results contained in that report (Tr. 440, 445, 721). Decade did not contend that the Westinghouse information was not proprietary, i.e., did not satisfy the requirements of 10 CFR §2.790(b)(4), but limited its challenge to a claim that with respect to the test results, the balancing test under §2.790(b)(5) required public disclosure of such information. The Board, however, independently determined to review the proprietary classification of material contained in the appendices to the Westinghouse sleeving report and stated that it also might review whether Westinghouse information met the test for proprietary status under §2.790(b)(4). In March 1982, Decade enlarged the scope of its proprietary challenge to make the

information covered by the challenge coextensive with the Board inquiry.^{3/}

In connection with this proprietary issue, Westinghouse has submitted to the Board extensive Testimony as follows:

- (1) "Testimony of Robert A. Wieseemann on behalf of Applicants" (hereinafter Wieseemann 2/25/82 Testimony). This Testimony incorporated by reference two affidavits previously filed with the NRC:
 - (a) Wieseemann 9/12/80 Affidavit;
 - (b) "Affidavit of R. A. Wieseemann" dated November 13, 1981 which included as a part thereof a Supplement containing Westinghouse proprietary information (hereinafter Wieseemann 11/13/81 Proprietary Affidavit)^{4/} and

^{3/}Westinghouse and WEPCO have questioned the propriety of this inquiry by the Board as an impermissible exercise of its sua sponte authority. Westinghouse does not believe that the belated adoption by Decade of the Board challenge moots the sua sponte problem. However, the sua sponte issue, having been ruled on by the Board and preserved for further appeal, is not further addressed in this brief.

^{4/}A non-proprietary version of the Wieseemann 11/13/81 Proprietary Affidavit was submitted to the Board and parties on December 31, 1981 (hereinafter this version will be referred to as the "Wieseemann 11/13/81 Non-Proprietary Affidavit").

- (2) "Testimony of T. A. Christopher on Behalf of Westinghouse Electric Corporation" filed February 25, 1982 (hereinafter Christopher Testimony);
- (3) "Supplementary Testimony of Robert A. Wiesemann on Behalf of Applicants" filed on March 23, 1982 (hereinafter Wiesemann 3/23/82 Supplementary Testimony);^{5/} and
- (4) "Testimony of R. A. Wiesemann on Behalf of Westinghouse Electric Corporation and Applicants in Response to ASLB Questions dated March 25, 1982" filed under oath on April 14, 1982 (hereinafter "Wiesemann 4/14/82 Testimony").^{6/}

The Commission Regulatory Staff (Staff) and Intervenor also filed testimony in this proceeding.

^{5/}The Wiesemann 2/25/82 Testimony, the Christopher Testimony and the Wiesemann 3/23/82 Supplementary Testimony were affirmed under oath by Affidavits dated March 29, 1982.

^{6/}In the March 4, 1982 conference call (Tr. 1106-07) and again by letters dated March 30, 1982 and April 9, 1982, Westinghouse has requested the Board, as part of the evidence in this proceeding, to take a view or tour of the Westinghouse facilities in Pittsburgh, Pennsylvania where tests relating to the sleeving process for steam generators were conducted. As of the date of this Brief, Westinghouse is not aware of any Board action on this request.

Summary of Argument

As is discussed in detail infra, Sections 1 and 103 of the Atomic Energy Act require the Commission to protect proprietary information from disclosure to the general public except under very limited circumstances not present in this matter. 10 CFR § 2.790 was promulgated by the Commission to implement that Congressional requirement. In enacting that requirement, Congress recognized that there were a number of important public policy interests served by the protection of proprietary information from public disclosure. Any but the most restrictive public disclosure of proprietary information could (1) discourage initiation of research and development by private parties; (2) limit the knowledge of the existence of such information; (3) impair the Commission's independent review process; and (4) endanger the position of the United States as the world leader in nuclear power reactor technology. These and other compelling reasons of public policy which mandate the safeguarding of proprietary information by the Commission are discussed at length in the Brief. Based on the strong public interest in protection of proprietary information, Westinghouse submits that the Board, in applying the balancing test set forth in § 2.790(b)(5) must give great weight to the uncontroverted evidence presented by Westinghouse, discussed at length in the Brief, by which

Westinghouse has established the substantial harm to its competitive position which would be caused if the proprietary information here involved were to be publicly disclosed.

Westinghouse submits that the evidence of record clearly establishes that the demonstrated concern for protection of the Westinghouse competitive position heavily outweighs the right of the general public to be fully apprised as to the bases for and effects of the proposed action. The extensive Westinghouse and Staff testimony which mandate this conclusion stand wholly uncontroverted. The arguments presented by Decade are utterly without merit and offer no basis for concluding that the public interest to be fully apprised as to the bases for and effect of a proposed action outweighs the demonstrated concern which has been clearly established by Westinghouse for protection of its competitive position. As is manifest from the history of protection of proprietary information by the Commission, the balancing test set forth in § 2.790(b)(5) clearly requires an objective and rational balance of the evidence, and such a balance here favors continued protection for the valuable Westinghouse proprietary information. Decade claims it needs to disclose the proprietary Westinghouse information to all its members as part of a general education campaign as well as to meet with media representatives to explain "details" of the proposed sleeving program at Point Beach. Decade has failed to

make any showing as to why the wealth of information on the subject of steam generator repair currently available to the public is not sufficient to meet its educational needs. To the extent that members of the public themselves intervene in proceedings conducted by the Commission, it is Westinghouse policy to make such proprietary information available to them under the terms of an appropriate protective order or agreement, as has been done here. Thus, those members of the public interested enough to participate already have access to the Westinghouse proprietary information.

Finally, Westinghouse submits that the proprietary information involved in this proceeding should be accorded the same confidential treatment which was afforded by the Commission to similar kinds of information in the "Acceptance Criteria for Emergency Core Cooling Systems for Light Water Cooled Nuclear Power Reactors" adjudicatory rulemaking proceeding. In the instant proceeding, Westinghouse has made the same strong showing of demonstrated concern for protection of a competitive position as was presented in the ECCS proceeding.

Argument

I. The Responsibility of the Commission to Protect Proprietary Information and the Nature of the Balancing Process

10 CFR § 2.790, after providing that final NRC records and documents regarding certain licensing actions or rulemaking proceedings generally shall be made available for public inspection, sets forth nine categories of records which are to be exempted from disclosure. Included within these categories are "trade secrets and commercial or financial information obtained from a person and privileged or confidential" - i.e., proprietary information. Paragraph (b) of §2.790 sets forth a special procedure for exempting proprietary information from public inspection. A person who proposes that the Commission withhold a document from public disclosure on the ground that it contains proprietary information must submit an application for withholding, together with an affidavit which contains "a full statement of the reasons on the basis of which it is claimed that the information should be withheld from public disclosure" (§2.790(b)(1)(ii)). The statement must address with specificity certain considerations identified in §2.790(b)(4) of the regulation which the NRC will take into account in determining whether the information sought to be withheld from public disclosure is in fact proprietary.^{7/}

If, after taking into account these considerations, the NRC determines that the document proposed for exemption from public disclosure contains proprietary information, the NRC then applies the balancing test pursuant to paragraph (b)(5) of § 2.790. That test^{8/} balances two factors: (a) "the right of the public to be fully apprised as to the bases for and effects of" a proposed Commission action, and (2) the "demonstrated concern for protection of a competitive position" of the owner of the information. Only if the first factor -

7/§2.790 (b)(4) reads as follows:

(4) In making the determination required by paragraph (b)(3)(i) of this section, the Commission will consider:

(i) Whether the information has been held in confidence by its owner;

(ii) Whether the information is of a type customarily held in confidence by its owner and whether there is a rational basis therefor;

(iii) Whether the information was transmitted to and received by the Commission in confidence;

(iv) Whether the information is available in public sources;

(v) Whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.

8/10 CFR § 2.790 (b)(5) reads:

"(i) whether the right of the public to be fully apprised as to the bases for and effect of the proposed action outweighs the demonstrated concern for protection of a competitive position and (ii) whether the information should be withheld from public disclosure pursuant to this paragraph."

the public right to be fully apprised - outweighs the second factor - the demonstrated concern - is proprietary information to be made public.^{9/}

The protection to be afforded proprietary information by the NRC is based on the recognition of the public interest in protecting competitive interests. It is in harmony with the policy expressed in the Atomic Energy Act of 1954, as amended^{10/} (hereinafter "AEA") to strengthen free competition in private enterprise" (AEA § 1(b)) and the responsibilities of the Commission as mandated by the AEA (see pp. 13 to 25, infra); the common law policy of protection of trade secrets (see pp. 27 to 29, infra); the policy of Congress against public disclosure of proprietary information as that policy is reflected in many statutes enacted by the Congress designed to protect such information from public disclosure (see pp. 29 to 30, infra); the policy underlying the exemptions contained in the Freedom of Information Act (see pp. 30 to 35, infra);

^{9/} Even here, however, with respect to adjudicatory licensing proceedings, under 10 CFR § 2.790(c) if a request for withholding is denied, the owner of the information has the right to withdraw the information from the Commission. This right was declared to be an "absolute right" in Westinghouse Electric Corporation v. NRC, 555 F.2d 82, 88 (3d Cir. 1977), where both a reading of the regulation and repeated representations by the Commission to the Court compelled this conclusion.

^{10/} 42 U.S.C. § 2011, et seq.

compelling reasons of public policy which mandate the safeguarding of proprietary information by the Commission (see pp. 35 to 41, infra); and the decision in the ECCS Rulemaking proceeding with respect to treatment of Westinghouse proprietary information, including test information and information which constitutes "pieces of the puzzle" (see pp. 42 to 46, infra). In construing the balancing test 10 CFR § 2.790(b)(4) and in applying that test to the instant proceeding, the Board should weigh heavily the long-established public interest in safeguarding proprietary information from disclosure to the general public, and hence to competitors.

A. Section 103 of the AEA Requires the Commission to Protect Proprietary Information from Public Disclosure Except Under Very Limited Circumstances

In order to understand the balancing test established by the Commission, it first is necessary to appreciate the Commission responsibility under the law for protection of proprietary information. Commission responsibilities regarding the treatment of proprietary information are mandated by the AEA.

The AEA contains a Congressional declaration of policy which states, inter alia:

"Section 1. Declaration. Atomic energy is capable of application for peaceful as well as military purposes. It is therefore declared to be the policy of the United States that

* * *

(b) the development, use and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise."^{11/}

Section 103 of the AEA (42 U.S.C. § 2133), cited by the NRC as one of the sections of the AEA authorizing the adopting of 10 CFR § 2.790^{12/} reads in relevant part as follows:

"[SEC. 103.] COMMERCIAL LICENSES CONDITIONS

(a) The Commission is authorized to issue licenses to persons applying therefor to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import or export . . . utilization or production facilities for industrial or commercial purposes

(b) The Commission shall issue such licenses on a non-exclusive basis to persons applying therefor . . . (3) who agree to make available to the Commission such

^{11/} AEA § 1, 42 U.S.C. § 2011.

^{12/} Section 201 of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5841, and § 161 of the AEA, 42 U.S.C. § 2201 are the other two provisions cited by the NRC as authorizing adoption of 10 CFR § 2.790. Section 201 of the ERA merely establishes the NRC and transfers to it, inter alia, all the licensing and related regulatory functions of the AEC and its components. Section 161 of the AEA is a broad general powers provision and does not shed light on the issue here under consideration.

technical information and data concerning activities under such licenses as the Commission may determine necessary to promote the common defense and security and to protect the health and safety of the public. All such information may be used by the Commission only for the purposes of the common defense and security and to protect the health and safety of the public." (emphasis added.)

The statutory history relating to the adoption of Section 103 of the AEA, and in particular the last sentence of Section 103(b), makes it clear that proprietary information developed by a private party and submitted to the NRC in connection with its licensing and regulatory function is to be protected from public disclosure except under very limited circumstances.

The Atomic Energy Act of 1954 had as its antecedent the Atomic Energy Act of 1946^{12.1/} (the "1946 Act"). Section 7(c) of the 1946 Act, providing for licensing, required that the licensees:

"agree to make available to the Commission such technical information and data concerning their activities pursuant to such licenses as the Commission may determine necessary to encourage similar activities by as many licensees as possible."

The initial version (hereinafter the "April version") of the bill to amend the "1946 Act" was introduced into the House of

^{12.1/}42 U.S.C. §§1801-19 (1946), as amended, 42 U.S.C. §§2011-2296.

Representatives on April 15, 1954 as H.R. 8862, 83d Cong., 2d Sess. (1954), and into the Senate on April 19 (legislative day April 14), 1954 as S. 3323, 83d Cong., 2d Sess. (1954).^{13/} This April version of the proposed amendment deleted the words "to encourage similar activities by as many licensees as possible" from the licensing provision of the 1946 Act.^{14/} Substituted therefor in the April version was a requirement that licensees:

"agree to make available to the Commission such technical information and data concerning their activities pursuant to such licenses as the Commission may determine necessary to promote the common defense and security and to protect the public health and safety."

The April version of the bill to amend the 1946 Act was referred to the Joint Committee on Atomic Energy of the United States Congress, which subsequently held hearings on the bill. On May 14, 1954, representatives of the General Electric Company testified at the hearings and expressed their agreement with the deletion of the words "to encourage similar activities by as many licensees as possible" which appear in the 1946 Act. However, they urged the adoption of language confirming

^{13/}Hearings on H.R. 8862 and S. 3323 Before the Joint Committee on Atomic Energy, 83d Cong., 2d Sess. (1954) (hereinafter cited as 1954 Joint Committee Hearings).

¹⁴The number of the licensing provisions was changed from §7 in the 1946 Act to §103 in the AEA.

that a licensee's right to technical information and know-how which he had developed would be protected. The testimony of General Electric with regard to this matter is as follows:^{15/}

"(3) Protection of technical information: Section 103 also imposes a requirement that licenses must agree to make available to the Commission such technical information and data concerning their activities pursuant to such licenses as the Commission may determine necessary to promote the common defense and security and to protect the public health and safety. This raises but does not answer some serious problems. What disposition may the Commission make of the technical data thus secured? Can the Commission give one licensee's know-how to anybody else, including his competitors, without requiring permission or paying compensation to the licensee who developed that know-how?

"We are pleased to note that in the revision of this standard from the form in which it appeared in the 1946 act, the words "to encourage similar activities by as many licensees as possible" were deleted. We presume this indicates an intention to protect the right to technical information and know-how. In the hope of encouraging a sound competitive atmosphere we hope that you will be willing to go one step further and expressly confirm that a licensee's right to technical information and know-how which he has developed will be protected."
(emphasis added).

On May 19, 1954, Mr. William A. Steiger, Chairman of the Committee on Patents of the National Association of Manufacturers, also testified at the hearings of the Joint

^{15/}The 1954 Joint Committee Hearings at 327.

Committee on this matter. In reference to the proposed amendments to §7 of the 1946 Act, as those amendments appeared in the April version of H.R. 8862 and S. 3323, Mr. Steiger noted that the provision whereby a licensee was required, as a condition of its license, to make available technical information and data required by the Atomic Energy Commission ("AEC") as necessary to promote the common defense and security and to protect the public health and safety left the judgment entirely up to the AEC. Accordingly, he urged the Joint Committee to further revise proposed §103:^{16/}

"It [§103, as proposed,] should be revised to state that only such information as is necessary for the indicated purposes must be furnished, and that such information is to be used by the Government only for these purposes."

Following the Joint Committee hearing sessions at which the above testimony was given, a redraft of the proposed bill to amend the 1946 Act was prepared, incorporating proposed changes to the April version H.R. 8862 and S. 3323. That redraft, printed as a Committee Print for Use of the Joint Committee on Atomic Energy (hereinafter the "May 21 redraft"),^{17/} was dated May 21, 1954. With respect to §103(b), the May 21 redraft modified certain language of the April version concerning what a licensee must agree to make available. More significantly for our present discussion, the

^{16/}1954 Joint Committee Hearings at 464.

^{17/}Joint Committee on Atomic Energy, 83d Cong., 2d Sess.,

May 21 redraft also added a sentence along the line suggested by the witnesses quoted above to confirm the right to protection from public disclosure of technical information and know-how submitted to the AEC. The May 21 redraft thus provided that the AEC was to issue licenses to applicants who, inter alia:

"agree to make available to the Commission such technical information and data concerning activities under such licenses as the Commission may determine necessary to promote the common defense and security and to protect the health and safety of the public."

To this was added the following sentence:

"All such information may be used by the Commission only for the purposes of common defense and security and to protect the health and safety of the public and for no other purpose." (Emphasis added).

The testimony discussed above of General Electric Company and the Committee on Patents of the National Association of Manufacturers is the only discussion contained in the Congressional history of the Atomic Energy Act of 1954, as amended, prior to the date of the May 21 redraft, which explains in any manner how and why this additional sentence came to be added to §103(b) of the May 21 redraft.

[Footnote 17 continued]

Draft in Bill Form Incorporating Changes Proposed to be Made In H.R. 8862 and Companion Bill S. 3323, 41 (Comm. Print 1954).

On June 8, 1954, the Joint Committee conducted further hearings on the proposed bill to amend the 1946 Act. At those June 8 hearings the version of the bill before the Joint Committee was the May 21, 1954, redraft. A discussion was held on the meaning of §103(b) as then proposed, and in particular the meaning of the additional sentence which had been added to that section. The participants in the discussion at the Joint Committee hearing on June 8, 1954 were Congressman W. Sterling Cole, Chairman of the Joint Committee on Atomic Energy, Congressman Chet Holifield, then a member and later to become Chairman of the Joint Committee, and Lewis L. Strauss, Chairman of the Atomic Energy Commission. Because it is so instructive as to the meaning of the last sentence of §103(b) of the AEA, the entire discussion relating to that sentence is set forth here in full:^{18/}

"Representative HOLIFIELD . . .

"Now I want to go to section b on page 4 of the commercial licenses and without reading the whole thing, unless it is necessary, the whole of section b, I want to point out that the words 'and for no other purpose' at the end of line 21 actually provide a limitation against the Government use of such information for any commercial or industrial purposes which the Government might want to use it for. That is my understanding of the language.

"Mr. STRAUSS. I do not know what those words were put there for.

^{18/}1954 Joint Committee Hearings at 924-25.

"Representative HOLIFIELD. I say if that meaning is clear as I have stated then we are putting an unnecessary restriction upon the Government and prohibiting it from using information which may have been developed in these facilities and turned over to the Government for weapon uses but for other purposes we are being excluded from the field, and it is a question of policy as to whether we should be, but I call attention to the fact that that is what the language does in my opinion.

"Chairman COLE. It is my recollection of the purpose of that expression again that it is to prevent, the sentence before it under subparagraph (3), requires that the licensee make available to the Commission any information or data that may flow from the operation of this license. It permits the Commission to use that data, that information, for purposes of the common defense and security but imposes on the Commission an obligation that they shall not pass that information on to outsiders in order to protect the property right, the commercial right, which a licensee as a developer of a new procedure, new idea, should properly have.

"Mr. STRAUSS. In that respect certainly eminently fair.

"Representative HOLIFIELD. That was the purpose of the section, I realize, but the section goes far beyond that, and I point out that if it is only the purpose of the section to protect trade information that other language should be written in, and this all-embracing phrase should be deleted.

"Now if it is the purpose of the bill, of course, to build up further prohibitory language against the Government using any of this information in its own facilities for its own purposes, why, then that is something else again. That is not a policy I agree with, but I think we ought to be clear on what we have here.

"I call attention of the counsel to that language and ask for an explanation at a later time."^{19/} (Emphasis added.)

It is clear that to Chairman Cole, Representative Holifield, and Chairman Strauss the "eminently fair purpose" of the additional sentence which had been added to §103(b) of the AEA was to impose on the AEC an obligation that it not pass trade information or data on to others, and that this sentence was added to the section to protect "the property right, the commercial rights" in trade information and data which properly belonged to licensees when they developed such information or data. The final version of the Atomic Energy Act of 1954 as passed by the Congress and signed by the President contained in §103 the last sentence substantially as set forth in the May 21, 1954 draft.^{20/} Despite numerous amendments to the AEA since it was adopted in 1954, no change has been made to this provision of §103.

^{19/}No further explanation was located in the Congressional history of the AEA.

^{20/}Representative Holifield in the quotation supra objected to the additional words "and for no other purpose" found in the May 21, 1954 draft because he feared such language would provide a limitation against the Government use of the information for any commercial or industrial purpose for which the Government might want to use such information. The bill enacted as the AEA deleted the additional words objected to by Representative Holifield. The question as to whether, in light of such deletion, the Government might have the right to use proprietary information for the Government's own commercial or industrial purposes has never been addressed as far as counsel is aware.

The significance of this legislative history is clear and unambiguous. Congress obviously intended to change the thrust of the law from that which had existed under the 1946 Act, wherein licensees were required to furnish technical information and data so as to encourage similar activities by other potential licensees. In the AEA, Congress was providing a program designed to encourage the peaceful development, use, and control of atomic energy and to strengthen free competition in private enterprise (AEA §1, 42 U.S.C. §2011). One method of effectuating this purpose was to make certain that technical information and know-how developed by private enterprise would be protected from disclosure to competitors. The last sentence of §103(b) was put in the Act to effectuate this goal.

In Westinghouse Electric Corporation v. NRC, supra, the Court expressly agreed with the view that §103(b) of the AEA was intended to restrict Commission use of proprietary information, although the Court rejected an argument that such restriction precluded disclosure of such information in all circumstances. (555 F.2d at 88-92.) In discussing the balancing test as phrased by the Commission in the 1976 Regulations hereunder consideration, the Court, after noting that in some respects it is "more favorable to the protection of proprietary information than prior versions," went on to quote the test and state:

"There is no reason to believe that in applying this [balancing] test NRC will disregard the longstanding congressional policy which disfavors disclosure of proprietary information or that NRC will disclose proprietary information other than such as bears on defense and health and safety." (555 F.2d at 92; emphasis added.)

Thus, the Court upheld the validity of the Commission regulation adopting the balancing test in the face of a challenge to the lawfulness of such adoption. That test, which is the subject of this Brief, provides the standard for determining when the Commission (subject to the right of withdrawal) may disclose proprietary information which bears on defense and health and safety. Of significance to the present discussion, the Court in Westinghouse emphasized the policy of Congress which "disfavors disclosure" of proprietary information, as that policy is translated into law in §103(b) of the AEA. The Commission regulations and the balancing test contained in those regulations must be construed in light of the clear Congressional policy and intent discussed by the Court behind the organic statute which the regulations implement.

B. Policy Considerations Involved in Many Federal Statutes Relating Directly to Proprietary Information Establish a Congressional Interest in Protecting Proprietary Information From Public Disclosure.

The policy evidenced by other statutes enacted by the Congress makes it clear that Congress recognizes a public

interest in the protection of proprietary information from public disclosure. Before reviewing those statutes, however, and the policy enunciated through such statutes, a brief historical view of protection of trade secrets^{21/} under the common law is both relevant and helpful.

^{21/}The term "trade secrets" has been defined as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. . . . Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management." Restatement of Torts §757, comment b (1939). The term "trade secrets", as defined by the Restatement, has been recognized as covering all types of valuable confidential information. See, e.g., Kodekey Electronics, Inc. v. Mechanex Corp., 486 F.2d 449 (10th Cir. 1973) (electronic device); Hulsenbusch v. Davidson Rubber Co., 344 F.2d 730 (8th Cir. 1965), cert. denied, 382 U.S. 977 (1966) (manufacturing techniques); Mixing Equipment Co. v. Philadelphia Gear, Inc., 312 F. Supp. 1269 (E.D. Pa. 1970), modified, 436 F.2d 1308 (3d Cir. 1971) (fruits of research in the form of charts, graphs, tables; operating and pricing policies); Harris Manufacturing Co. v. Williams, 157 F. Supp. 779 (W.D. Ark. 1957) (assembly machine; ingredients for adhesive); International Industries, Inc. v. Warren Petroleum Corp., 99 F. Supp. 907 (D. Del. 1951), aff'd in part, 248 F.2d 696 (3d Cir. 1957) (economic reports and plans); Van Products Co. v. General Welding & Fabricating Co., 419 Pa. 248, 213 A.2d 769 (1965) (chemical compound); Town & Country House & Home Service v. Newberg, 3 N.Y.2d 554, 147 N.E.2d 724 (1958) (customer lists).

Furthermore, "proprietary interests[s] . . . should, in law and equity, be treated the same as trade secrets". International Industries, Inc. v. Warren Petroleum Corp., supra, at 915. As stated by Justice Story in 2 Story, Equity Jurisprudence, §952 (1st ed. 1836) "and it matters not, in such cases, whether the secrets be secrets of trade or secrets of title, or other secrets of the party important to his interests."

1. Protection of trade secrets is a long-standing and valid principle of common law.

Protection of trade secrets is a long-standing principle of common law. In at least 36 states trade secrets have been specifically recognized by the courts,^{22/} and numerous states have enacted statutes adding criminal law sanctions to the common law protection of trade secrets.^{23/}

The Restatement of Torts sets forth the trade secret protection as follows:

"One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other . . ." (Restatement of Torts, §757 (1939)).

The United States Supreme Court has recognized the validity of the policy behind protection of trade secrets on many occasions. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470

^{22/}See, e.g., Schulenburg v. Signatrol, Inc., 33 Ill.2d 379, 212 N.E.2d 865 (1965), cert. denied, 383 U.S. 959 (1966); Van Products Co. v. General Welding & Fabricating Co., 419 Pa. 248, 213 A.2d 769 (1965); B. F. Goodrich Co. v. Wohlgenuth, 117 Ohio App. 493, 192 N.E.2d 99 (1963); Delaware Chemicals, Inc. v. Reichhold Chemicals, Inc., 35 De. Ch. 493, 121 A.2d 913 (1956); Empire Steam Laundry v. Lozier, 165 Cal. 95, 130 P. 1180 (1913); Tabor v. Hoffman, 118 N.Y. 30, 23 N.E. 12 (1889); Salomon v. Hertz, 40 N.J.Eq. 400, 2A. 379 (Ch. 1886).

^{23/}Included among the states having such sanctions are major industrial states such as California (Cal. Penal Code Ann. §499c (West Supp. 1982); Massachusetts (Mass. Gen. Laws Ann. Ch. 93, §§42, 42A (1975); Michigan (Mich. Compl. Laws §§752.771-.773 (Supp. 1981); New Jersey (N.J. Stat. Ann. §2C:20-1, 20-2 (1981)); New York (N.Y. Penal Law §§155.00(6), 155.30(3), 165.07 (McKinney (1975)); Ohio (Ohio Rev. Code Ann. tit. 13, §§1333.51, 1333.99 (E) (Page 1979)); and Pennsylvania (18 Pa. Cons. Stat. Ann. §3930 (1973)).

(1974); United States v. Dubilier Condenser Corp., 289 U.S. 178 (1933); E. I. Du Pont de Nemours Powder Co. v. Masland, 244 U.S. 100 (1917); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911); Board of Trade v. Christie Grain & Stock Co., 198 U.S. 236 (1905); Fowle v. Park, 131 U.S. 88 (1889).

The protection accorded the trade secret holder against disclosure or unauthorized use of a trade secret was reaffirmed recently by the United States Supreme Court in Kewanee Oil Co. v. Bicron Corp., supra. In that case the Supreme Court, reversing the United States Court of Appeals for the Sixth Circuit, held that the trade secret law of Ohio was not preempted by federal patent law. In so doing, Mr. Chief Justice Burger set forth the strong policies which underlie the protection of trade secrets as follows (at 481):

"The maintenance of standards of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secret law."

In his resounding reiteration of the policy behind trade secret law the Chief Justice also stated (at 485):

"Trade secret law will encourage invention in areas where patent law does not reach and will prompt the independent innovator to proceed with the discovery and exploitation of his invention. Competition is fostered . . ." (Emphasis added.)

The fostering of competition which underlies the trade secret law is the same desirable goal which Congress in §1 of

the AEA declared to be the policy of the United States in connection with the development, use and control of atomic energy.

2. Many federal statutes embody protection of proprietary information

Congress has enacted many statutes which embody the common law protection of proprietary information. The entire thrust of these statutes makes it clear that there runs through the federal law a congressionally mandated policy to afford protection to proprietary information.

The policy against public disclosure of proprietary information is so strong that Congress has enacted criminal sanctions in support of this policy. 18 U.S.C. §1905 makes it a crime for a government official to disclose information if not authorized by law to do so. No clearer expression of Congressional intent to protect proprietary information from public disclosure can be imagined than a statute which makes it a crime for a public official to make "known in any manner or to any extent not authorized by law" information which "concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association" (18 U.S.C. §1905).

At least 27 statutes have been enacted by the Congress since 1934 which deal with protection of proprietary information and are designed to protect trade secrets and proprietary information from public disclosure. Many of these acts directly involve the health and safety of the public, yet afford protection of proprietary information. For example, §15 of the Occupational Safety and Health Act of 1970 (29 U.S.C. §664) provides for confidential treatment of all information which might reveal a trade secret referred to in 18 U.S.C. §1905. Likewise, §4 of the Flammable Fabrics Act (15 U.S.C. §1193(c)) prohibits public disclosure of information which contains or relates to trade secrets or other matters referred to in 18 U.S.C. §1905. The central theme common to all of these statutes is that proprietary information is to be protected from public disclosure.

3. The policy underlying the Freedom of Information Act and the exemptions contained therein are particularly instructive in considering NRC authority in this matter.

One of the most important enactments of the Congress respecting the making public of information possessed by an agency is the Freedom of Information Act (5 U.S.C. §552) (hereinafter "FOIA"). The FOIA provides that each agency of the federal government must make available to the public, with certain exceptions, all information in its possession (5 U.S.C.

§552).^{24/} Nine specific exceptions are set forth in the FOIA (5 U.S.C. §552 (b))^{25/} which provide protection from public disclosure of certain information by exempting such information from the public disclosure requirements of the Act.

The fourth exemption of the FOIA relates to proprietary information (§552(b) (4))^{26/} and reads as follows:

"(b) This section does not apply to matters that are - . . .

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

^{24/}See House of Representatives Report No. 92-1419, printed in Joint Committee Report dated March, 1975 of the United States Congress, "Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book; Legislative History, Texts, and Other Documents".

^{25/}These nine specific exemptions of §552 (b) are the same, word-for-word, as the categories listed in 10 C.F.R. §2.790(a).

^{26/}In 1974, the FOIA was amended in certain respects. The initial bills in both the Senate and House of Representatives proposing amendments to the FOIA contained suggested revisions of the proprietary exemption language of §552(b) (4). During hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, during May, 1973 there was considerable discussion concerning the proposed amendments to the proprietary exemption. After the hearings were concluded, the proposed revisions to the proprietary exemption contained in §552(b) (4) were eliminated from the amending legislation and the 1954 amendments to the FOIA, when subsequently enacted into law, did not change the wording of §552(b) (4). FOIA Amendments of 1974 (P.L. 93-502). See the FOIA Act, Print of Hearings before a Subcommittee of the House Committee on Government Operations on H.R. 5425 and H.R. 4960, 93d Cong. 1st Sess. (1973).

The exemption language of §2.790(a)(4) is patterned after the above-quoted FOIA exclusion. In interpreting §2.790, we submit it would be instructive to look at judicial cases interpreting §552(b)(4) of the FOIA.

In Westinghouse Electric Corp. v. Schlesinger, 392 F.Supp. 1246 (E.D. Va. 1974), aff'd, 542 F.2d 1190 (1976), cert. denied, 431 U.S. 924 (1977), the District Court found that disclosure of an employer information report filed by a Westinghouse facility, as well as disclosure of certain other reports, was prohibited by the proprietary exemption of §552(b)(4) of the FOIA. In so doing, the Court, quoting from Bristol-Meyers Co. v. FTC, 424 F.2d 935, 938 (D.C. Cir. 1970), cert. denied, 400 U.S. 824 (1970), gave the purpose^{27/} of the exemption as follows:

^{27/}The District Court opinion also included the following analyses of the proprietary exemption set forth in §552(b)(4) (392 F. Supp. at 1250):

"In Sterling Drug Inc. v. F.T.C., 146 U.S. App. D.C. 237, 450 F.2d 698, 709 (1971), the court apparently adopted the standard for coverage by the exemption which was set forth in the Senate Report on the Freedom of Information Act, namely:

'This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes.'

S. Rep. No. 813, 89th Cong. 2d Sess. 9 (1964).

" 'This provision serves the important function of protecting the privacy and the competitive position of the citizen who offers information to assist government policymakers.' " (392 F. Supp. at 1250.)

In National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974), plaintiff brought suit under the FOIA seeking to enjoin federal officials from refusing to permit plaintiff to inspect and copy certain records of the Department of the Interior. The Court of Appeals for the District of Columbia Circuit reversed and remanded a District Court decision which had granted a Motion for Summary Judgment of the Department on the ground that the lower court needed to make a determination as to whether the information sought to be protected from disclosure was "confidential" within the meaning of §552(b) (4) and hence was "exempt from disclosure" (498 F.2d at 771). In so doing, the Court of Appeals noted that there was a governmental interest protected by the exemption--i.e., encouraging cooperation with the Government by persons having information useful to officials. It then stated (at 768):

[Footnote 27 continued]

The House Reports add:

'It would also include information which is confidential, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.'

H.R. Rep. No. 1497, 89th Cong. 2d Sess. 10 (1964)."

"Apart from encouraging cooperation with the Government by persons having information useful to officials, section 552(b) (4) serves another distinct but equally important purpose. It protects persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication."

The Court went on to review in detail the legislative history which led to the inclusion of the §552(b)(4) exemption in the FOIA. In this connection it quoted with approval the following testimony of a representative of the Department of Justice urging adoption of the proprietary exemption (498 F.2d at 769):

"'Again, not only as a matter of fairness, but as a matter of right, and as a matter basic to our free enterprise system, private business information should be afforded appropriate protection, at least from competitors.'"

Thus the Court of Appeals reached the following conclusion (at 770):

"As we have already explained, however, section 552 (b) (4) may be applicable even though the Government itself has no interest in keeping the information secret. The exemption may be invoked for the benefit of the person who has provided commercial or financial information if it can be shown that public disclosure is likely to cause substantial harm to his competitive position."

It is clear that the policy underlying the proprietary exemption of §552(b)(4) of the FOIA is indicative of a general Congressional interest in not authorizing public disclosure of proprietary information.^{28/}

^{28/}As expressed by the Attorney General in Attorney General's Memorandum on the Public Information Section of the

Based upon the strong common law policy of protection of trade secrets, based upon the numerous state and federal statutory expressions of that policy and based upon the considerations underlying and the Court cases construing the proprietary exemption set forth in §552(b)(4) of the FOIA, Westinghouse submits that this Board, in applying the balancing test set forth in §2.790(b)(5) must give great weight to the evidence, discussed infra, by which Westinghouse has established the substantial harm to its competitive position which would be caused if the proprietary information here involved were to be publicly disclosed.

C. Compelling Reasons of Public Policy Mandate the Safeguarding of Proprietary Information by the Commission

The safeguarding of proprietary information benefits a number of significant public interests. Any but the most

[Footnote 28 continued]

Administrative Procedure Act, U.S. Department of Justice, June, 1967 (at 34):

"An important consideration should be noted as to formulae, designs, drawings, research data, etc., which, although set forth on pieces of paper, are significant not as records but as items of valuable property. These may have been developed by or for the Government at great expense. There is no indication anywhere in the consideration of this legislation that the Congress intended, by subsection (c), to give away such property to every citizen or alien who is willing to pay the price of making a copy. Where similar property in private hands would be held in confidence, such property in the hands of the United States should be covered under exemption (b)(4)."

restrictive public disclosure could (1) discourage initiation of research and development by private parties, (2) limit the knowledge of the existence of such information, (3) impair the Commission's independent review process, and (4) endanger the position of the United States as the world leader in nuclear power reactor technology.

In the following paragraphs, we discuss the numerous reasons why any but the most restrictive disclosure of proprietary information would harm significantly the interests of the Commission and the public, and would weaken seriously free competition in private enterprise, thus contravening that Congressional objective.

In the past, there has always existed a free exchange of information between industry and the Commission uninhibited by fears that valuable information would be disclosed to competitors. Westinghouse submits that the Commission did not intend the Section 2.790(b)(5) balancing test to be interpreted in any manner which would inhibit that free exchange.

It is merely stating the obvious to note that the competitive incentive by a reactor vendor to undertake research and testing is chilled by the prospect that the results of such research and testing can and will be made available to competitors. Furthermore, it follows that the reporting of

such information to the Commission may be discouraged if the information thereafter is openly available to competitors or other unauthorized persons. The result may well be to encourage disclosure of only the minimum amount of information believed necessary to obtain the sought-after license.

In addition, requiring proprietary information to be made available to competitors may lead to situations where work of one vendor no longer can be compared by the NRC against the work of another vendor. After public disclosure there will be less incentive to continue research, development and testing and more incentive to copy or use what the first disclosure reveals. At present, the Commission is able to review and evaluate independent and sometimes different solutions to common problems as well as to cross-check the work of various reactor vendors. Disclosure of proprietary information could result in an injurious disruption of this Commission's practice of independent review, analysis and evaluation.

Moreover, the current protection afforded proprietary research and test data by the Commission results in more than one vendor submitting similar information on subjects of Commission interest, thus permitting the Commission, by means of comparison and cross-checking, to evaluate test accuracy, etc., without incurring the substantial delay and cost which would be associated with any research program which it other-

wise might have to conduct in order to independently verify the accuracy, etc., of the test data.

Furthermore, if vendor proprietary information was disclosed without restriction, there would be a very great temptation to merely copy an analysis, problem solution, etc., of a competitor which previously had secured the approval of the Commission.

Any incentive to perform research or testing on a subject which has been investigated and tested by another vendor also would be weakened. In short, unrestricted disclosure of proprietary information could seriously impair the current capability of the Commission to independently review licensing submissions by reducing the data base and the number of analysis techniques upon which the Commission's safety evaluations are presently predicated. Pricing practices in a competitive market where one vendor could anticipate receiving the benefits of another vendor's research and development soon would eliminate the inclusion of an allowance in the price for independently supported research and development work, contrary to the public interest. We believe that independent development work is beneficial to the industry, the Commission, and the public, and contributes to nuclear safety. Discouragement of this work should be avoided.

In addition, unrestricted disclosure of proprietary information could endanger the position of the United States as the world leader in nuclear power reactor technology. As the result of years of pioneering work on the power generation applications of nuclear energy, the United States currently is regarded as the world leader in nuclear reactor technology. Many benefits to the United States are the products of this world leadership position. For example: (1) the sale of U.S. reactors and technology abroad contributes significantly to this country's balance of payments; (2) the existence of a highly developed nuclear power generation technology will enable this country to meet its goal of energy self-sufficiency and eliminate its dependency on the energy resources of other nations for the continued growth of the U.S. economy; (3) nuclear power technology is a major source of employment in this country at a time when the nation is continually confronted with unemployment and the shift of more and more U.S. jobs to foreign nations.

The current United States position of leadership has not gone unchallenged. Many of the major industrialized nations in the world are seeking to supplant the United States in that position. In this regard, foreign reactor vendors closely scrutinize all information disclosed by the Commission to the general public. To the extent that these foreign companies can secure reactor technology developed at great cost

by United States firms for the trivial expense of making copies in the Commission's Public Document Room, they reap a significant competitive advantage vis-a-vis the U.S. companies. Unrestricted disclosure of the proprietary information of the U.S. reactor vendors by the Commission thus would jeopardize the position of prominence of the U.S. reactor vendors in the world market. Further, such disclosure would deprive U.S. companies of the opportunity to sell or license their technology abroad, thereby having a detrimental effect on the U.S. economy.

Finally, we wish to call to the Board's attention certain pertinent observations of the Department of Justice concerning the need to protect proprietary information in order to preserve competitive incentives and enhance safety research. In April 1971, the Secretary of Transportation wrote the Attorney General and requested advice as to whether the U.S. antitrust laws prohibited international cooperation arrangements to share information on the development of experimental safety vehicles. The reply of the Justice Department was contained in a letter dated July 21, 1971 to John A. Volpe, Secretary of Transportation, from Richard W. McLaren, Assistant Attorney General, Antitrust Division. After discussing questions of antitrust legality, Mr. McLaren turned to considerations of government policy. In this regard, he noted that "the Department of Justice feels that government

agencies which are charged with the responsibility of meeting specific public goals, such as promoting automobile safety, should proceed in a manner which promotes competition to the maximum extent consistent with the achievement of their specific statutory responsibilities." Specifically, in the area of the application of automotive safety innovation to automobile design and construction, the Assistant Attorney General stated as follows:

"A major area of DOT's ESV work will, of course, involve the application of automotive safety innovation to automobile design and construction. In this area, we believe that it is very important that cognizance be taken of the fact that a program of premature disclosure of company research efforts may be counterproductive. We would think that it would best serve our national auto safety effort if DOT is kept informed, on a confidential basis, of individual company auto safety research, i.e., DOT should have comprehensive knowledge of the state-of-the-art. And, as indicated above, we also think it important to preserve competitive incentives in automobile safety research."

In summary, Westinghouse submits that compelling reasons of public policy form the basis for the Commission weighing the "demonstrated concern for protection of a competitive position" in the §2.790(b)(5) balancing test.

D. The Commission Rulings in the ECCS Rulemaking Proceeding Provide Strong Support for the Protection of Westinghouse Proprietary Information in the Instant Matter

The subject of protection of proprietary information was fully discussed in the Commission's adjudicatory rulemaking on "Acceptance Criteria for Emergency Core Cooling Systems for Light Water Cooled Nuclear Power Reactors, Docket 50-1" (ECCS Proceeding). Because the Consolidated National Intervenors challenged the protection from general disclosure of certain Westinghouse proprietary information, the Board heard testimony from Westinghouse witness Robert A. Wiesemann concerning the criteria and standards used and the procedures applied by Westinghouse in determining information to be proprietary.^{29/}

On three separate occasions, February 23, 1972, February 25, 1972, and March 2, 1972, the ECCS Board issued rulings from the bench on treatment of proprietary information. Subsequently, on April 3, 1972, the ECCS Board issued a written order entitled "Hearing Board Order on Questions ^vRelating to Proprietary Information" which sustained those bench rulings. Selected Issuances of the Atomic Energy Commission . . . in the Rulemaking Proceeding on . . .

^{29/}The claimed proprietary material was made available, of course, to the Consolidated National Intervenor attorney and advisors under suitable protective arrangements.

Emergency Core Cooling System . . ., TID-26713 (March 1975)
(hereafter "ECCS Selected Issuances").

On June 6, 1972, the Commission issued a Memorandum referring to the Hearing Board Order of April 3, 1972. In its Memorandum sustaining the ECCS Board, the Commission stated:

"In the Commission's view, the Board's handling of the proprietary question is consistent with applicable law and general Commission policy and, insofar as special limitations tailored to this proceeding have been imposed, strikes what would appear to be an acceptable balance between the private and public interests involved. In short, we are in accord with the Board's disposition of the various matters treated in its certification." (see ECCS Selected Issuances)

On December 28, 1973 the Commission rendered its ECCS Opinion, a portion of which (pp. 10-13) was devoted to a discussion of the matter of "Proprietary Data." In that Opinion, the Commission maintained the position taken in its June 6, 1972 Memorandum. Insofar as they are material to the instant matter being briefed, the highlights of the ECCS Board proprietary rulings, as sustained by the Commission, may be summarized as follows:

- (1) Standards and criteria used by Westinghouse in determining whether material should be classified as proprietary, as testified to by Mr. R. A. Wiesemann of Westinghouse, constitute a "well-

thought-through" system and provide a rational basis for decisions by Westinghouse to hold information as confidential. (ECCS Transcript (ECCS Tr.) 4008, lines 1-8, 25; 4009, lines 1-3; 3475, lines 16-23).^{30/}

- (2) There is a definite public interest in the protection of what Congress has identified as trade secrets and commercial or financial information obtained from a person and held confidential or privileged. (ECCS Tr. 4011, lines 9-16; 4012, lines 1-7).
- (3) The originator of proprietary information has the right to form its own judgment about the meaning of the information to its own affairs, goals and needs (ECCS Tr. 4013, lines 13-25; 4014, lines 1-3) and a company does not lose the right to protect information if it is unable to quantify judgments about competitive benefits (ECCS Tr. 4014, lines 4-14) or because it on occasion comes to a wrong conclusion concerning whether release of the information would damage its competitive position (ECCS Tr. 4014, lines 11-16). Neither does a company lose the

^{30/}The standards and criteria noted by Mr. Wieseemann in his September, 1980 Affidavit are the same as those which were described to the Board in the ECCS proceeding.

rig' to protect information because someone to whom it is made available pursuant to a predetermined method of distribution may fail to comply with protective agreements or procedures for keeping the material confidential (ECCS Tr. 400, lines 9-24).

- (4) Bits and pieces of information of a proprietary "puzzle" are entitled to protection, since they could lead to disclosure of the overall proprietary trade secrets or commercial information, etc. (ECCS Tr. 4013, lines 6-13; 4015, line 25; 4016, lines 1-9).
- (5) Test results reasonably come within the standards identified by Westinghouse in classifying material as proprietary and are entitled to protection. (ECCS Tr. 4487, lines 3-6.)
- (6) Descriptions of how tests are performed, including material such as diagrams relating to and pictures of test apparatus, which are reasonably related to the test results, are part of the test process and hence are entitled to protection where they are customarily held in confidence by the originator. (ECCS Tr. 4487, lines 15-25; 4488, lines 1-4.)

Westinghouse submits that the proprietary information involved in the instant matter should be accorded the same

confidential treatment which was afforded by the Commission to similar kinds of information in the ECCS proceeding. In the instant proceeding, Westinghouse has made the same strong showing of demonstrated concern for protection of a competitive position as was presented in the ECCS proceeding.

II. The Standards as Applied in this Case
Mandate Protection for the
Westinghouse Proprietary Information

A. The Evidence Clearly Established the Requisite
Demonstrated Concern for Protection of a Competitive
Position

The foregoing discussion makes it clear that there is a public interest in protecting a competitive position, as well as a public interest in being fully apprised as to the bases for and effects of a proposed action. The balancing test of §2.790(b)(5) represents the Commission resolution of these two competing public interests.

With respect to demonstrating in the present case the public interest in protecting a competitive position, Westinghouse submits that it has more than met its burden. Under §2.790(b)(4), Westinghouse clearly established the demonstrated concern required before (b)(5) becomes operational. The uncontradicted testimony of Messrs. Wiesemann and Christopher satisfy the (b)(4) test. Indeed, Intervenor in this case has not set forth any challenge to the (b)(4) determination, and the Staff consistently has held that the (b)(4) standard has been met.

Meeting the (b)(4) standard provides the necessary input for that portion of the (b)(5) balance relating to competitive position. By establishing that information is proprietary under §2.790 (b)(4), Westinghouse has established the required "demonstrated concern for protection" of its proprietary material. The weight to be accorded on this side of the scale is great, given the fact that the testimony here is unchallenged and unimpeached. That testimony established that the Westinghouse proprietary tests, test results, and related information have been held in confidence in accord with policies and procedures established by Westinghouse for the purpose of protecting Westinghouse commercial interests in such information. (Wiesemann 9/12/80 Affidavit). The basis for holding this information in confidence is to enable Westinghouse to benefit from the value of the information to recover its investments in obtaining the information. Westinghouse testimony also established that the information sought to be withheld from public disclosure was transmitted to the Commission in accord with established Commission procedures implementing the relevant regulation, 10 CFR §2.790, and was received in confidence by the Commission. As noted above, the Staff agreed that the information was proprietary and was to be accorded protection from public disclosure. (Testimony of Timothy G. Colburn dated February 25, 1982). Further, the

Westinghouse testimony showed that the information sought to be protected by the requested proprietary protection is not available in public sources.

The uncontroverted testimony of Westinghouse also established that the operating nuclear plant services industry serves a limited market of electric utilities engaged in the generation of electricity by means of nuclear power plants. Westinghouse provides highly skilled field service engineers and technicians with specialized remotely operated tooling to inspect, repair and modify where necessary, radioactive plant components necessary to plant operation. Because of the high replacement power costs to the consumer when a nuclear plant is shut down, there is a significant need to minimize the time required for a specific inspection or repair. Additionally, the repair must be performed with the minimum possible exposure to all personnel involved and must be of the highest possible quality so that additional shut downs for additional repairs to a specific component will not be required. Therefore, the competitive bid evaluation by a specific utility in evaluating the proposals from several service vendors is done by simultaneously weighing several highly technical factors; that is, tooling quality and reliability, the time required for a particular set of tooling to perform the task, the radiation exposure required for the task and the price for service.

(Christopher Testimony at 1-2.)

The most rigorous segment of the service market is that of steam generator services. On a repetitive basis, it is the area of highest radiation fields. Any improperly performed repairs may necessitate additional plant shut downs since the steam generator is one of the most important components to a plant's operation. That is, a leak beyond the limits imposed by technical specifications can necessitate a plant shutdown. (Christopher Testimony at 2.)

A successful vendor in this market does not simply design tooling to perform a quality repair. Rather, the tooling must be capable of being employed to perform the repair in the absolute minimum time while it is being operated or adjusted by personnel who are wearing double sets of clothing, including plastic gloves and a full face respirator. Thus, it is not simply how a tool works and what the operating procedure for it is that determines its market competitiveness. Equally important to competition is why it was designed in a particular manner and why a particular repair procedure is arranged in a specific sequence. The tooling design constraints and operating procedures are developed only after substantial efforts are expended in prototype testing and qualification. This means that a competitor service vendor who obtains Westinghouse proprietary design or testing data is able to

avoid substantial qualification and development costs for alternative repair techniques, which would result in substantial harm to the Westinghouse competitive position. (Christopher Testimony at 2-3.)

The uncontroverted evidence also establishes that there are currently several commercial negotiations related to sleeving programs in progress, and eight operating nuclear plants which are evaluating sleeving proposals. The Westinghouse proprietary information, if disclosed to a competitor, would allow such competitor to reduce required engineering evaluation analysis and thereby obtain a competitive cost advantage. There are several individual steps involved in a sleeving process and each competitor varies its procedures, not only with regard to the method of performance, but also whether a particular step needs to be performed at all. That issue makes the proprietary design calculations, design data, tests, and test results associated with the process extremely important to its ultimate cost and time for performance. (Christopher Testimony at 3-4.)

Disclosure of the Westinghouse proprietary information would reveal distinguishing characteristics of the sleeving process itself, the competitive advantages accruing to the

process including its demonstrated reliability and licensibility^{31/} and how Westinghouse achieved and verified such competitive advantages. The testimony discusses several specific examples of how this might occur. (Wiesemann 4/14/82 Testimony.)

The ASME Code does not provide a "cook book" for how to perform tests. The Westinghouse proprietary information detailing how code tests were actually performed would benefit its competitors if disclosed. Furthermore, the Westinghouse testing program goes beyond the code requirements. Sound engineering practice dictates that Westinghouse exceed the requirements of codes in order to address other requirements of sleeving as a product line. The plant operator, for example, needs assurance of a reliable installation process which can be completed without significant problems of acceptance that could extend plant downtime. Sound engineering practice, when considering the overall requirements for a competitive product,

^{31/}It should be noted that a Westinghouse competitor can easily make use in the licensing process of Westinghouse proprietary information in the event it were publicly disclosed. 10 CFR §50.32 provides that a license or permit applicant may incorporate by reference information contained in previous applications, statements or reports filed with the Commission provided that such references are clear and specific. Thus to take advantage of any disclosure of Westinghouse proprietary information all a Westinghouse competitor need do is examine the Westinghouse material and include by reference in the submittal those items of Westinghouse information which are of benefit to the competitor.

dictate the extent of such optional testing. Thus, in addition to revealing distinguishing aspects of the sleeving processes themselves, revealing the Westinghouse proprietary information would disclose to competitors the judgment of Westinghouse and decisions it has made regarding what is required to be competitive. Such information Westinghouse would consider very valuable if it could obtain it with respect to its competitors' activities. It is reasonable to assume that such information concerning Westinghouse judgments and decisions would likewise be valuable to Westinghouse competitors. (Wiesemann 3/23/82 Supplementary Testimony at 2-3 and Wiesemann 4/14/82 Testimony.)

Further, the uncontroverted testimony shows that the sleeving process itself is on the leading edge of technology not only in the nuclear field but also in other fields such as aerospace. The competitive position of a given vendor is highly dependent on technological level of its product. Therefore, proprietary calculations and design data tests and test results such as those presented in the Westinghouse Point Beach Steam Generator Sleeving Report (WCAP 9960) can be critical to the success of a negotiation and should be protected from public disclosure. (Christopher Testimony at 4.)

Finally, Westinghouse evidence explained the "piece of the puzzle" principle. In order to describe all the aspects of the proprietary processes in the Westinghouse sleeving process, multiple pieces of information are involved. In protecting the Westinghouse proprietary processes, Westinghouse uses its best judgment as to which information might benefit its competitors if they had access to it. Westinghouse can never know for certain how much if any of the information it is withholding a competitor may have or to which it may gain access. Westinghouse does know that each small piece of information it obtains about its competitors' processes fills in another part of Westinghouse's overall understanding of such processes. This situation is analogous to the TV game show in which the contestants are faced with a large panel consisting of perhaps as many as 20 blocks. As each block is turned over, the contestants in turn attempt to solve the rebus that would be revealed when all the blocks are turned over. Some contestants are unable to solve the rebus even when all the blocks are turned over but some actually are able to solve the rebus with only the first block turned over. At some point, one piece of additional information, even though it may be insignificant in itself, enables one to deduce the entire picture. That last piece of information is as valuable as the whole picture. Since there is no way of knowing for certain what piece of information is going to be the last piece, each piece, no

matter how insignificant it appears to be, must be treated as having the value of the whole proprietary picture, the picture being the detailed nature and competitive advantages of the Westinghouse steam generator sleeving process. (Wiesemann 3/23/82 Supplementary Testimony at 5.)

Westinghouse has expended very substantial effort and money in developing its proprietary sleeving information. That information could only be acquired by competitors, with difficulty through considerable expenditure of effort and funds. The Westinghouse proprietary information gives it a competitive edge in the sleeving program market and its commercial position would be adversely affected if that proprietary information was revealed publicly.^{32/} (Christopher Testimony at 6.)

^{32/}The Westinghouse Testimony established that Westinghouse safety test information is protected as proprietary so long as its value to Westinghouse is enhanced by such protection. Westinghouse test information is a corporate asset of Westinghouse, and no specific period of time is established during which the information is to be kept proprietary. Where the information is judged by Westinghouse to be more valuable to Westinghouse by making it public rather than keeping it in the private domain, it may be released. The value of protection may or may not decline rapidly as time passes, and in fact may increase as time passes. Thus, so long as the value to Westinghouse of keeping the information proprietary outweighs the value to Westinghouse of releasing the information, it is withheld from disclosure, regardless of the length of time involved. (Wiesemann 3/23/82 Supplementary Testimony at 4.)

For all the reasons discussed above, the public release of the Westinghouse proprietary sleeving information (including even the release of individual pieces of that information) would cause substantial harm to the Westinghouse competitive position. Thus, in applying the balancing test of 10 CFR §2.790(b)(5), the public interest in protection of a competitive position weighs heavily in the present case.

B. The Record is Void of Probative Testimony Supporting the Need for Public Disclosure, and the Balancing Weighs Heavily in Favor of Nondisclosure

The record in this case is totally void of any material probative evidence which supports the position that the public interest to be fully apprised as to the bases for and effect of a proposed action outweighs the demonstrated concern which has been clearly established by Westinghouse for protection of its competitive position. The bald claim by Decade that "the countervailing interest of the public relating to the safety aspect of it exceeds any proprietary interest that the vendor may have" (Tr. 723) completely misapprehends the nature of the balancing test and the testimony presented by Decade fails to establish any need for disclosure, much less that such need outweighs the demonstrated concern for proprietary protection. Clearly the balancing test set forth in 10 CFR §2.790(b)(5) requires an objective and rational balance of the evidence presented. Once the test of

§2.790(b)(4) has been met, and hence the concern demonstrated for protection of the proprietary interest, there is no presumption favoring disclosure of such proprietary information. Indeed, the test is phrased so that the evidence concerning the need for public disclosure must "outweigh" the "demonstrated concern" for protection of the proprietary position. More than an even balance is required to result in disclosure. As noted in the Testimony of Staff witness Timothy G. Colburn dated February 25, 1982 ("hereinafter Colburn Testimony"):

"To tip the scales in favor of public disclosure there must be a public need which can be rationally balanced [against the demonstrated concern for protection of a competitive position]. The bare claims by the intervenor in this proceeding that the public needs this [Westinghouse proprietary] information do not provide a rational basis for balancing." (Colburn Testimony, p. 6.)

The only evidence submitted by Intervenor in this proceeding wholly fails to demonstrate that the right of the public to be fully apprised outweighs the demonstrated concern for the protection of a competitive position. The Intervenor in its testimony presents two arguments:

(1) that disclosure by WEPCO of some proprietary information (possibly including some Westinghouse proprietary information) which had been accorded proprietary treatment in a Wisconsin Public Service

Commission proceeding somehow estopped Westinghouse from asserting its right to seek protection from public disclosure of its proprietary information in this proceeding. ("Affidavit of Peter Anderson Concerning the Confidentiality Issue" dated February 3, 1982); and

(2) that Decade allegedly needed to disclose the proprietary Westinghouse information to all of its 62,000 members as part of a general education campaign as well as to meet with "news media reporters and editorial writers for newspapers" to explain "details" of the proposed sleeving program at Point Beach 1. ("Supplemental Affidavit of Peter Anderson Concerning the Confidentiality Issue" dated March 11, 1982.)

Neither of the above arguments of Decade satisfies the burden of establishing that the right of the public to be fully apprised outweighs the public interest in protection of a competitive position. The first argument espoused by Decade is totally irrelevant and immaterial. The proprietary information involved in that Wisconsin Public Service Commission ("PSC") proceeding related to the contractual terms of a settlement agreement between WEPCO and Westinghouse. None of the sleeving program proprietary information at issue in this proceeding was involved in the PSC proceeding. Moreover, whether the public disclosure referred to by Decade was an inadvertent or

intentional public disclosure by WEPCO of some or all of the proprietary information originally accorded confidential treatment in the PSC proceeding, such disclosure does not create an estoppel by which WEPCO and/or Westinghouse are prevented from ever asserting a proprietary claim with regard to information of that kind, let alone a different kind, in the future. To state the Decade claim is to demonstrate its ridiculous nature. The owner of proprietary information is always free at some future point in time to determine that it no longer wishes, for whatever reasons, to maintain certain such information as confidential. It does not thereby lose the right to maintain other information as proprietary.

Decade's second argument and statement regarding its educational needs is similarly without merit. The only "evidence" that Decade presents in support of this argument is the conclusory statement that in order to further public education on the subject of steam generator repairs, it needs to publicly disclose the Westinghouse proprietary information. Decade has failed to make any showing as to why the wealth of information on the subject of steam generator repair currently available to the public is not sufficient to meet its educational needs nor does Decade make any effort to show how the proprietary information - which is highly technical in nature - would be used to further the public education program

or how other detailed technical information which is non-proprietary in nature has been used by Decade for public education. The mere conclusory statement that Decade's membership needs the Westinghouse proprietary information to assist in some vague educational effort is wholly insufficient to carry the burden that the need of the public to be fully apprised outweighs the demonstrated concern for protection of the Westinghouse competitive position. As noted in the Colburn Testimony, abundant information is available to the public regarding the proposed steam generator sleeving program at Point Beach.

"[T]he NRC Staff's safety evaluation of the information supporting the proposed steam generator sleeving program and the basis for the evaluation are contained in the Safety Evaluation Report and Environmental Impact Assessment issued with the November 10, 1981, license amendment which permitted a demonstration sleeving program at Point Beach Unit 1 (Enclosure 4). These documents as well as a non-proprietary version of the Point Beach steam generator sleeving report and open transcript of the October 29-30, 1981, Board hearing are available to the public. These documents do apprise the public as to the nature of the problems with the steam generators at Point Beach and the technical procedures being employed to resolve those problems. Additionally, the hearing process at Point Beach has also presented a forum where the rights of persons properly and directly concerned to inspect these documents has been upheld by their ongoing participation in that process and by their access to all documents pursuant to a protective order." (Colburn Testimony at 5-6.)

The Westinghouse proprietary information related to its sleeving programs is extremely technical in nature and complicated by the variety of different disciplines involved in the design. For example, the Westinghouse Point Beach Generator Sleeving Report (WCAP 9960) involves a combination of chemistry analyses and corrosion studies, metallurgical evaluations and materials selections, electrical and electro-mechanical designs, computerized radiation analyses for material selection and time motion studies, and extensive non-destructive evaluation techniques. All of these disciplines utilize state-of-the-art techniques. It would be extremely difficult for a member of the general public, even were he to have qualifications of a university professor, to understand and comment productively on this material without an extensive indoctrination in those disciplines unrelated to his which control the qualification basis. The qualification and analyses techniques utilized in the design report are orientated specifically to the design of the particular tooling and require extensive knowledge of the particular tooling application before any meaningful assessment can be performed. (Christopher Testimony at 5.) Therefore, it is extremely doubtful that members of the public, apart from Westinghouse

competitors, would be able to understand the Westinghouse proprietary information.^{33/}

Nevertheless, to the extent that members of the public intervene in and participate in proceedings conducted by the Commission, it is Westinghouse policy to make such proprietary information available to them under the terms of an appropriate protective order or protective agreement, as as been done in the instant case. Thus, those members of the public interested enough to participate already have access to the Westinghouse proprietary information. (Christopher Testimony at 5-6.)

In this regard, the Board should take note of the wide dissemination that Westinghouse does make of its proprietary information, subject, of course, to the requisite protective orders or agreements. The position of Westinghouse in this regard is simple to state: Westinghouse proprietary information is made available to the Commission, its staff, its

^{33/} Furthermore, it should be noted that the proposed Point Beach sleeving program does not present an issue of significant hazards consideration. Decade presented no evidence in this regard while Staff witness Colburn testified as follows:

"In this Point Beach proceeding, the NRC Staff has concluded that the proposed sleeving program does not raise an issue of significant hazards and safety of the public would not be endangered." (Colburn Testimony at 5.)

Boards, and the Advisory Committee on Reactor Safeguards ("ACRS"). Westinghouse proprietary information also is made available to consultants to the Commission, its staff and the ACRS, such as national laboratories, universities and individual consultants. In addition, Westinghouse, upon request and subject to protective agreement, supplies proprietary information to various cognizant state agencies. Westinghouse also makes proprietary information available to its customers and potential customers upon agreement of nondisclosure to unauthorized persons. With regard to licensing reviews and proceedings, Westinghouse proprietary information also is made available to intervenors who request such information in connection with contentions at issue in a hearing upon their agreement not to disclose the information to unauthorized persons. In making information available to intervenors, Westinghouse makes such information available to the parties themselves, their counsel, and their technical advisors, if requested to do so.

The only group to whom Westinghouse proprietary information normally is not made available are competitors of Westinghouse. Even in that situation, however, Westinghouse proprietary information, to the extent necessary, has been made available to such competitors (when determined by the Commission in consultation with Westinghouse) to identify safety problems in such competitors' reactors or fuels.

What Decade essentially is claiming through its testimony and argument is that in this Commission licensing proceeding there is a public interest in disclosing Westinghouse proprietary information in order to assist Decade's public relations and information purposes, and that this interest of Decade, which it equates with the right of the public to be fully apprised as to the bases for and effects of a proposed action, outweighs the fact that such disclosure would result in an adverse effect on the Westinghouse competitive position. However, the reality of the situation, as demonstrated by the evidence, is that disclosure would result in Westinghouse competitors obtaining access to valuable trade secrets, developed at great cost, and that such access would adversely affect in a substantial way the competitive position of Westinghouse, while Decade's use of the information, in some undefined way, would be part of a general education campaign and for media purposes to explain "details" of the proposed program. Why the present publicly available information is not sufficient for Decade's purpose has never been explained. Surely the balancing test set forth by the Commission in §2.790(b)(5) comes out in the present case heavily weighted on the side of continued protection for the valuable proprietary information of Westinghouse.

Conclusion

For all the foregoing reasons, Westinghouse respectfully requests the Board to affirm the Staff determination and continue to accord the Westinghouse proprietary information protection against public disclosure.

Respectfully submitted,

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Dated: April 21, 1982

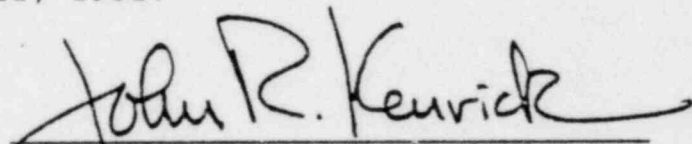
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	:	
	:	
WISCONSIN ELECTRIC POWER COMPANY	:	Docket Nos. 50-266-OLA
	:	50-301-OLA
(Point Beach Nuclear Plant,	:	
Units 1 and 2)	:	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Brief of Westinghouse Electric Corporation, Appearing Specially, Concerning the 10 CFR § 2.790(b)(5) Balancing Test" have been served upon the persons listed on Attachment 1 to this Certificate of Service by deposit in the United States Mail (First Class), postage prepaid, this 21st day of April, 1982.



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