

to be attended by the Board and representatives of Westinghouse, the staff and the Saginaw Valley intervenors. The participation of the Saginaw Valley intervenors should be in accordance with the terms of an appropriate protective order entered, if possible, by stipulation of Westinghouse and the Saginaw Valley intervenors. In the absence of such a stipulation, the Board should enter an order which will protect the legitimate interests of Westinghouse while permitting the Saginaw Valley intervenors to aid the Board in its deliberations.

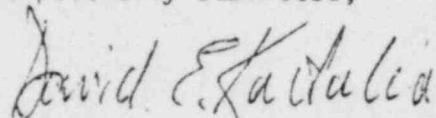
With respect to the legal issues raised by Westinghouse, we offer the following comments, each keyed to the paragraph, or paragraphs, of the Westinghouse motion, to which it relates:

- (1)(b) We agree that the Board's subpoena should not be enforced if the Westinghouse reports are sought solely for use in a comparison of the Babcock and Wilcox and Westinghouse iodine spray removal technologies. The Atomic Safety and Licensing Appeal Board (Appeal Board), in its Memorandum of September 21, 1971, ruled that if the applicant satisfies the Board that its system will meet AEC reactor licensing requirements, the Board need not consider the merits of some other system. However, as we understand the position of the Saginaw Valley intervenors, the reports are not sought solely for the purpose of comparative analysis.

- (1)(d) We are at a loss to respond to the unexplained Westinghouse assertion that the reports are not "evidence" within the meaning of 10 CFR § 2.720 and therefore not subject to subpoena.
- (1)(f) We do not agree that the Westinghouse reports are exempt from disclosure in the sense that the Board would be without power to order production of the reports in the event they are shown to be proprietary. As the Appeal Board stated in its memorandum of September 21, 1971, this Licensing Board "should weigh the detrimental effects of disclosure against the demonstrated need for production."
- (2)(a) We do not agree that the absence of a showing of "need" for the reports by the Saginaw Valley intervenors makes unnecessary any inquiry into the issue of whether the reports are proprietary, in light of the Appeal Board's memorandum of September 21, 1971. That memorandum makes clear that the question of need is not the threshold inquiry. The Board may, however, quash the subpoena, without inquiry into the proprietary issue, if it finds, in accordance with 10 CFR 2.720(f), that the reports are not relevant to any issue in the proceeding.
- (2)(b) See our comments on paragraph (1)(b).

- (2)(d), (3) See our comments on paragraph (1)(f). With respect to paragraph (2)(d), we note additionally that the fact that the reports may contain "opinions, evaluations, analyses, recommendations and advice" is immaterial; no claim of governmental privilege is before the Board.
- (4) We do not agree that this dispute must be resolved by the Board with no participation by the Saginaw Valley intervenors. See our comments at page 1 above regarding in camera proceedings.
- (5) As we understand the discussions on the record at the November 23, 1971 conference, Westinghouse has already consented to accept an oral subpoena in lieu of a written subpoena and has thus waived whatever technical objections it might have had with respect to the issuance, form or service of the subpoena. See particularly, Tr. 5031 and 5036.

Respectfully submitted,



David D. Kartalia
Counsel for AEC Regulatory Staff

Dated at Bethesda, Maryland,
this 16th day of December, 1971.