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NSD-NRC-96-4889

November 21, 1996

Document Control Desk
United States Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Attention: Frank J. Miraglia, Jr.
Acting Director
Office of Nuclear Reactor Regulation

Subject: REQUEST FOR WITHHOLDING INFORMATION FROM PUBLIC DISCLOSURES -
WESTINGHOUSE LETTERS OF JUNE 11, 1996, JUNE 27, 1996 AND SEPTEMBER
4, 1996 (NSD-NRC-96-4740, NSD-NRC-96-4756, NSD NRC 4812), AND WOLF CREEK
NUCLEAR OPERATING CORPORATION (CAW-96-944) (TAC NO. M94764).

Dear Mr. Miraglia:

This is in response to your several letters dated October 16, 1996 from Ms. Craig and a letter from your office dated November 5, 1996 concerning Westinghouse's request for proprietary treatment of a number of submittals pertaining to the incomplete rod insertions at Wolf Creek, in which your office rejected the proprietary classification of several cited phrases. Westinghouse is concerned about the NRC disagreement with our position that a portion of the material identified by Westinghouse is proprietary. Westinghouse is also concerned by the failure of the NRC to provide Westinghouse with appropriate notice and opportunity to withdraw the information under CFR §2.790, and by the NRC refusal to allow withdrawal of the information.

Westinghouse believes that the information which was submitted to the NRC and identified as proprietary was and is, in fact, proprietary. It is information that is customarily held in confidence by Westinghouse. In addition, the disclosure of the information in the form in which it appears in the report and the presentations to the NRC referred to in your letters could cause harm to the competitive position of Westinghouse. Although, as you correctly pointed out, certain items that were claimed to be proprietary appear in other public documents, the context in which they now appear in the rod drop report and the presentations to the NRC would disclose the information in a form which would not otherwise be available to our competitors.

Very often where pieces of information are in the public domain they are very much like parts of a complicated puzzle. Even if you have all the puzzle parts, it may be time consuming and costly to put the pieces together with any degree of assurance that the picture is accurate. Thus, the context in which information is presented is important, and disclosure of the information by disclosing the rod drop report and other material would provide our competitors not only with the basic information, but the ability to utilize that information in a manner which they otherwise would not have without

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expenditure of the time and effort comparable to that already expended by Westinghouse. To the extent the information is available in pieces to the public, there can be no additional benefit served by making it available again. However, the phrases contained in the report would add additional value to what has previously been available. It is possible that a small amount of information in the referenced material was inconsistently classified. We have not gone through the expense of evaluating whether the inappropriate classification was proprietary or nonproprietary, because that point is now moot and a very small part of this issue. However, we assure you that any such improper classification was inadvertent.

The information submitted to the NRC and contained in the report and presentations was submitted in a voluntary manner. Where there has been a voluntary submittal, the standard to be applied is that to maintain information proprietary it must have been held in confidence by the owner. In the form presented in the report and presentations, the material claimed to be proprietary by Westinghouse has, in fact, been held in confidence by Westinghouse and, thus, meets this test.

In Mr. Miraglia's letter, the staff claimed that the information is required to be made public (1) so that PWR licensees can adequately assess the operability of their control rods and recognize the potential for safety-significant precursor phenomenology; and (2) so that other fuel manufacturers can assess the susceptibility of their fuel to similar conditions.

With respect to the first of these reasons, Westinghouse has protective agreements with the purchaser of its fuel and, under those agreements, has already made the information available to the PWR licensees to whom you refer. With respect to the second of these reasons, it has been the long-standing policy of Westinghouse, recognized and approved by the NRC, that we do not withhold from our competitors proprietary information which identifies the existence of a safety problem or potential safety problem. However, this information is maintained as proprietary for all other purposes, and information relating to the solution of the safety problem, as opposed to the existence of a safety problem, is always maintained as proprietary and not disclosed to our competitors. Thus, the two reasons referred to above by the NRC for disclosure of the Westinghouse proprietary information are covered by current Westinghouse policies and procedures.

With respect to the staff conclusion that the right of the public to be fully apprised as to the basis for and effects of the failure of the control rods to fully insert at Wolf Creek outweighs the Westinghouse concern for the protection of Westinghouse's competitive position, no basis is given for this summary conclusion by the NRC. Westinghouse cannot understand how the NRC can reach such a conclusion, since the nonproprietary version of the information provided to the NRC apprises the public of the basis for and effects of failure of the control rods to fully insert at Wolf Creek, and the method of identifying the proprietary information makes clear the nature of the information available to the NRC relating to these conclusions. Moreover, any member of the public who would be involved in a licensing proceeding at Wolf Creek would, under appropriate protective order, be entitled to obtain the proprietary information.

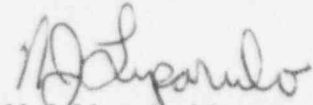
With respect to the denial of the requested withdrawal of the documents in question, your letters do not comply with the provisions of 10 CFR § 2.790. Under that regulation where a request for withholding on the grounds that the information is proprietary is denied by the NRC, the NRC is required to notify the requester of the denial with a statement of reasons and to provide a time not less than 30 days after the date of the notice when the document will be placed in the Public Document Room. If, within the time specified in the notice, the requester demands withdrawal of the document, the document will not be placed in the Public Document Room and will be returned to the requester. Your letters provided ten days' notice rather than the required period of 30 days or more, and they

purport to deny the withdrawal because of a claim of overriding public health and safety considerations. No such limitation is contained in the regulations. Moreover, the NRC through its General Counsel, is on record with the Court as recognizing that the right of withdrawal is without qualification or limitation (except in a rulemaking context not here relevant). To quote from the General Counsel:

"Any information submitted [other than in a rulemaking context] would be considered for withholding from the public at the time submitted, and if withholding is denied, the Commission will provide a statement of reasons and the owner of the information would have at least thirty days to withdraw it, thus preventing its disclosure."

Notwithstanding the above, and in the spirit of trying to work this matter out with the Commission, Westinghouse has reviewed the proprietary information as to which you would deny proprietary status. As a result of that review, we have concluded that we are willing to permit public disclosure of certain of that information. We want to make it clear, however, that we still consider the information which we are willing to release to be proprietary, but we have concluded as a matter of judgment that the value of such information to us is outweighed by the value of reaching an amicable agreement with the NRC. Certain information the NRC has objected to which we still consider to be appropriate for proprietary protection is identified in the attachment to this letter, and we would ask the Commission to review and reconsider its position in connection with this latter material. In addition, the Commission has already agreed to maintain as proprietary other information contained in the referenced documents and we request that proprietary protection continue to be afforded to that information as well. Should the Commission continue to disagree with our position that all such information is proprietary, we request the withdrawal of such information and the return of such information to Westinghouse.

Very truly yours,



N. J. Liparulo, Manager
Regulatory & Engineering Networks

cc: C. M. Craig

Attachment

