

UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

In the Matter of )  
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CONSUMERS POWER COMPANY )           Docket Nos. 50-329  
                               )  
Midland Plant, Units 1 & 2 )           50-330

CERTIFICATION OF QUESTIONS TO THE APPEAL BOARD

The questions hereafter certified arise from the request by Saginaw intervenors 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 reports in question, WCAP-7153, 7198-L, and 7499-L have been furnished, subject to a protective order, \* to counsel for the Saginaw intervenors in the Point Beach Unit #2 proceeding (AEC Docket No. 50-301) where he is representing different persons.

The request to use the documents in this proceeding was first based on the claim by Saginaw intervenors

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\* 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.

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that the construction permit could not be granted unless the proposed reactors incorporated the "best available technology" and that, therefore, the Safety and Licensing Board (ASLB) must make a comparative evaluation of the Westinghouse iodine spray removal system and the Babcock & Wilcox (B & W) system to be incorporated in the proposed reactors. \*\* The ASLB rejected that contention holding 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. (T. 2114)

Intervenors also claim they could not intelligently examine into the question of the adequacy of the B & W spray removal system unless they were free to use the reports in cross examination. The ASLB, after reading the Westinghouse reports, the B & W reports, and various articles in the published literature, (see T. 2301) concluded that use of the Westinghouse reports was not necessary to such an examination.

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\*\* For present purposes, the significant difference between those systems can be taken as the difference in the reagent spray additives used. The B & W system uses basic sodium thiosulphate as an additive. The Westinghouse system uses sodium hydroxide. Intervenors do not challenge other aspects of the system.

At that time, intervenors asked for an opportunity to persuade the ASLB in camera that intervenors needed the documents for their examination. The ASLB agreed to listen to such an argument; however, counsel for Saginaw intervenors subsequently concluded that he could not adequately argue his case unless he could show the Westinghouse reports to a chemist. (Neither of the two technical assistants authorized to see the documents under the Point Beach protective order is a chemist.) Westinghouse, however, refused to permit a broader disclosure than had been authorized under the original protective order. The basis of the Westinghouse position was in part substantive -- that it did not know the person to whom counsel proposed to exhibit the material, and, therefore, could not be sure that the proprietary material might not be kept confidential. In part, their refusal was based on procedural considerations -- that since the material had been produced in another proceeding under the protective order of a different ASLB the privilege might be lost by expanding the number of persons entitled to examine it beyond those specified in the original order, even if this ASLB were to enter a supplemental protective order.

The procedural problem is complicated by the way in which intervenors' counsel acquired the documents. Ordinarily, documents of this nature could be acquired in one of two ways: (1) by a subpoena to Westinghouse under the provisions of Section 2.720 of the Commission's regulations, or (2) since the Commission has the documents in its possession, under the provisions of Section 2.744 of the regulations. Although the methods of acquiring the documents are different, the ASLB is 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. There can be no serious question of relevance in this case, but as noted above, the ASLB feels that cross examination is perfectly feasible without recourse to the claimed proprietary information, and, therefore, that no need has been shown.

As noted in its oral order of June 25, 1971 (T. 2302), the ASLB did not think it necessary to examine deeply into the assertion by Westinghouse that the information contained in the report was in fact proprietary. However, on the

basis of its preliminary inquiry, the ASLB was satisfied that there was a sufficient basis for that assertion. The information seems clearly to have been the product of Westinghouse's research and development, and Westinghouse's competitors would seem likely to reap at least some advantages from the disclosure of the material. In view of the statement by the Appeal Board in the Monticello proceeding that great weight should be accorded the view of the supplier of information that the data is proprietary, the ASLB felt that it was unnecessary to go farther into that question.

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. Nor is there, unfortunately, any easy way in which cross examination could be conducted without danger to the confidentiality of the information. Applicant is completely dependent upon the assistance of E & W for defending the iodine spray removal system, so that the use of the reports on cross examination would immediately result in the disclosure of the information to Westinghouse's competitors.

If this were an isolated case, the ASLB would be satisfied to let its decision on this question stand; however, the underlying questions are certain to arise in other cases and with respect to other subjects in this case. Accordingly, the ASLB has agreed to certify the questions to the Appeal Board. In doing so, the ASLB recognizes that a number of these questions may be premature but hopes that even if so, the formulation of the questions may be useful to the Appeal Board in its consideration of the subjects when, as, and if they are properly raised:

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.
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.
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.

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.

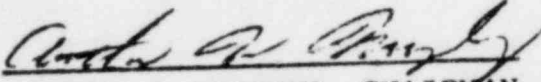
5. Was the ASLB acting within its discretion in not granting permission to the intervenors to show the reports to a named chemist in order to assist intervenors' counsel to demonstrate the need for the information, in view of the ASLB's conclusion on an examination of the reports and the available literature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

In order for the Appeal Board to consider the question, the ASLB is prepared to seal and deliver to the Appeal Board the Westinghouse reports referred to earlier. However, it is

the understanding of the ASLB that these documents are available to the Appeal Board from the Regulatory Staff and will be furnished by the Regulatory Staff upon request by the Appeal Board.

FOR THE ATOMIC SAFETY AND LICENSING  
BOARD

August 18, 1971

  
ARTHUR W. MURPHY, CHAIRMAN



UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

In the Matter of )

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

Docket No. 50-329, 330



CERTIFICATE OF SERVICE

I hereby certify that copies of the Board's CERTIFICATION OF QUESTIONS TO THE APPEAL BOARD dated August 18, 1971 in the captioned matter have been served on the following by deposit with the United States Postal Service, first class or air mail, this 18th day of August 1971:

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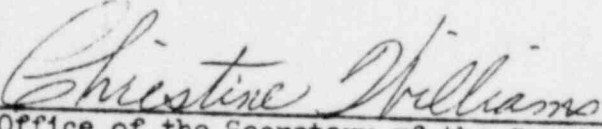
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