

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

Before the Atomic Safety and Licensing Board

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

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

ANSWER OF WESTINGHOUSE ELECTRIC CORPORATION,
APPEARING SPECIALLY, TO DECADE MOTION FOR
PUBLIC DISCLOSURE OF PROPRIETARY INFORMATION

I. Introduction

During the course of the above-captioned licensing proceeding, Wisconsin Electric Power Company (Licensee) has had occasion to submit proprietary information owned by Westinghouse Electric Corporation (Westinghouse) to the Licensing Board and parties^{1/} to the proceeding pursuant to a protective order. As required by 10 CFR §2.790 (1981), the Licensee submitted applications for withholding from public disclosure together with affidavits from Robert A. Wiesemann requesting proprietary protection for the information on behalf of Westinghouse. The Licensing Board has issued an oral order allowing interim pro-

^{1/} Demonstrating their commitment to make proprietary information available to all with a legitimate need to know, the Licensee and Westinghouse have also made the same or similar information available to the Public Service Commission of Wisconsin (PSC), which has considered the financial and scheduling implications of sleeving and steam generator replacement (Tr.377), intervenor's proposed technical advisors (Tr.389), and a PSC employee who attended the October 29-30 hearings (Tr.498). Access to the information by these non-parties has been accomplished by the use of appropriate protective orders of the PSC or protective agreements with Westinghouse.

proprietary protection for the information (Tr.143) at least until a hearing could be scheduled concerning what information, if any, should be released to the public (Tr. 717). Westinghouse is appearing specially to argue that the Board's Order should continue in effect.^{2/}

II. Decade's Motion

Wisconsin's Environmental Decade (Decade) has variously argued that all or part of the proprietary information should not be afforded proprietary protection by the Commission. Originally, Decade argued that none of the information should be given proprietary protection because there had been no affidavit claiming proprietary protection filed with the information (Tr.455). However, in fact, affidavits regarding confidentiality have been filed (Tr. 719),^{3/} and the grounds originally argued by Decade were specious.

^{2/} Dicta of the Atomic Safety and Licensing Appeal Board indicates that a non-party should make a special appearance in a Licensing Board proceeding in order to preserve its right to either appeal from, or participate on an appeal of, the Licensing Board's decision on the matter. In the Matter of Kansas Gas and Electric Corp., et al. (Wolf Creek Nuclear Generating Station, Unit No. 1), (ALAB-311), Memorandum and Order dated February 3, 1976, 3 NRC 85, at 87-89.

^{3/} After the Licensing Board issued its oral protective order on October 20, 1981 (Tr.143), the Licensee has continued to mark the proprietary portions of subsequent submittals and referenced the original affidavits of R. A. Wiesemann and the reasons cited therein that the information should be accorded proprietary protection. The Licensee and Westinghouse have done so with the understanding that the Board's protective order will serve its purpose of protecting the confidential nature of the information without recourse to the burdensome and time-consuming process of reapplication and supporting affidavits with each new submittal. Westinghouse strove for the most efficient method to make the information available, while preserving its proprietary character, to help in effecting a speedy resolution of the issues. Timeliness has been a paramount concern throughout this proceeding (Tr. 488-89).

Decade has now moved to have those portions of the Westinghouse proprietary data detailing testing procedures and the results of the testing procedures publicly disclosed (Tr. 440, 455, 721).

Thus, the proprietary nature of the balance of information in the reports dealing with the sleeving process is seemingly clear to Decade, and its original motion should be considered to have been withdrawn (Tr. 440, 455).

Decade's arguments to support its revised motion to disclose proprietary testing procedures and results are that: 1) any test conducted for safety purposes is essential to the record of the proceeding (Tr. 451, 456, 721); and 2) tests are different from proprietary processes themselves (Tr. 440, 450, 721-22). In addition, Decade has argued, to use its representative's own words, that "to the extent any trade secret order does go forward, we believe justice demands it be applicable to all parties in this proceeding; otherwise as, in fact, did occur in other proceedings before other jurisdictions, the Applicant is free to release those portions that are selected out from the matters which make it appear advantageous and we are bound not to release the parts which contradict that" (Tr. 720).

III. Westinghouse Answer

The thrust of Decade's motion appears to be that the public policy of assuring that the public is fully apprised of the basis for and the effects of the proposed Commission licensing action outweighs the public policy of assuring confidential treatment for proprietary information. This is the weighing test referenced in 10 CFR §2.790(b)(2)

and (5)(1981). Hence, by not disputing the earlier threshold claim of the Licensee and Westinghouse that the information relating to the testing and test results is a trade secret or confidential or privileged commercial or financial information, together with the uncontroverted evidence of Westinghouse on this matter, Decade has acceded to the proprietary claim addressed in §2.790(b)(4). Therefore, this answer will address only the weighing envisioned by §2.790(b)(2) and (5).^{4/}

Succinctly stated, Westinghouse's position is that Decade has merely restated that which the Commission asserts in its rules - that there is some public interest in knowing the bases and the effects of the proposed licensing action. However, Decade has failed to demonstrate how and to what extent this public right would be served by release of the information to Westinghouse competitors, for it is only this group of the interested public which has not had access to the information. Westinghouse and the Licensee have cooperated with the Board's efforts to make the information available to all other interested persons with a legitimate need to know. All that Westinghouse and the Licensee have asked in turn is that these interested persons take the information subject to the terms of proprietary orders or agreements.

^{4/}To the extent that the Board wishes other issues considered more fully, Westinghouse requests an opportunity to address them more fully by means of supplemental pleadings, supplemental affidavits, or otherwise as might be determined following a conference of the Board and parties on the record. A Motion to this effect accompanies this Answer.

To date, the information has been made available in whole or part to all parties to this proceeding, to this Board and the Commission, to the Wisconsin Public Service Commission (PSC) and a PSC representative at the October 29 and 30 hearings^{5/}, and Decade's proposed technical advisors (Tr.389).

Reliance on the Wolf Creek^{6/} Appeal Board decisions to support release of this proprietary information is inapposite. First, the question there was to what extent discovery of asserted proprietary information could be had against a person not a party to the proceeding, and how 10 CFR 2.740(c)(6) was to be applied in that setting. Here, on the other hand, the issue is the release of information in the Commission's possession pursuant to 10 CFR 2.790. And in any event, the only information ordered released in those cases was that relating to contractual terms for the sale of a commodity no longer being marketed by the vendor. Here, on the other hand, the uncontroverted evidence shows that Westinghouse is engaged in an ongoing commercial venture where the release of the data would harm its competitive position. Stated again, all interested persons with a legitimate interest in the information already have access to it pursuant to protective arrangements. The only interested persons who would benefit from its wider disclosure would be Westinghouse competitors. And it is this group from which the information should be kept, as recognized

^{5/}The PSC has expressed an interest in the sleeving program as it relates to scheduling and financial questions over which it exercises jurisdiction.

^{6/}In the Matter of Kansas Gas & Electric Company, et al. (Wolf Creek Nuclear Generating Station, Unit No. 1) (ALAB-311) February 3, 1976, 3 NRC 85; (ALAB-327) April 27, 1976, 3 NRC 408.

in the fourth exemption from disclosure in both the Commission's regulations^{7/} and the Freedom of Information Act (5 USC 552)^{8/}.

Assuming, arguendo, that Decade had shown some minimal benefit in disclosing the Westinghouse proprietary information in addition to that which has already taken place pursuant to protective arrangement, the balancing demanded by §2.790(b)(2) and (5) tips the scales in Westinghouse's favor. Decade's minimal assertion of a public interest in further disclosure fails when weighed against the substantive showing in the Affidavits of Robert A. Wieseemann filed with the information.

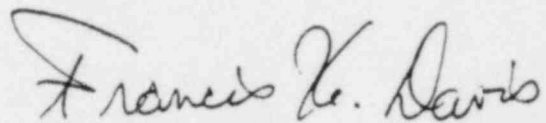
There is a countervailing public good to be achieved by protecting proprietary information from disclosure, as urged by Decade. The Commission has recognized this rationale in deliberations in applying §2.790, and has been reluctant to take actions which "could result in a reduction of information needed for important policy making and decision making functions."^{9/}

^{7/} 10 CFR §§2.790(a)(4), 9.5(a)(4)(1981).

^{8/} Section 552(b)(4) reads: "(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;...."

^{9/} 41 Fed. Reg. 11808, at 11810 (March 22, 1976).

For the foregoing reasons, Westinghouse urges the Board to deny Decade's Motion and continue in effect its protective order for the Licensee's and Westinghouse's proprietary data, thereby continuing to serve the public policy of protecting legitimate competitive positions as the uncontroverted evidence shows is involved in this proceeding.

A handwritten signature in cursive script, reading "Francis X. Davis". The signature is written in dark ink and is positioned above a horizontal line.

Francis X. Davis
Counsel for Westinghouse Electric
Corporation, Appearing Specially

Dated: November 12, 1981