



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

NOV 18 1985

Dr. Zack T. Pate, President
Institute of Nuclear Power Operations
1100 Circle 75 Parkway
Suite 1500
Atlanta, GA 30339

Dear Dr. Pate:

In Mr. Wilkinson's letter of February 15, 1984, he requested that the NRC protect the confidentiality of unit-specific NPRDS data under the provisions of 10 CFR 2.790(b). Specific information was provided in the form of a sworn affidavit that addressed the pertinent requirements of this regulation.

Mr. Wilkinson indicated that the NRC should consider NPRDS unit-specific data exempt from mandatory public disclosure for the following reasons:

1. NPRDS unit-specific data is held in confidence by INPO and its member utilities;
2. NPRDS unit-specific data is unique and there is a rational basis for INPO holding it in confidence;
3. NPRDS unit-specific data has been provided to the NRC in confidence and it is not available in public sources;
4. NPRDS unit-specific data is important to INPO's member utilities in their selection of equipment vendors and public disclosure of this data would result in an economic harm to INPO; and
5. Public disclosure of NPRDS unit-specific data would, in INPO's judgment, impair the NRC's ability to obtain this data in the future because the NRC under present law and regulation is not entitled to this data as a right, and if such unit-specific data were made available publicly, INPO and its member utilities would reassess the appropriate scope of NRC's access to this data.

Based upon this submittal, we have reviewed INPO's application and the material based on the requirements and criteria of 10 CFR 2.790, and we have determined that NPRDS unit-specific data constitutes confidential commercial information and thus is exempt from mandatory public disclosure. Accordingly, I am initiating action to inform the NRC staff of this determination and to specifically direct that NPRDS unit-specific data reported subsequent to January 1, 1982, is to be protected from unauthorized disclosure.

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We understand that INPO has no objection to the reasonable and appropriate public use by the NRC of NPRDS data since January 1, 1982 that is not unit-specific and that where NPRDS unit-specific data forms a basis for a specific NRC regulatory decision, INPO would be amenable to its public disclosure. Within this context, the NRC interprets the phrase "specific regulatory decisions" to include both decisions which result in a specific formal regulatory action being taken and decisions where it is concluded no formal agency action is necessary.

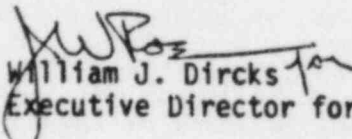
In either type of decision, NPRDS unit-specific data will be released only if (1) the data which forms a basis for the regulatory decision appears in an NRC document addressing a safety concern, and (2) an NRC Office Director determines pursuant to 10 CFR 2.790(b)(5) that the public's right to know that basis warrants the release of the data. Unless a compelling immediate safety concern dictates otherwise, INPO will be given reasonable advance notification of the NRC decision to make the specific data public on a given date so that INPO will have the opportunity to exercise its legal options regarding such disclosure.

Withholding from public inspection shall not affect the right, if any, of persons properly and directly involved with NRC activities to inspect the documents. If the need arises, we may send copies of this information to our consultants working in the area under review. We will, of course, ensure that any non-NRC employees requiring access to NPRDS data have signed the appropriate agreements for handling proprietary information.

If the basis for withholding this information from public inspection should change in the future such that the information could then be made available for public inspection, you should promptly notify the NRC. You should also understand that the NRC may have cause to review this determination pursuant to 10 CFR 2.790 in the future if the scope of a Freedom of Information Act request includes NPRDS unit-specific information.

Should you have any questions on this subject, please contact Jack Heltemes at 301/492-4484.

Sincerely,


William J. Dircks
Executive Director for Operations

INPO

Institute of
Nuclear Power
Operations

1100 Circle 75 Parkway
Suite 1500
Atlanta, Georgia 30339
Telephone 404 953-3600

February 15, 1984

Mr. William J. Dircks
Executive Director for Operations
United States Nuclear Regulatory Commission
Washington, D. C. 20555

Dear Mr. Dircks:

I. BACKGROUND

At present, INPO provides the NRC with complete access to the Nuclear Plant Reliability Data System (NPRDS). INPO operates and bears the cost of NPRDS, and the NPRDS data are the property of INPO and its member utilities. The NRC and INPO's member utilities and participants have on-line telephone access to NPRDS. INPO is submitting this letter in the form of an affidavit to satisfy the requirements of 10 CFR §2.790(b) with respect to a certain type of NPRDS data as described below.

INPO also sells subscriptions to quarterly and annual reports of NPRDS data to any party with a legitimate need for these data. Subscribers receive NPRDS data on paper or microfiche only, and subscribers receive no NPRDS data that identify a specific plant or utility. (In this memorandum, we shall refer to NPRDS data that identify a specific nuclear plant or utility as "unit-specific data.") Only the NRC and INPO's member utilities and participants have access to unit-specific data. INPO requires its participants to agree not to disclose unit-specific data without the express permission of the utility to which the data relate.

INPO bears the substantial cost of operating NPRDS through the dues paid by its member utilities and participants. Access to the NPRDS is furnished to the NRC without charge as part of "the exchange of experience, information, and data related to the safety of nuclear power plants" stated in the Memorandum of Agreement between the NRC and INPO.

INPO has two primary reasons for seeking to protect the confidentiality of NPRDS unit-specific data. First, these data are commercially valuable to INPO's member utilities in the following uses:

- o selecting and purchasing equipment based on historical performance
- o reducing causes of lost generation by identifying recurring equipment problems and corrective actions taken by others

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- o locating similar equipment at other plants for loaned parts to aid in rapid repairs during a forced outage
- o revising maintenance practices and schedules based on equipment problems reported by other plants

Second, the reporting of equipment reliability to the NPRDS is voluntary, and in INPO's judgment, the continued assurance of confidentiality will encourage utilities to make comprehensive reports to NPRDS. Thus, in large part, the integrity of NPRDS depends on confidential treatment of unit-specific data.

INPO has no objection to the reasonable and appropriate public use by NRC of NPRDS data that are not unit-specific, and within reason, NPRDS data that are not unit-specific may be made available to the public by the NRC. INPO, however, strongly objects to disclosure by the NRC of NPRDS unit-specific data that are furnished to the NRC with the expectation that they will be held in confidence and not made publicly available.

In order to protect NPRDS unit-specific data from disclosure while continuing the desirable exchange of information stated in the Memorandum of Agreement, INPO proposes to follow the procedure set forth in 10 CFR §2.790 ("Public Inspections, Exemptions, Requests for Withholding").

II. PROTECTION OF NPRDS UNIT-SPECIFIC DATA UNDER §2.790

Under §2.790, NRC records and documents, as a general rule, will be placed in the NRC Public Document Room. (A copy of §2.790 is attached to this letter.) There are nine specific exceptions to this general rule listed in §2.790(a), which are identical to the exemptions from disclosure listed in the Freedom of Information Act, 5 U.S.C. §552(b). The fourth exemption listed, which INPO considers applicable to NPRDS unit-specific data, reads as follows:

Trade secrets and commercial or financial information obtained from a person and privileged and confidential.

Section 2.790(b)(4) and (5) set forth the specific factors the NRC will consider in determining whether particular documents contain confidential commercial information and, if so, whether the interest in confidentiality outweighs the "right of the public to be fully apprised."

As a threshold matter, it is clear that NPRDS unit-specific data, like other INPO reports, are "commercial information." Miller, Anderson, Nash, Yerke & Wiener v. D.O.E., 499 F. Supp. 767, 770 (D.Ore. 1980) (construction of nuclear plant was "transaction integrally related to commerce;" therefore, a memorandum on "a particular incident" at the plant site was commercial in nature and hence exempt from disclosure under the FOIA). See American Airlines, Inc. v. National Mediation Board, 588 F.2d 863 (2d Cir. 1978) (rejecting contention that union signature cards were noncommercial because the union was a nonprofit organization).

The various factors listed in §2.790(b)(4) all relate to the confidentiality of the document in question. NPRDS unit-specific data clearly satisfy all these factors. Such data are held in confidence by INPO and its member utilities, who own the data. NPRDS unit-specific data are unique, and therefore it cannot be said whether such data are "customarily" held in confidence by their owners. As explained above, however, INPO has a "rational basis" for seeking to protect the confidentiality of NPRDS unit-specific data.

INPO provides the NRC with free access to NPRDS with the explicit expectation that the NRC will not disclose NPRDS unit-specific data publicly. In addition, it is obvious that NPRDS unit-specific data are not "available in public sources."

The final factor to be considered by the NRC, under §2.790(b)(4)(v), is whether disclosure is likely to cause "substantial harm to the competitive position of the owner of the information." In this regard, INPO submits that NPRDS unit-specific data are important to its member utilities in their selection of equipment vendors and that public disclosure of these data would harm the competitive position of INPO's member utilities. It also is clear that collecting NPRDS unit-specific data is extremely expensive; in 1984, the operating budget for the NPRDS Department exceeds \$1 million. No third party could duplicate NPRDS unit-specific data.

Furthermore, INPO submits that the focus on competition and competitive position in §2.790(b)(4)(v) is too narrow. The origin of §2.790(b)(4)(v) is clearly National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974), a case decided under FOIA. There the court held that commercial or financial information is confidential if its disclosure is likely (1) "to impair the Government's ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained" (emphasis added). Significantly, the tests set forth in Morton are to be applied in the alternative. See Worthington Compressors, Inc. v. Costel, 662 F.2d 45, 50-52 (D.C. Cir. 1981). Thus, for purposes of FOIA, a document may be confidential, even though its disclosure would not affect competition, provided that its disclosure would impair the government's ability to obtain this information in the future. The "competition" test of Morton has been criticized as follows:

The definition based on competition seems obviously too narrow, because adequate reasons for confidentiality may have no relation to competition, and the Court quite properly said in Washington Research Project, Inc. v. Department of HEW, 504 F.2d 238, 244 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975), that "the reach of the exemption . . . is not necessarily coextensive with the existence of competition in any form."

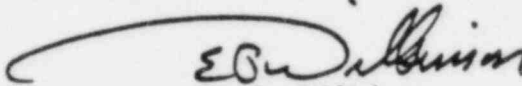
K. Davis, Administrative Law §5:32, at pp. 402-03 (1978) (emphasis added).

Public disclosure of NPRDS unit-specific data would, in INPO's judgment, impair the NRC's ability to obtain these data in the future because the NRC

under present law and regulation is not entitled to these data as of right, and if such unit-specific data were made available publicly, INPO and its member utilities would reassess the appropriate scope of NRC's access to these data.

Once the NPRDS unit-specific data are found to be confidential commercial information, §2.790(b)(5) requires a balancing of the interest in confidentiality against the public's right to know the basis of the NRC's regulatory actions. In INPO's view, the public's interest is consistent with maintaining the confidential status of unit-specific data because confidentiality encourages the collection of these data. Also, much of this information is available to the public in a different form via Licensee Event Reports, which describe equipment problems contributing to reportable plant events. Furthermore, §2.790(b)(6) would permit unit-specific data to be used in licensing and other proceedings subject to appropriate controls. INPO therefore requests that NRC withhold NPRDS unit-specific data from public disclosure. Finally, where NPRDS unit-specific data form the basis for a specific NRC regulatory decision, INPO would be amenable to their release and would attempt to convince the reporting utility to agree also to their release.

Sincerely,

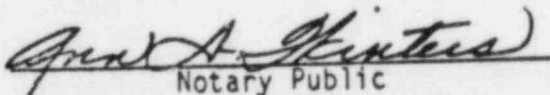

E. P. Wilkinson
President

EDW:jaa

Attachment

cc: Jack W. Roe, USNRC
Zack T. Pate

Subscribed and sworn to before me this Fifteenth day of February, 1984, County of Cobb, State of Georgia.


Notary Public
Notary Public, Georgia State at Large
My Commission Expires April 10, 1984