

UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

In the Matter of  
CONSUMERS POWER COMPANY  
Midland Plant, Units 1 and 2

Docket Nos. 50-329  
50-330

REPLY OF AEC REGULATORY STAFF TO WESTINGHOUSE MOTION FOR  
RECONSIDERATION OF ORDER DENYING ITS DECEMBER 7, 1972  
MOTION TO QUASH SUBPOENA

On November 23, 1971, the Atomic Safety and Licensing Board (Licensing Board), issued an oral subpoena directing Westinghouse Electric Corporation (Westinghouse) to produce three reports<sup>\*/</sup> sought by intervenors Saginaw Valley Nuclear Study Group et al. (intervenors). On December 7, 1971, Westinghouse filed a motion to quash this subpoena. In its December 22, 1971 "Order with Respect to Various Motions Filed in this Proceeding," the Licensing Board denied the Westinghouse motion and, among other things, directed Westinghouse to submit "its arguments and supporting data, if any (by affidavit), to sustain the claim that the information in question is proprietary." By the instant motion, filed January 15, 1972, Westinghouse seeks reconsideration of the Licensing Board's order denying its motion to quash the subpoena. This motion is supported by a brief, dated January 15, 1972, and by an "Affidavit of Robert A. Wiesemann," dated January 14, 1972 (the Wiesemann affidavit).

In accordance with the guidance of the Atomic Safety and Licensing Appeal Board (the Appeal Board) in its "Memorandum" of September 21,

<sup>\*/</sup> (1) WCAP 7153-L, "Investigation of Chemical Additives for Reactor Containment Sprays," (2) WCAP 7198-L, "Evaluation of Protective Coatings for Use in Reactor Containment," and (3) WCAP 7499-L, "Topical Report--Elemental Iodine Removal by Reactive Sprays."

1972, where, as here, a claim of proprietary has been made, the Licensing Board's "first objective...is to obtain reasonable assurance that the information is, in fact, proprietary." As noted below, Westinghouse has, with the instant motion, submitted information (the Wiesemann affidavit) in support of its claim that the reports are in fact proprietary, thus responding to the Licensing Board's order denying the motion to quash and enabling the Licensing Board to proceed with the threshold inquiry contemplated by the Appeal Board's Memorandum of September 21, 1971.

Westinghouse nevertheless argues that the Licensing Board should dispose of this matter on the grounds of need, relevance or "public policy" without first ascertaining whether the reports are proprietary. In our view, the Westinghouse arguments in support of this position are unsound. The principal contention of Westinghouse is that the Licensing Board should treat the matter of need as a threshold inquiry. This, however, is plainly at odds with the controlling guidance of the Appeal Board. Westinghouse has not shown any valid reason for reconsideration at this time of the Licensing Board's order denying the motion to quash.

As to the question of the proprietary nature of the reports, Westinghouse takes the legal position that a report is proprietary if it is "customarily held in confidence by the originator." The Wiesemann affidavit is tendered by Westinghouse as evidence that the reports

subpoenaed by the Licensing Board meet this test and are therefore proprietary.

We believe that Westinghouse has correctly stated the test to be applied in determining whether the subpoenaed reports are proprietary. That test is the one which would apply if a demand for the reports had been made under 10 CFR 2.744 (i.e., a demand for production by the staff, as opposed to a demand under 10 CFR 2.720 for production by Westinghouse, as in the case here); and the Appeal Board has already advised the Licensing Board that the standards for determining whether a document is proprietary should be similar under Section 2.720 and 2.744.<sup>1/</sup> We are also of the view that the Wiesemann affidavit establishes prima facie that the reports are proprietary.

The next step in disposing of this matter is to provide the intervenors an opportunity to respond to the Westinghouse assertion that reports are customarily held in confidence by Westinghouse. If the intervenors elect to put the Westinghouse assertion in issue, the Board should schedule an evidentiary session to resolve the issue. If the intervenors do not choose to contest the assertion by Westinghouse, the lengthy controversy involving these reports will be, in our view, ripe for termination by an order quashing the subpoena. The

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<sup>1/</sup> The Appeal Board's Memorandum states, at p. 3: "Generally speaking, we perceive of no reason why the standards for determining whether information is proprietary should be different depending on whether Section 2.720 or Section 2.744 is utilized for production of the information."

Licensing Board has already ruled that the reports are not needed as the Licensee is - thus avoiding the necessity for the Board to "weigh the detrimental effects of disclosure against the demonstrated need for production," which is the second and final step in procedure laid down in the Appeal Board's Memorandum of September 21, 1971.

Accordingly, the AEC regulatory staff urges the Licensing Board to deny the instant motion for reconsideration and to proceed in the manner described above.

Respectfully submitted,

*David E. Kartalia*

David E. Kartalia  
Counsel for AEC Regulatory Staff

Dated at Bethesda, Maryland,  
this 14th day of February, 1972.

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2/ This ruling is recorded in the Licensing Board's "Certification of Questions to the Appeal Board," dated August 18, 1971.