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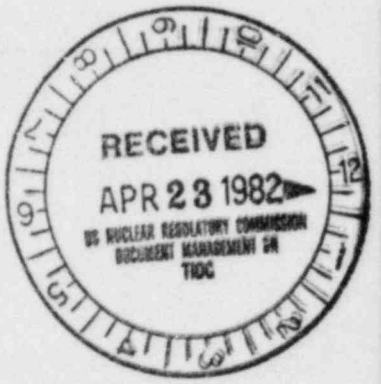

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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, Units 1 and 2)	)	(OL Amendment)
	)	

LICENSEE'S BRIEF IN OPPOSITION TO DECADE'S ORAL MOTION FOR PUBLIC DISCLOSURE OF CERTAIN PROPRIETARY INFORMATION

Certain of the extensive information submitted to the NRC on this docket, in support of Licensee's application for approval to operate Point Beach Units 1 and 2 with sleeved steam generator tubes, is asserted to be proprietary to Westinghouse Electric Corporation ("Westinghouse") and has been the subject of applications for withholding from public disclosure pursuant to 10 C.F.R. §2.790. At the close of hearings held in this proceeding on October 29 and 30, 1981, Wisconsin's Environmental Decade ("Decade") made an oral motion for public disclosure of certain portions of the proprietary

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information. Chairman Bloch framed Decade's motion as an argument that:

> * * * any test that was conducted for safety purposes must be disclosed because it's essential to the record of the proceeding and because tests are different from proprietary processes themselves.

Tr. 721-22. As Decade's representative explained, its motion was premised on its assertion that:

> * * * the countervailing interest of the public relating to the safety aspect of [the sleeving project] * * * exceeds any proprietary interest that the vendor may have when it comes to safety tests as opposed to the design parameters.

Tr. 722. Counsel for Licensee noted that he did not know precisely which information Decade was seeking to disclose, Tr. 721, and requested that Decade identify the information at risk and specify its arguments for public disclosure. Tr. 718. However, Decade refused to elaborate, and chose not to file a written motion, Tr. 720. Instead, Decade asserted that Licensee was "fully alerted ad nauseum" to its position, Tr. 720, and that all of the legal and factual arguments that Decade wished to make in support of its motion had "already been made on the record" of the hearing. Tr. 720.

Licensee and Westinghouse filed written responses to Decade's oral motion. See "Licensee's Response to Oral Motion of Wisconsin's Environmental Decade for Disclosure of Proprietary Information" (11/12/81); "Answer of Westinghouse Electric Corporation, Appearing Specially, To Decade Motion For Public Disclosure of Proprietary Information" (11/12/81).

The NRC Staff has determined that the information which is the subject of Decade's motion (as well as other information submitted on this docket) is proprietary and should be withheld from public disclosure pursuant to 10 C.F.R. §2.790. See, e.g., Tr. 791, as corrected by Letter, Counsel for NRC Staff to Board, dated November 24, 1981; Letter, Robert A. Clark (NRC) to Robert A. Wiesemann (Westinghouse), dated November 20, 1981; and "Testimony of Timothy G. Colburn," at 1-2 and Enclosure 1 (served 2/25/82). In addition, extensive written testimony has been filed on confidentiality issues, and a briefing schedule was established by the Board for consideration of Decade's oral motion.

The issue presented is whether certain parts of the proprietary information submitted to the NRC in support of Licensee's application for approval to conduct sleeving operations at Point Beach have been correctly withheld by the NRC from public disclosure pursuant to 10 C.F.R. §2.790. There is little question that the information was properly determined by NRC to be classified as "trade secrets or privileged or confidential commercial or financial information."[1/]

1/ Much argument has focused on post hoc definition of the scope of Decade's skeletal oral motion. As framed at the hearing, Decade's oral motion did not challenge the underlying proprietary nature of the information, but rather was expressly limited to an assertion that application of the "balancing test" to the proprietary information nonetheless weighed in favor of public disclosure of the information. See Tr. 721-22. Notwithstanding the explicit language of its oral motion and its insistence at the October 30 hearing that all its arguments in support of its motion were already on the record, Tr. 720,

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Affidavits accompanying the original submittal of the information to the NRC as part of the application,[2] as well as testimony filed in this proceeding by Westinghouse[3] and the NRC Staff,[4] more than sufficiently demonstrate that the

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Decade subsequently attempted to expand its motion to challenge the underlying proprietary nature of the information. See, e.g., Tr. 803-05, 962-64, 966, 993-94. All other parties (the Staff, Westinghouse, and Licensee) had understood Decade's oral motion to be limited to the "balancing test" issue, and objected to Decade's attempts to enlarge the scope of its motion. See, e.g., "Licensee's Response To Oral Motion of Wisconsin's Environmental Decade for Disclosure of Proprietary Information" (11/12/81), at 3-4; "Answer of Westinghouse Electric Corporation, Appearing Specially, To Decade Motion For Public Disclosure of Proprietary Information" (11/12/81), at 3-4; Tr. 795-97; Tr. 960-61; Tr. 966-67; Tr. 987-88; Tr. 998. More recently, Decade has apparently refocused its interest on the "balancing test" issue -- "alleging that there is a public right to know which * * * overrides the Westinghouse proprietary interest." Tr. 1078. The Board has apparently similarly limited its view of the scope of the issue before it. Tr. 1134. In any event, as the Board has acknowledged, Westinghouse has advanced substantial evidence to support the proprietary nature of the information in question. Tr. 988, 992.

2/ See Letter, Robert A. Wiesemann (Westinghouse) to Harold R. Denton (NRC), dated September 28, 1981, re: Point Beach Steam Generator Sleeving Report, CAW-81-70, enclosing Affidavit of Robert A. Wiesemann, dated September 5, 1980 (AW-80-53). See also, Affidavit of R. A. Wiesemann and Supplement To Affidavit of R. A. Wiesemann, dated November 13, 1981.

3/ See "Testimony of T. A. Christopher" and "Testimomy of Robert A. Wiesemann" (served (served 2/25/82) and "Supplemental Testimomy of Robert A. Wiesemann" (served 3/23/82), with Affidavits of R. A. Wiesemann and T. A. Christopher (dated 3/29/82); "Testimony of R. A. Wiesemann on Behalf of Westinghouse Electric Corporation and Applicants in Response to ASLB Questions Dated March 25, 1982" (dated 4/14/82).

4/ See "Testimony of Timothy G. Colburn" (served 2/25/82), as supplemented by Letter, Counsel for NRC Staff to Board, dated March 11, 1982 (enclosing pages inadvertently omitted from

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information withheld meets the rigorous and specifically articulated tests set out in 10 C.F.R. §2.790(b)(4) for arriving at such a determination.[5/]

The next question, then, is whether the Commission (through its Staff designee), having properly determined pursuant to section 2.790(b)(4) that the information consists of "trade secrets or privileged or confidential commercial or financial information" (herein referred to as "proprietary information"), has properly determined pursuant to 10 C.F.R. §2.790(b)(5) that the challenged proprietary information should be withheld from public disclosure.[6/] The Commission has

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enclosure to Testimony), with "Affidavit of Timothy G. Colburn" (dated 3/23/82) and revised "Testimony of Timothy G. Colburn" (served 3/23/82); "Affidavit of Emmett L. Murphy" (dated 3/23/82) and modified "Affidavit of Emmett L. Murphy" (dated 3/24/82); "Affidacit of Timothy G. Colburn" (dated 3/23/82); "Affidavit of Irmer Jean Lee" (dated 3/23/82).

5/ Decade, on the other hand, has provided no evidence on the question of whether the requirements of §2.790(b)(4) for determining the proprietary nature of the information have been satisfied.

6/ There is uncertainty about the identification of the specific proprietary information here at risk. Decade has never clearly specified the information it seeks to disclose, and its varying general descriptions of that information have conflicted. Compare, e.g., Tr. 632, 721-22, 804-05, 957-58, 972-73, 1072-73; "Decade's Reply in Opposition to Westinghouse's Brief to Bar It Access to Allegedly Proprietary Data" (12/7/81), at p. 3. Further, in framing the issues for its determination, the Board has expressed an independent interest in confidentiality matters, and has conceded that some of its areas of interest exceed the issues raised by Decade. See, e.g., Tr. 916-17, 954-55, 973, 977, 996-97, 1102, 1106, 1134; "Memorandum and Order Concerning Preliminary Confidentiality Issues" (12/21/81), at 2; "Memorandum and Order

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determined that the Point Beach proprietary information related to sleeving should be withheld from public disclosure. Decade has asked the Board to reexamine the Commission's decision with respect to a portion of the proprietary information that has been withheld.

The Commission's Rules of Practice have long recognized the concept of withholding proprietary information from public disclosure. The fundamental concern has been that, if such information were to be publicly disclosed, there would be a severely restricted and edited flow of information to the Commission from the commercial enterprise whose competitive position would be at risk, and the Commission would not obtain sufficient information to successfully perform its statutory duty to protect the health and safety of the public.[7/] This

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Concerning Burden of Going Forward on Confidentiality Issues" (2/2/82, at 8-9; "Notice of Hearing" (2/19/82); "Memorandum and Order Concerning A Motion to Certify A Sua Sponte Question" (2/26/82), at 3. The Board's authority to raise and decide confidentiality matters beyond the scope of those properly put into issue by Decade is a subject which has been explored at length in this proceeding, and need not be reargued here. However, Decade is not free to moot the question of the Board's sua sponte authority by asserting its own interest in all "matters previously only challenged by the Board." See Letter, Decade to Board, dated March 12, 1982. See also "Memorandum and Order Concerning Reconsideration of our Denial of a Motion to Certify a Sua Sponte Question" (3/31/82), at 1-3. Such facile attempts to (admittedly) amend its vague oral motion at this late date are patently impermissible, and -- in the instant case -- eviscerate the Commission's sua sponte rule.

7/ See, e.g., "Withholding Proprietary Information from Public Disclosure in Regulatory and Licensing Activities," SECY-R-75-130, October 25, 1974, at 1.

concept is basic, fundamental, and crucial to a proper understanding and interpretation of the Commission's regulations for withholding proprietary information.[8/] Therefore, by the promulgation of 10 C.F.R. §2.790, the Commission has made a generic policy decision that it is in the public interest to withhold proprietary information from public disclosure.[9/]

The public interest in protecting proprietary information-- to assure that the Commission receives adequate safety information-- is a powerful interest, and not one easily overcome. In recognition of this fact, the Commission has incorporated three important concepts into its public disclosure regulations.

First, the tests for determining whether or not information claimed to be proprietary should be accorded that status are rigorous. Over the years, since the Freedom of Information Act was passed in 1966, the Commission has devoted considerable

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8/ Section 2.790(a)(4) of the Commission's Rules of Practice parallels exactly the provision of the Freedom of Information Act, 5 U.S.C. §552(b)(4), which exempts from agency disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." See 41 Fed. Reg. 11809 (March 22, 1976) in which the Commission states that the exempted categories of information in 10 C.F.R. §2.790(a) conform to the categories specified in the Freedom of Information Act.

9/ The Commission, prior to its 1966 revision of §2.790, 41 Fed. Reg. 11808 (March 22, 1976), specifically considered, and rejected, an alternative proposal to require all information submitted in support of a license application to be publicly disclosed. See Commission discussions of alternative proposal No. 3, 38 Fed. Reg. 31543 (November 15, 1973) and 39 Fed. Reg. 40960 (November 22, 1974).

study toward the promulgation of appropriate regulations to govern the withholding of proprietary information. This culminated in an amendment of section 2.790 in 1976, 41 Fed. Reg. 11808 (March 22, 1976), which significantly elevated the showing an applicant has to make to obtain proprietary status for its sensitive information.10/

10/ In SECY 75-588B, at 2, the Executive Legal Director stated, "The most important change to the present rule is the addition of decision-making criteria to guide the submitter and the staff in processing applications for withholding proprietary information, including the addition of a standard ("substantial harm to a competitive position") which may have the effect of narrowing the type of information which may be protected under the Commission's regulations."

The Board asked the parties to respond to the following question in conjunction with their proprietary information briefs: "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. 1120. It should be noted that the tests are not "concealed." The test information is made available to the NRC and, under appropriate protective order or agreement, can be made available to parties having a legitimate interest in the information. Whether or not the information is determined to be proprietary depends upon satisfaction of the specific criteria listed at 10 C.F.R. §2.790(b)(4). Those criteria do not include increasing the regulatory barrier to competition by others. They do include consideration of whether there is likely to be "substantial harm to the competitive position of the owner of the information." Any "regulatory barrier to competition by others," if indeed such can be said to exist, would be the same for all persons. As it pertains to this case, the fact that test information independently developed by Westinghouse is protected from public disclosure would have no effect on the ability of others to independently develop test information of their own. The Commission's harm to competition criteria makes it clear that Westinghouse is not required to aid its competition by allowing them access to Westinghouse-developed information.

Second, the Commission has placed much emphasis on the fact that a party to a licensing or rulemaking proceeding who needs access to proprietary information may, upon proper showing of relevancy, inspect such information under a protective order or upon signing of a protective agreement. 10 C.F.R. §2.790(b)(6), 41 Fed. Reg. 11809 (March 22, 1976). This is particularly significant in this proceeding, where Decade, in its self-styled role as representative of the public interest, has been given access to virtually all proprietary information in the Point Beach sleeving docket.

And finally, notwithstanding the strong public interest in protecting proprietary information and the strong showing that must be made to classify information as proprietary, the Commission's regulations and procedures provide that the Commission will examine each individual application for withholding of proprietary information to determine whether it should be withheld from public disclosure.

Given the Commission's compelling public policy reason for withholding from public disclosure information that has met the tests for proprietary information, it is virtually inconceivable that the Commission's section 2.790(b)(5) balance would tip in favor of disclosure in the absence of some special or unique circumstances requiring that a particular piece of proprietary information should be disclosed.[11/] For it to be

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11/ This is consistent with the NRC's experience in implementing its public dislcosure regulations. It is Licensee's

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otherwise would be to render meaningless both the Commission's policy determination that information meriting proprietary status should be protected and the Commission's stringent requirements for making the section 2.790(b)(4) proprietary determination.

There are no special or unique circumstances, or circumstance of any kind, surrounding the proprietary sleeving information in this docket which would tip the section 2.790(b)(5) balance in favor of public disclosure. From that standpoint, the proprietary sleeving information is no different from any of the other proprietary information the Commission has withheld from public disclosure in this or any other NRC docket. The release by the Commission of information adjudged to be proprietary, in the absence of such unique or special circumstances, would completely undermine and destroy the public interest objective of the Commission in according protection to proprietary information, i.e., the free and unfettered flow of information needed by the Commission to discharge its statutory obligation to protect the health and safety of the public.

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understanding, based on conversations with Staff counsel, that there are instances where the Commission has denied requests to find that information is proprietary, but information which has passed the proprietary tests in §2.790(b)(4) has rarely, if ever, been determined not to merit protection from public disclosure pursuant to §2.790(b)(5).

The fact that proprietary information is safety-related would not tip the balance, for virtually all proprietary information withheld from public disclosure by the NRC in licensing and rulemaking dockets would in some respects bear on public health and safety. In any event, that is the precise purpose of the Commission's withholding policy for proprietary information--to avoid impeding the availability of safety information to the Commission.

Accordingly, it is both reasonable and appropriate that the Commission determined, pursuant to section 2.790(b)(5), that the proprietary sleeving information in this docket should be withheld from public disclosure. The only question remaining, therefore, is whether Decade has presented any compelling reason, not previously available to the Commission, why certain of the sleeving information determined to be proprietary should nevertheless be publicly disclosed.

To challenge the Commission's determination that certain proprietary information should be withheld from public disclosure, Decade was required to identify the proprietary information in dispute, and advance reasons why the Commission's decision to withhold the proprietary information should be overturned. See generally, Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-600, 12 N.R.C. 3, 9-11 (1980) (noting that specified requirements modeled on those adopted by federal courts for use in analogous circumstances); Wisconsin Electric Power Co. (Point Beach

Nuclear Plant, Unit 2), LBP-73-9, 6 A.E.C. 152, 167 (1973); Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-10, 4 A.E.C. 390, 398 (1970). It is not insignificant in this case that Decade resisted to the bitter end providing any reasons for overturning the Commission's determination. Decade, in presenting its oral motion, pointedly refused to file a formal, written motion identifying with particularity the information it wished to have publicly released and giving its reasons therefor. Tr. 720. No reasons were given by Decade to support release of the proprietary information, other than Decade's desire to have it released. After unusually extensive briefing, letter writing, and oral arguments during transcribed conference calls on various issues related to the proprietary information question, during which Decade consistently failed to state any reasons why the Commission's determination should be overturned, the Board established a schedule for submission of affidavit testimony by the parties. Again, Decade gave no reasons in its submitted affidavit.[12/] The Board, perplexed by Decade's failure to provide reasons why the proprietary information should be released gave Decade one more chance, and (over Licensee's and Westinghouse's objections), requested Decade to "substantiate the precise nature of the interest of Wisconsin's Environmental

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12/ Indeed, Decade's affidavit, dated February 23, 1982, did not even discuss the disputed proprietary information, or any other proprietary information related to this proceeding.

Decade in the release of information to its members or to the public." Tr. 1088-91, 1096-97. Decade finally provided what it purported to be a reason for public disclosure in its March 11, 1982 affidavit in response to the Board's directive.

Decade's sole argument is that its purpose is to take the nuclear safety issue "to the village square" by publicly disseminating nuclear safety information. Decade did not distinguish between proprietary and non-proprietary information; Decade did not distinguish between Point Beach proprietary information and proprietary information related to any other nuclear plant; Decade did not distinguish between the Point Beach proprietary information on sleeving from any other Point Beach proprietary information; and, most significantly, Decade did not even attempt to show why the disputed information in the instant case (sleeving tests) should be accorded any less protection from public disclosure than any other proprietary sleeving information in this docket. In short, Decade's argument is that any or all proprietary information (whatever Decade happens to ask for) should be publicly released for no other reason than the fact that Decade wants to take it "to the village square." Thus, Decade's motion is in actuality a challenge to the Commission's public disclosure regulations in section 2.790. Such challenges are proscribed by section 2.758 of the Commission's Rules of Practice; for this reason alone, Decade's motion to have the Board reverse the Commission's decision to withhold proprietary information from public disclosure should be denied.

There are other reasons for denying Decade's motion. As discussed above, the Commission's determinations under sections 2.790(b)(4) and (5) were both reasonable and proper. Decade has not even attempted to show why the Commission's determinations with respect to the Point Beach proprietary information related to sleeving tests were improper or in error, nor has Decade advanced any showing of unique or special circumstances which could tip the Commission's balance toward public disclosure. The Board has a plethora of evidence before it supporting the Commission's determinations, and none (save a generic attack on the Commission's regulations) on why the determinations should be reversed. Decade's motion should therefore be denied.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

BY: _____

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Dated: April 21, 1982

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NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensee's Brief In Opposition To Decade's Oral Motion For Public Disclosure Of Certain Proprietary Information" dated April 21, 1982, were served, by deposit in the U.S. Mail, first class, postage prepaid to all those on the attached Service List.

Delissa A. Ridgway

Dated: April 21, 1982

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