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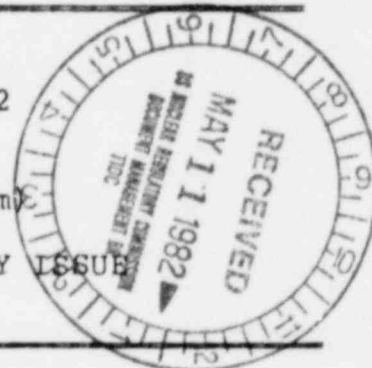
UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

Wisconsin Electric Power Company
POINT BEACH NUCLEAR PLANT UNITS 1 & 2
DOCKET NOS. 50-265 AND 50-301
Operating License Amendment
(Steam Generator Tube Slewing Program)

DECADE'S REPLY BRIEF ON THE CONFIDENTIALITY ISSUE



INTRODUCTION

This brief is submitted by the Decade on the confidentiality issue in response to the briefs of Westinghouse Electric Corporation("Westinghouse" or "W"), Wisconsin Electric Power Company("Wisconsin Electric" or "WE") and the Nuclear Regulatory Commission Staff("Staff"), and in further opposition to trade secret protection for the slewing safety tests.

ARGUMENT

I

THE STANDARDS AND TESTS TO BE APPLIED TO THE FACTS OF THIS CASE ARE DIFFERENT THAN CLAIMED BY THE UTILITY, VENDOR AND STAFF

A. THE FIRST TEST BALANCES COMPETING INTERESTS AND DOES NOT GIVE TOTAL DEFERENCE TO ALLEGED COMMERCIAL CLAIMS

The great bulk of the Westinghouse and Staff briefs deal with an exhaustive exposition of the history of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2133. Staff Br., at pp. 2 to

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23; W Br., at pp. 10 to 44.

At first glance their protracted discussion might seem merely superfluous in light of the fact that the rules of the Commission clearly set forth the detailed standards to apply, 10 C.F.R. §2.790, and there does not appear to be any purpose in giving such exorbitant attention to the general statutory grant.

However, while no explicit statement is ever made, the apparent intent is to create the impression that (1) there is a presumption in favor of non-disclosure and (2) anything with any arguable commercial value should be protected regardless of competing interests. See, e.g., W Br. at pp. 19 to 23; Staff Br. at pp. 5 to 8.

To the extent that this is the intention, such an impression would be wholly erroneous and must be corrected.

As stated in our brief-in-chief, the general rule under the applicable regulations duly promulgated by the Commission is to disclose everything unless there is "compelling reason for nondisclosure after a balancing of the interests". 10 C.F.R. §2.790(a).

To overcome the presumption against nondisclosure, the utility or vendor must show why any "demonstrated concern for protection of a competitive position" outweighs "the right of the public to be fully apprised as to the basis for and effects of the proposed action". 10 C.F.R. §2.790(b)(5).

Westinghouse's focus on its version^{1/} of the legislative history surrounding enactment of the 1954 amendments to the Atomic Energy Act to the exclusion of the Commission rules is not surprising in view of the fact that the vendor's judicial

challenge to the agency's interpretation of its statutory authority in its rules has been squarely rejected.

The vendor urged the Court of Appeals to hold that §103 of the Atomic Energy Act, 42 U.S.C. §2133, prohibits the disclosure of any proprietary information as would be permitted under 10 C.F.R. §2.790 and that §103 creates an "absolute" protection from disclosure. Westinghouse v. N.R.C. (3rd Cir. 1977), 555 F. 2d 82, 89 and 92. The Court rejected this extreme contention.

"We think this misstates the meaning of §103(b)(3). Section 103(b)(3) expressly grants the Commission the authority to use information collected to 'promote' the common defense and health and safety of the public. In specific instances the disclosure of proprietary information may be totally consistent with the attainment of such goals. The statute elsewhere provides for public participation in licensing proceedings and for judicial review thereof. Health and safety have been overriding concerns of these cases. The provisions of the statute authorizing public participation are intended to help promote the health and safety of the public. Disclosure of proprietary information forming the bases of a decision on a licensing matter may facilitate both informed administrative action and intelligent judicial review. * * *"

Id., at p. 92. [Citations omitted.]

In any event, Wisconsin Electric informs us that an attempt to attack the Commission's regulations in the context of a licensing proceeding is entirely inappropriate. WE Br., at 13.^{2/} Thus, any further consideration of Westinghouse's attempt here to rewrite the Commission's rules more to its liking would be out of order.

B. THE SECOND TEST IN THIS CASE IS WHETHER
THE HARM FROM DISCLOSURE IS "SUBSTANTIAL"

As part of our brief-in-chief, the Decade argued that, not only did the "balancing" test, 10 C.F.R. §2.790(b)(5), disfavor trade secret protection, but also the "substantial harm" test, 10

C.F.R. §2.790(b)(4)(v), militated against the safety tests even being considered proprietary.

Opposing counsel contend that the Decade may not even raise any subd. (4) arguments and is limited by its prior statements to subd. (5) assertions. WE Br., at p. 3 n. 1; W Br., at p. 46; Staff Br., at p. 39.

This is not an accurate statement of our prior representations. The Decade repeatedly made clear that it reserved the right to raise subd. (4) considerations if succeeding facts made that appropriate:

"I just want to make it clear, and we have made it clear a number of times before. We are reserving the right to argue, if we find the evidence does justify it, beyond the question of the balancing test, whether it is proprietary per se. This is merely a technical reservation, but I just wanted to make that clear."

Transcript p. 1132.

Subsequent to that time, the Staff submitted evidence which related to the extent the safety tests were exclusively used by Westinghouse. Affidavit of Emmett L. Murphy, dated March 23, 1982("Murphy Affidavit"). This new evidence met the conditional reservation which the Decade had consistently hewn to and establishes the appropriateness of its argument under subd. (4).

C. THE FREEDOM OF INFORMATION ACT DOES NOT CREATE
LIMITING TEST IN THIS CASE

Extensive argument has been made by opposing counsel suggesting that the Freedom of Information Act, 5 U.S.C. 552("FOIA"), has the effect of limiting disclosure in this case beyond that set forth in 10 C.F.R. §2.790. It is implied that the FOIA peremptorily denies release of any proprietary documents

even if there is an overwhelming public interest in disclosure. W Br., at pp. 29 to 33; Staff Br., at pp. 31 to 32.

As we stated in our brief-in-chief, it is unnecessary to reach the question of whether their statement of restrictions in the FOIA law are correct because it has been held that FOIA does not repeal by implication other statutes which make disclosure a matter of agency discretion. E.A.A. v. Robertson(1975), 422 U.S. 255, 262. In turn, the Commission's organic statutes have been held to confer that discretion. Westinghouse, supra, at p. 92.

Thus, counsels' argument on the Freedom of Information Act may be disregarded.

D. THE STANDARDS TO BE APPLIED ARE THOSE OF A TRIAL TRIBUNAL.
NOT AN APPELLATE BODY

Another misrepresentation of the context of this dispute is the claim that this Board should sit as an appellate body to review the Staff determination on confidentiality, and, presumably, only conduct a limited review appropriate to appeals. WE Br., at pp. 5 to 6.

This is not the case. Once the Commission establishes an Atomic Safety and Licensing Board to preside over an application, it is the Board and not the Staff who speaks for the Commission in the first instance.

"The Commission * * * may from time to time establish one or more atomic safety and licensing boards * * * to preside in such proceedings for * * * amending licenses * * *."

"An atomic safety and licensing board shall have the duties and may exercise the powers of a presiding officer as granted by §2.718 and otherwise in this part."

10 C.F.R. §2.721(a) and (d).

Pursuant to its official notice, 46 Fed. Reg. 40359-60(Aug.

7, '81), the Commission established this Board "to preside over the proceeding" involving the Licensee's application to sleeve instead of plug degraded tubes. Establishment of Atomic Safety and Licensing Board to Preside in Proceeding, dated August 25, 1981.

The challenged documents were submitted after the Board was constituted and thereby fall under the Board's jurisdiction in the first instance, not the Staff's.

This has been the position of the Board in the past ("[W]e will plan to issue our own ruling on confidentiality, regardless of the action of the staff," Transcript p. 775), and it is the correct position.

Even if, arguendo, the Board were in posture of reviewing the Staff's actions, it nonetheless would be inappropriate to show any deference for two reasons.

First, whatever presumptions of good faith may have attached to the Staff before Three Mile Island have been shattered in the aftermath of the accident. Both major investigations commissioned by the President and by the Commission itself reached the same frightening conclusion:

"On top of all this, we found that before March 28, 1979, an attitude of complacency pervaded both the industry and the NRC, an attitude that the engineered design safeguards built into today's plants were more than adequate, that an accident like that at Three Mile Island would not occur--in the peculiar jargon of the industry, that such an accident was not a 'credible event.'"

"Within the NRC, complacency has created a climate in which the pursuit by an individual employee of concerns regarding the safety of systems or hardware that the staff has previously concluded was safe is discouraged. Indeed, it appears well understood by the staff that assertion of safety concerns, particularly those that may be

controversial, is most unlikely to advance one's career and is far more likely to result in stigmatization. In short, at the NRC 'whistle blowing' and 'rocking the boat' are likely to lead to 'career paralysis.'

Special Inquiry Group, Three Mile Island(1980), at 91 and 163.("Rogovin Group").

"But, we have seen evidence that some of the old promotional philosophy still influences the regulatory practices of the NRC. While some compromises between the needs of safety and the needs of an industry are inevitable, the evidence suggests that the NRC has sometimes erred on the side of the industry's convenience rather than carrying out its primary mission of assuring safety."

President's Commission, The Accident at Three Mile Island(1979), at p. 19("Kemeny Commission").

Second, a reading of the Staff's brief demonstrates a total and disturbing insensitivity to the "right of the public to be fully apprised as to the basis for and effects of the proposed action". See, e.g., Staff Br., at pp 39 to 41.

II

THE BALANCING TEST SUPPORTS DISCLOSURE

The Decade's brief-in-chief established that (1) sleeving poses a threat to the "health and safety to the public" and (2) every independent evaluation has concluded that the Commission is unable to protect the public from such hazards.

The Commission has previously recognized that the importance of releasing to the public allegedly proprietary documents to explain the basis of its decision affecting safety outweighs any commercial interest in confidentiality. Re Generic Emergency Core Cooling Systems(1973), 6 A.E.C. 1085, 1088("ECCS").

That precept applies with equal force here. Just as in the ECCS proceeding, the issue of degraded steam generator tubes in

the case at bar is also a matter that potentially compromises the effectiveness of the plant's safety systems. If the adequacy of the sleeve installation cannot be assured through tests, an otherwise minor loss-of-coolant-accident could result in "essentially uncoolable conditions". Report to the American Physical Society by the Study Group on Light Water Reactor Safety, 47 Review of Modern Physics(Supp. 1), Summer 1975, at p. S-91.

Much of the contested documents for which confidentiality is claimed deal with difficulties in insuring the safety of sleeved tubes. For example, one section of the Westinghouse Sleeving Report discusses the problems in inspecting the joint between the sleeve and the tube. Westinghouse, Point Beach Steam Generator Sleeving Report for Wisconsin Electric Power Company(1981), WCAP-9960, at p. 7.7.

If trade secret protection is accorded for this and other allegedly proprietary sections describing the serious problems of insuring safe installation of sleeves, the Decade will be unable to explain to its members, to the newsmedia and the public at large the factual basis for its disagreement with the conclusion as to safety reached by the Staff, Westinghouse and Wisconsin Electric. Supplemental Affidavit of Peter Anderson, dated March 11, 1982("Supplemental Anderson Affidavit").

The Staff argues that the public will receive sufficient information from the expurgated versions of the safety test reports that one of adversary parties has selectively decided it was to its advantage to release and from the Staff Safety Evaluation Report that cannot reference any other part of the

tests. Staff Br., at pp. 41 to 42. We beg to differ.

All that the public will see is the meretricious conclusions of the Staff, utility and vendor and the censored part of the facts showing only that which is favorable to one side: not the complete facts on which an informed person can reach his or her own opinion as to whether the judgment of the nuclear industry is adequate to protect the public health and safety.

It should be remembered that the judgment of the nuclear industry has been deemed inadequate by the two prestigious panels who evaluated the Commission's and the industry's performance. Kemeny Commission, at p. 56; Rogovin Group, at p. 91. It should be remembered, too, that concerns about the safety of Point Beach Nuclear Plant are widespread in Wisconsin, as evinced by two editorials on the subject by the state's most respected newspaper, The Milwaukee Journal, copies of which are attached.

Thus, in truth, the selective releases that would be permitted if a protective order were entered would probably be more misleading to the public than informative. This would not fulfill the public purpose of "the right of the public to be fully apprised as to the basis for and effects of the proposed action", 10 C.F.R. §2.790(b)(5), as required by the Commission's rules. Responsible civic organizations would be improperly gagged from correcting these grave misconceptions.

Against this public importance in disclosure, the Board must recognize that the countervailing commercial considerations to be held in balance are not significant. For, the Decade is not challenging the central installation process in sleeving, but has

conservatively limited its challenge to the narrow area of safety tests. This is especially important in two respects.

Since the bulk of the test techniques are probably not unique to Westinghouse, but rather are relatively common procedures that could be expected from any competitor, Murphy Affidavit, at pp. 3 to 4, this first means that the commercial value of this information is so slight as to call into question whether its release would result in "substantial harm" that could support its being deemed proprietary at all. 10 C.F.R. §2.790(b)(4)(v).

Second, this also means that only that small part of the total confidential package which most directly and immediately implicates the health and well-being of the public is in the balance with the marginal commercial interest.

Westinghouse avers that the Decade's arguments for release "are utterly without merit". W Br., at p. 8. Wisconsin Electric purports that "it is virtually inconceivable that the Commission's section 2.790(b)(5) balance would tip in favor of disclosure". WE Br., at p. 9. Staff claims that the public's need for disclosure is "without merit". Staff Br., at p. 40.

The facts show otherwise, and, at the same time, reflect on the casual abandon with which the nuclear industry will engage in hyperbole as a sad substitute for reasoned consideration.

III

THE POLITICAL NATURE OF THE INDUSTRY'S POSITION REMAINS

In Decade's brief-in-chief, we contended that the industry's real motivation in seeking trade protection was political. The actions of Wisconsin Electric in other forums involving

confidentiality were cited in support of this contention.

It is said in rebuttal that the unauthorized release of proprietary material by Wisconsin Electric in that other proceeding is not relevant here because it involved commercial, not technical, information and because the release is said to have been inadvertent. W Br., at pp. 56 to 57

That defense will not suffice. It is immaterial that the subject of the trade secret information in the other proceeding was different than here because the issue at hand is whether solemn claims of commercial value are cast aside when convenient, not the particular type of information involved.

Also, it is unconvincing to claim that the release was inadvertent. For Wisconsin Electric's witness testified under oath that the proprietary nature of the documents was shown by its restricted in-house distribution to only those officials with a need to know, specifically Messrs. Bernstein[sic], Peters, Faye, Reed, Tate and Charnoff. Affidavit of Peter Anderson, dated February 23, 1982 ("Anderson Affidavit"), at Exhibit B, pp. 7a to 8a. Yet the utility employee who is said to have "inadvertently" released the confidential material was a "John Bartell", Anderson Affidavit, at Exhibit E, who was not supposed to even have had access to it, according to the utility's sworn testimony.

C O N C L U S I O N

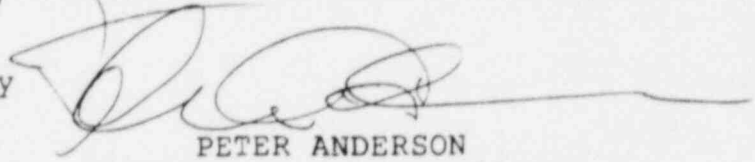
For the foregoing reasons, Westinghouse's request for trade secret protection of the sleeving test results should be denied.

DATED at Madison, Wisconsin, this 2nd day May, 1982.

Respectfully submitted,

WISCONSIN'S ENVIRONMENTAL DECADE, INC.

by



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Footnotes

- 1 Westinghouse's version of legislative history is truly unique. It is not satisfied with standard operating procedure for exaggerating legislative history by reliance on the statements of one congressman in an empty committee room on the Sunday before Christmas. Westinghouse now would have legislative history be established by the statements of industry officials with vested economic interests. W Br., at pp. 17 to 19.
- 2 In this light, it can be seen that the Licensee's claim that it is the Decade who is attempting to challenge the Commission's rules—rather than the vendor—is especially outrageous.

On, Wisconsin

An Editorial

10/1/81

Point Beach 'nuke' has hazy future

What in the world would Wisconsin do without the Point Beach nuclear power plant, which alone potentially could meet almost 20% of the state's electricity needs?

We don't mean that Wisconsin couldn't cope without Point Beach. We do mean that the Public Service Commission should get busy investigating exactly how this state could get along if Point Beach power were substantially reduced or cut off.

Ours is not just idle curiosity. The Nuclear Regulatory Commission is getting uneasy about the possibility that the steel shells shielding the reactors in 13 nukes around the nation, including Point Beach, may be turning brittle faster than expected. NRC spokesmen say the plants could become unsafe to operate by the end of next year.

Wisconsin Electric, the plant's owner, says nothing in its studies so far indicates a need for special treatment at Point Beach. But the PSC shouldn't wait for NRC studies to be finished. Fortunately, there's excess reserve capacity in Wisconsin power plants right now. Nevertheless, the PSC should vigorously plan, in detail, the practical energy-conservation alternatives that could replace Point Beach power.

There's another question. The PSC recently authorized potentially \$85 million in repairs of steam generator tubes at Point Beach. Critics say that cost could run much higher and that the repairs might not get the plant safely back to full capacity.

Why commence such a project (at customers' expense, of course) if there's a possibility the NRC might substantially reduce Point Beach output or shut it down? We think the PSC owes the public some answers that the commission probably does not yet possess.

THE MILWAUKEE JOURNAL

Thursday, April 8, 1982

Nagging about nuclear safety

Persistent Peter Anderson vexes Wisconsin's Public Service Commission so much on the topic of nuclear power plant safety that commissioners tend to shrug him off. But can they so easily brush aside a new internal report of the Nuclear Regulatory Commission staff, which repeats many of the same questions?

We hope not, because the NRC report is troubling. It cites the increased operating costs and unanswered safety questions associated with weakened tubes in the steam generators of at least 40 nukes around the country. Included are the Point Beach and Kewaunee plants in Wisconsin and the two Zion units just south of the border in Illinois. (The extent of tube damage ranges widely, from major at Point Beach to apparently minor at Kewaunee.)

The report traces the problem to "a combination of steam-generator mechanical design, thermal hydraulics, materials selection, fabrication techniques and secondary-system design and operation." The report adds that possibilities for accidents "have not yet been rigorously studied."

Those are just the sort of complaints that have been brought repeatedly to the PSC by Anderson, who represents Wisconsin's Environmental Decade. And while the PSC does not have jurisdiction

over nuclear plant safety, the safety issue clearly is related to cost questions, which are directly the business of the PSC.

Indeed, the PSC last year authorized potentially \$85 million in repairs of steam-generator tubes at Point Beach without delving thoroughly into whether the expenditure would be enough to get the plant safely back to full capacity, or whether that is even possible. The new NRC staff report concludes that there is no simple way to correct the problem without spending huge sums or leaving the plants operating at reduced capacity.

Well, hindsight in this case may not be particularly useful, but PSC commissioners irked by Anderson's persistence may have been unduly inattentive to the substances of what Anderson was saying. It is not too late for them to begin serious inquiry into the questions that have been given undeniable validity by the NRC staff report.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Wisconsin Electric Power Company
POINT BEACH NUCLEAR PLANT UNITS 1 & 2
Docket Nos. 50-266 and 50-301
CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing document will be served this day by depositing copies of the same in the first class mails, postage pre-paid and correctly addressed, to the following:

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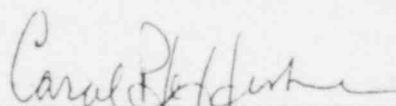
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