UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD:

Algie A. Wells, Chairman
Dr. John H. Buck
Dr. Lawrence R. Quarles

IN THE MATTER OF

CONSUMERS POWER COMPANY
(Midland Plant, Units 1 and 2)

DOCKET NOS. 50-329
50-330

MEMORANDUM

On August 18, 1971, the Atomic Safety and Licensing Board in this proceeding certified five questions for Appeal Board determination.[1/] The questions arise from the request of the "Saginaw intervenors"[2/] that they be permitted to use certain "proprietary" reports of the Westinghouse Electric Corporation in connection with their examination of the iodine spray removal system of the proposed reactors. The system which the applicants have proposed to use for the Midland reactors is a product of the Babcock & Wilcox Co.

1/ This proceeding involves the application of Consumers Power Co., Inc., for a construction permit for Units 1 and 2 of a nuclear generating plant to be located at Midland, Michigan.

2/ Saginaw Valley Nuclear Study Group, Citizens Committee for the Environmental Protection of Michigan, Sierra Club, United Auto Workers of America, Trout Unlimited, West Michigan Environmental Action Council, Inc., and University of Michigan Environmental Law Society.

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Intervenors seek to use the Westinghouse reports, to which their counsel acquired access, under protective order, [3] in a licensing proceeding involving another plant, to show that the spray removal system proposed for the Midland Plant is not the "best available" system. The Licensing Board in this proceeding rejected the intervenors' request for permission to use the Westinghouse reports. The Licensing Board also held that it need not inquire into whether the best available system is being used, but only into whether the proposed system meets the Commission's safety criteria.

COMMENTS ON CERTIFIED QUESTIONS

1. Was the ASLB correct in its conclusion that the applicant is not required to establish that its proposed reactors incorporate the "best available technology", but only that its system satisfy the Commission's safety requirements?

As the Licensing Board explains in its certification, this question arises from the intervenors' contention that the construction permit for the Midland plant cannot be granted unless the proposed reactor incorporates the "best available technology". While this was a general contention, intervenors made specific reference to the iodine spray removal system as designed by Babcock and Wilcox and another system designed for other reactors by Westinghouse.

3/ The protective order permitted counsel to show the documents to two persons assisting in the case, provided that they agree to be bound by its provision.

The record of this proceeding shows no attempt by anyone to define "best available technology"; and, in our opinion, the efficacy of any subsystem cannot be determined by an examination of its technology alone but must be evaluated in terms of its interplay with other components and subsystems. There may be many engineering choices in the selection of specific items for a subsystem but the final design must be an optimization of these choices to produce a subsystem which will interact with the larger system in such a manner that the subsystem and the complete system meet the relevant AEC licensing requirements. Individual designs using interplay of many technologies can reach the same final results using vastly different components and subsystems. Thus, especially for such a highly complex plant as a reactor, the "best technology" for a subsystem can only be determined in relation to other subsystems and the plant in its entirety. Principally for this reason, the Commission has used general design criteria as the basis for its licensing requirements, leaving to the applicants the details of design.

With regard to the Midland reactor, the Licensing Board must be satisfied that the proposed spray system will operate, within the overall complex of the reactor plant, to obtain the iodine reduction necessary to meet AEC reactor licensing requirements. If the applicant sustains its burden of proof in this regard, it will have satisfied those requirements and it will be unnecessary to consider the spray system of another reactor as proposed by intervenor.

2. Was the ASLB acting within its discretion in concluding, on the basis of its own examination of the proprietary reports, and the available literature, that the reports were unnecessary to the desired cross-examination?

In describing the background to the questions certified to this Appeal Board, the Licensing Board interpreted the Commission's Rules of Practice, 10 CFR Part 2, as providing two ways by which the documents in question could be sought: (1) by a subpoena to Westinghouse under the provisions of Section 2.720 or (2) since the Commission has the documents in its possession, under the provisions of Section 2.744, "Production of AEC records and documents." Stating that the two methods of acquiring the documents were different, the Licensing Board indicated that it was "satisfied that the standards controlling the claim of privilege are those set out in Section 2.744, i.e., that where a claim of privilege is made, the person seeking the documents must show need for and relevance of the documents". The Licensing Board continued:

> "It should be stressed that the question in this case is not disclosure to intervenors or furnishing of information to the ASLB. The information has been disclosed to intervenors' counsel and technical assistants (although they would like to expand the list to include at least one additional person); the ASLB has already read the reports. The question here is only whether it is necessary to effective cross examination for intervenors to be able to use the reports."

In the circumstances which underlie the certified question, we think that the matter of disclosure, and that of production of documents cannot be divorced from each other, as both matters intertwine. Although it is true, as stated by the Licensing Board, that the pertinent information was already disclosed to intervenors' counsel and technical assistants, that disclosure was made under a protective order issued by a Licensing Board in another, unrelated, licensing proceeding. Its authorized use did not extend to disclosure of the information to others, nor for purposes outside of that proceeding. Accordingly, insofar as the instant proceeding is concerned, absent the consent of Westinghouse, use of the information by intervenors required issuance of an order by this Licensing Board for production of the reports. Thus, we view this certified question as relating to a request for production of the proprietary reports for the purpose of cross-examination; and we answer it in that context.

The Commission's Rules of Practice, 10 CFR Part 2, include three separate sections pertaining to the production of documents in connection with a licensing proceeding, Section 2.720 (subpoenas), Section 2.741 (discovery and production of documents), and Section 2.744 (production of AEC records and documents). In adopting three separate sections to cover this subject, we believe that the Commission did not intend to establish duplicative procedures for dealing with the same documents. We believe, instead, that the Commission contemplated a plan in which each section would establish a procedure to govern the production of documents depending on the circumstances involved -- Section 2.720 to apply to records in the

possession of persons who are not parties to the proceeding;[4] Section 2.741 to records of parties other than the regulatory staff;[5] and Section 2.744 to records of the regulatory staff. This view of the effect of the three sections, in our opinion, accords to the parties in the licensing proceeding a reasonable and orderly procedure for seeking documents in connection with the proceeding.

In this case, where documents are in the possession of the Commission, as well as in the possession of a person who is not a party to the proceeding, both Section 2.720 and Section 2.744 are available, as the Licensing Board states, to a party seeking the documents. The governing section depends, of course, on whether the documents are being sought from the Commission or from another source.

In this case, during the hearing in this proceeding, intervenors moved the regulatory staff to produce the "Westinghouse proprietary reports dealing with the iodine removal spray system" (Tr., June 21, 1971, pp. 1549-1551). The provisions of Section 2.744 would thus govern the request made. Under Section 2.744, to qualify for access to records containing proprietary information, a person must show, not only relevance, but also need for the document in connection with the adjudicatory proceeding. On the basis of

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4/ Section 2.720(h) states in this regard that the subpoena procedure of Section 2.720 is not applicable to the production of records or documents in the custody of AEC personnel.

5/ Section 2.741(d) states: "The provisions of this section are not applicable to the production for inspection and copying or photographing of AEC records and documents. Motions for production of such records or documents are subject to the provisions of §2.744."

its own examination of the proprietary reports and the available literature, the Licensing Board found that cross-examination was feasible without recourse to the claimed proprietary information; and, therefore, that no need had been shown. We conclude that, in the present circumstances, this action was within the discretionary authority of the Licensing Board.

3. Must the ASLB, despite its conclusion that no need is shown for the documents, nevertheless inquire into the basis for the assertion that the information is proprietary, where the information has been furnished to the Commission as proprietary, where it is based on the results of research and development, and is of a type generally kept confidential in the industry?

As noted in the answer to Question 2, it is our opinion that Section 2.744 is the appropriate rule for disposition of intervenors' request.

Section 2.744, as a general rule, requires that relevant AEC records and documents be produced upon request. This general requirement for disclosure, however, does not apply to documents falling with the purview of 10 CFR Section 2.744(b) and (c). These documents are required to be produced only in accordance with the procedures specified in Section 2.744 (b), (d) and (e), as applicable.

Information which is proprietary falls under Section 2.744(b) or (c) and is required to be produced only upon a showing, by the proponent, of relevancy and need, and then only if its production would not be contrary to the public interest and would not adversely affect the rights of any person. Of course, Section 2.744(b) or (c) applies only if the information is, in fact, what it is purported to be; i.e., proprietary.

Whether the information is, in fact, proprietary is initially for the Licensing Board to decide, based on all relevant factors available. The Licensing Board has broad discretion in how it should arrive at the appropriate decision. In the circumstances of this case the Licensing Board determined, on the basis of the factors enumerated in the question, that the reports were proprietary and that no need has been shown for them. We conclude it is within the discretion of the Licensing Board to decline further inquiry into the proprietary nature of the reports.

4. Are the standards for determining whether information is, in fact, proprietary, and whether proprietary information should be disclosed, the same whether the information is sought by subpoena under Section 2.720 of the Commission's regulations or under Section 2.744?

Generally speaking, we perceive of no reason why the standards for determining whether information is proprietary should be different depending upon whether Section 2.720 or Section 2.744 is utilized for production of the information. The first objective under either section is to obtain reasonable assurance that the information is, in fact, proprietary as

asserted. Similarly, as to whether proprietary information should be disclosed, we see no reason which dictates that different standards are to be applied. In either case, in considering a request for production of proprietary information, the Licensing Board should weigh the detrimental effects of disclosure against the demonstrated need for production.

5. Was the ASLB acting within its discretion in not granting permission to the intervenors to show the reports to a named chemist in order to assist intervenors' counsel to demonstrate the need for the information, in view of the ASLB's conclusion on an examination of the reports and the available literature that there was no need for such disclosure?

Consonant with our views under Question 2, we consider intervenors' request for permission to go beyond the protective order under which their counsel and specified assistants were permitted access to the Westinghouse reports as tantamount to a request for production under Section 2.744.

The Licensing Board indicated satisfaction, on the basis of its examination of the reports and available literature, that the information requested was, in fact, proprietary and that there was no need for disclosure to intervenors. In face of this conclusion, it does not appear that access to the information in question would have served any useful

purpose and might have acted to the detriment of the owner of the proprietary information. In the circumstances of this case, we are of the view that the Licensing Board's refusal to permit disclosure of the document to a named chemist for the purpose of assisting intervenors' counsel to demonstrate the need for such disclosure was within the Licensing Board's discretion.

ATOMIC SAFETY AND LICENSING APPEAL BOARD

BY _____
William L. Woodard
Assistant Executive Secretary

Dated: Sept. 21, 1971

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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(Midland Plant, Units 1 and 2)) Docket No. 50-329, 330

9-21-71,

CERTIFICATE OF SERVICE

I hereby certify that copies of the MEMORANDUM issued by the Appeal Board dated September 21, 1971 in the captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 21st day of September 1971:

Arthur W. Murphy, Esq., Chairman
Atomic Safety and Licensing Board
Columbia University School of Law
Box 38
435 West 116th Street
New York, New York 10027

Dr. Clark Goodman
Professor of Physics
University of Houston
3801 Cullen Boulevard
Houston, Texas 77004

Dr. David B. Hall
Los Alamos Scientific Laboratory
P. O. Box 1663
Los Alamos, New Mexico 87544

Dr. Stuart G. Forbes
100 Tennessee Avenue, Apt. 37
Redlands, California 92373

Thomas F. Engelhardt, Esq.
David E. Kartalia, Esq.
Regulatory Staff Counsel
U. S. Atomic Energy Commission
Washington, D. C. 20545

Robert Lowenstein, Esq.
Jerome E. Sharfman, Esq.
Lowenstein and Newman
1100 Connecticut Avenue, N. W.
Washington, D. C. 20036

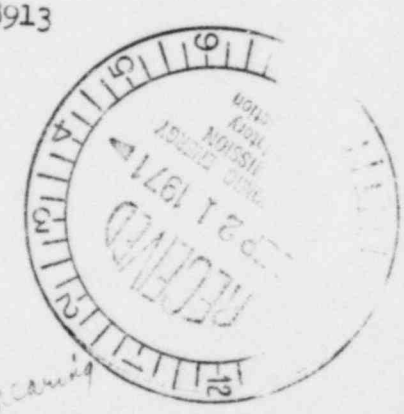
Richard G. Smith, Esq.
Smith & Brooker, P. C.
703 Washington Avenue
Bay City, Michigan 48706

Harold P. Graves, Esq.
Vice President and General
Counsel
John K. Restrick, Esq.
Consumers Power Company
212 West Michigan Avenue
Jackson, Michigan 49201

Mr. R. C. Youngdahl
Senior Vice President
Consumers Power Company
212 West Michigan Avenue
Jackson, Michigan 49201

Honorable Frank Olds, Chairman
Midland County Board of
Supervisors
623 St. Charles Street
Midland, Michigan 48640

Honorable Jerome Maslowski
Assistant Attorney General
State of Michigan
Seven Story Office Building
525 West Ottawa
Lansing, Michigan 48913



Honorable Curtis G. Beck
Assistant Attorney General
State of Michigan
Seven Story Office Building
525 West Ottawa
Lansing, Michigan 48913

Myron M. Cherry, Esq.
109 North Dearborn Street
Suite 1005
Chicago, Illinois 60602

Anthony Z. Roisman, Esq.
Berlin, Roisman & Kessler
1910 N Street, N. W.
Washington, D. C. 20036

James A. Kendall, Esq.
Currie and Kendall
135 North Saginaw Road
Midland, Michigan 48640

Dr. Wayne E. North, Chairman
Midland Nuclear Power Committee
P. O. Box 335
Midland, Michigan 48640

J. Richard Sinclair, Esq.
Milton R. Wessel, Esq.
Allen Kezsbom, Esq.
Kaye, Scholer, Fierman, Hays
and Handler
425 Park Avenue
New York, New York 10022

William A. Groening, Jr., Esq.
James N. O'Connor, Esq.
The Dow Chemical Company
2030 Dow Center
Midland, Michigan 48640

William J. Ginster, Esq.
Merrill Building, Suite 4
Saginaw, Michigan 48602

Mr. Wendell H. Marshall
RFD No. 10, Mapleton
Midland, Michigan 48640

Irving Like, Esq.
Reilly, Like and Schneider
200 West Main Street
Babylon, New York 11702

Patricia D. Krautter
Office of the Secretary of the Commission

cc: Mr. Murphy
Mr. Engelhardt
Mr. Wells
N. Brown
H. Smith