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RE: Midland Proceeding - Proprietary Date

Gentlemen:

Enclosed for your use is the ALAB-391, the second opinion by the Appeal Board on the public disclosure of cost and pricing provisions for nuclear fuel suppliers.

Sincerely yours,

R. Rex Renfrow

RRR/rf

Enclosure

cc: Service List (w/Encl.)

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DECISION

April 18, 1977

(ALAB-391)

Returning to us for a second time is the controversy which has arisen in this construction permit proceeding respecting whether the applicants should be compelled, in response to a discovery demand made by the intervenors, to make public disclosure of the cost and pricing provisions of the nuclear fuel supply contract entered into by themselves and the Westinghouse Electric Corporation. The background of the controversy and the principles which govern its resolution are fully developed in ALAB-327, 3 NRC 408 (1976), and require no detailed repetition here. It is sufficient to restate the conclusions there reached:

> (1) in support of their claim that the contract provisions in issue were entitled to receive protection against public disclosure, the applicants had been required to establish, *inter alia*, "that there is a 'rational basis' for treating as confidential the cost and pricing provisions of nuclear fuel supply contracts; *i. e.*, that significant commercial injury might be sustained by one or more of the parties to such contracts were those provisions to be publicly disclosed";
>
> (2) no such showing had been made;
>
> (3) in the circumstances of the case, the applicants were entitled to a second opportunity to make the showing; and
>
> (4) if the applicants successfully availed themselves of that opportunity, protective treatment then was to be accorded the contract provisions unless there were found "to be countervailing considerations militating in favor of public disclosure which clearly outweigh the potential harm to Westinghouse and/or the applicants which might inure from such disclosure".

3 NRC at 417-18. The matter was remanded to the Licensing Board for further consideration in conformity with those conclusions.

On November 24, 1976, following an additional evidentiary hearing, the Licensing Board entered its order on the remand, in which it determined by a divided vote that public disclosure was required. LBP-76-42, NRC-76/11 550. As at least implicitly authorized by ALAB-327, the applicants filed a motion seeking review of that order.[1] On December 21, 1976 we granted the motion and established a briefing schedule.[2] On full consideration of the arguments advanced in support of and in opposition to the decision below, we affirm in part and reverse in part.

[.02 Burden of Proof]

A. As ALAB-327 makes clear, the applicants had the affirmative burden on the remand to establish that they or Westinghouse might suffer competitive injury were the cost and pricing provisions of the contract publicly disclosed. Our scrutiny of the record convinces us that this burden was not met insofar as potential injury to the applicants is concerned. The only real question is whether the possibility of harm to Westinghouse was demonstrated with the requisite degree of particularity.

The starting point of our inquiry is the scope of the contract itself, which became effective in December 1973 and appears to have a life span of 20 years. Specifically, the contract covers two major components of the fuel supply which will be required to operate the Wolf Creek facility: (1) natural (*i. e.*, unenriched) uranium; and (2) fabricated fuel assemblies. The dual nature of Westinghouse's undertaking is of present significance because it is conceded that that company is no longer "making future sales of uranium to utilities" (Tr. 5249). Given this circumstance—*i. e.*, the fact that Westinghouse is not now in competition with other concerns for contracts to supply natural uranium—there is every reason to be skeptical of the claim that to reveal the cost and pricing provisions of the natural uranium portion of the contract would occasion competitive injury. Stated otherwise, Westinghouse's burden on this phase of the matter was especially heavy.

In an endeavor to satisfy that burden, Westinghouse (through the applicants) presented the testimony of two of its officials: Sam W. Shelby, the General Manager of Water Reactor Divisions Marketing; and Robert A. Wiesemann, the Manager of Licensing Programs in the Nuclear Safety

[1] The disclosure issue first came before us on an application for directed certification of an earlier order of the Licensing Board which had required the applicants to comply with the intervenors' discovery demand without benefit of a restriction upon further disclosure. To allow sufficient time for our consideration and disposition of the matter, we promptly entered an interim protective order. *See* ALAB-307, 3 NRC 17 (1976). In ALAB-327, we directed that the protective order should continue in effect pending the outcome of the remand therein directed and further provided that, should the Licensing Board again rule against the applicants' claim, the *status quo* was to be maintained for a period of 11 days "to enable the applicants to apply, should they be so inclined, for further relief from this Board." 3 NRC at 419.

[2] In taking this action, we extended the interim protective order to abide the event of our decision (*see* fn. 1, *supra*).

Department of the Pressurized Water Reactor Systems Division. The thrust of their testimony was that exact knowledge of the details of the cost and pricing provisions of the contract might convey to a competitor useful information bearing upon Westinghouse's business practices in general and pricing strategies in particular. We have examined this evidence with considerable care in quest of specifics with regard to precisely how a present or future competitor of Westinghouse in some commercial field *other than* the supplying of natural uranium might be advantaged by access to those terms of this contract which relate exclusively to the pricing of natural uranium. That quest has been in vain. The most that we have found are some broad conclusory statements, totally wanting in any meaningful supporting detail. That plainly does not suffice.

The situation is otherwise with respect to the cost and pricing provisions directed to the furnishing of fabricated fuel assemblies. Although the witnesses might have furnished a more comprehensive explanation of the manner in which a competitor in that line of endeavor might use those provisions to the detriment of Westinghouse, there appears to be enough in the record to compel the conclusion that there is a real (and not just theoretical) possibility of such detriment. Westinghouse still is soliciting contracts for fuel fabrication services and, indeed, has a heavy investment in facilities designed to provide those services. Even if (given the age of this contract) it might reasonably be assumed that the precise cost figures contained therein would no longer obtain in any event, allied with those figures are price adjustment clauses. On their face, the clauses illume Westinghouse's pricing strategies as applied to fuel fabrication services and give substantial credence to the concerns articulated by the witnesses. For its part, the cross-examination of Messrs. Shelby and Wiesemann by counsel for the other parties (who adduced no affirmative evidence of their own) did not to any extent undermine the legitimacy of those concerns.

In sum, we agree with the Licensing Board that a rational basis has not been established for treating as confidential the natural uranium cost and pricing provisions of the contract but cannot accept the Board's like conclusion with respect to the provisions addressed to fabricated fuel assemblies. On the first score, it must be emphasized that our holding rests exclusively on our appraisal of the content of this record. Nothing that we have said should be taken to imply a belief that in no circumstances could the public disclosure of the cost and pricing terms of a particular contract cause competitive injury to one of the contracting parties in some area of business endeavor not embraced by that contract. Rather, the result we reach on the natural uranium portion of the contract before us rests entirely on our conviction that, in this instance, there was a failure of proof on the part of the claimants for confidential treatment.

[.03 Public Interest]

B. What is left for decision is whether, as to the fuel fabrication provisions, there are "countervailing considerations militating in favor of public disclosure which clearly outweigh the potential harm to Westinghouse * * * which might inure from such disclosure". See p. 3, *supra*. In our view, a negative answer is required.

In ALAB-327, *supra*, we took note of the *sua sponte* reliance of the Licensing Board in its first order upon both the First Amendment to the Constitution and the antitrust laws. For the reasons developed in that decision, we rejected that reliance outright. 3 NRC at 414-15. Nonetheless, in the more recent order now under review, the Chairman of the Licensing Board, apparently speaking for himself alone, has once again pointed to purported First Amendment and antitrust considerations to buttress his conclusion that public disclosure is mandated here. NRCI-76/11 at 586-88. As on the prior occasion, none of the parties has endorsed his views in this regard. And justifiably so.

Insofar as the First Amendment is concerned, we have been given no cause to elaborate upon what was said in ALAB-327. We have been favored, however, with a somewhat more extensive exposition of the underpinnings of the Licensing Board Chairman's thinking regarding the possible application of the antitrust laws.[3] Yet the exposition is unpersuasive. We discern nothing in any of the decisions cited by him which might be taken to stand for the proposition that there are antitrust implications attendant upon the unwillingness of a company to have its competitors learn of the cost and

[3] In ALAB-327, we commented upon the failure of the Licensing Board to have expanded upon the bald statement in its first order that the agreement between Westinghouse and the applicants not to disclose the cost and pricing terms of the contract "may violate" those laws. See 3 NRC at 411, 414.

pricing terms of a negotiated contract which it has entered into with third parties. Those decisions dealt essentially with alleged endeavors by two or more competitors in a market to fix prices for particular goods or services sold in that market. To the extent that there was a condemnation of secrecy, the context was its use in aid of price fixing *among the competitors themselves*. In the case before us, there is of course no suggestion that Westinghouse's desire to withhold pricing information from its competitors might serve as part of an attempt—involving both Westinghouse and the competitors—to fix prices in the fabricated fuel assemblies market.

In these circumstances, the matter comes down to whether public disclosure of the cost and pricing terms of the fabricated fuel assemblies portion of the contract was required either (1) to enable the Licensing Board to discharge properly its functions, or (2) to furnish the citizens of Kansas with data which the public interest requires they possess. In resolving this point in Westinghouse's favor, we need simply note our general agreement with the views expressed by Mr. Kornblith in his dissenting opinion below (NRCI-76/11 at 591-97), which views also had the endorsement of Dr. Anderson (*id.* at 581).

For the foregoing reasons, the order under review is *affirmed* in part and *reversed* in part. The parties are to endeavor to reach agreement among themselves, within 30 days of the date of this decision, respecting the revisions in the outstanding interim protective order (see ALAB-307, *supra*) which are called for by our determinations herein. The substance of any such agreement shall be communicated to this Board promptly. In the event of a failure to reach agreement within 40 days of the date of this decision the parties shall file memoranda setting forth their respective positions on the matter. Upon its receipt and consideration of the submission or submissions, this Board will enter a permanent protective order. In the meanwhile, the interim order shall remain in full force and effect.

It is so ORDERED.

CCH

VERMONT YANKEE NUCLEAR POWER STATION, ET AL.

[¶ 30,178]

For previous decision, see ¶ 30,171.

Environmental considerations—Nuclear fuel cycle—Cost-benefit balancing.—The greater the investment in a particular facility the smaller the possibility that the numerical values assigned to the environmental effects of the nuclear fuel cycle could have the effect of tipping the overall cost-benefit balance against the facility. Moneys already spent are irrelevant only where the NEPA comparison is between (1) completing the proposed facility and (2) abandoning that facility and not substituting another facility for it.

.01 In the Matter of Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), Docket No. 50-271, Public Service Electric and Gas Company (Salem Nuclear Generating Station, Units 1 and 2), Docket Nos. 50-272 and 50-311, Philadelphia Electric Company (Peach Bottom Atomic Power Station, Units 2 and 3), Docket Nos. 50-277 and 50-278, Metropolitan Edison Company, et al. (Three Mile Island Nuclear Station, Units 1 and 2), Docket Nos. 50-289 and 50-320, Duquesne Light Company, et al. (Beaver Valley Power Station, Units 1 and 2), Docket Nos. 50-334 and 50-412, Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352 and 50-353, Public Service Electric and Gas Company, et al. (Hope Creek Generating Station, Units 1 and 2), Docket Nos. 50-354 and 50-355, Pennsylvania Power and Light Company (Susquehanna Steam Electric Station, Units 1 and 2), Docket Nos. 50-387 and 50-388, Duke Power Company (Catawba Nuclear Station, Units 1 and 2), Docket Nos. 50-413 and 50-414, Georgia Power Company (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), Docket Nos. 50-424 and 50-425, Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), Docket Nos. 50-483 and 50-484, Union Electric Company (Callaway Plant, Units 1 and 2), Docket Nos. STN 50-488 and STN 50-489, and Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), Docket Nos. 50-518, 50-519, 50-520 and 50-521, Memorandum and Order, Au[illegible]