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USNRC

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION '81 NOV 30 P2:27

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

SECRETARY
OF LICENSING & SERVICE
BRANCH

In the Matter of	:	
	:	Docket Nos. 50-266
WISCONSIN ELECTRIC POWER COMPANY	:	50-301
	:	(OL Amendment)
(Point Beach Nuclear Plant,	:	
Units 1 and 2)	:	

BRIEF OF WESTINGHOUSE ELECTRIC CORPORATION
APPEARING SPECIALLY, ON ISSUE OF DECADE ACCESS
TO PROPRIETARY DATA PURSUANT TO PROTECTIVE ORDER

I. Introduction

The question addressed by this brief is whether Decade should be allowed access to a proprietary affidavit filed by Westinghouse Electric Corporation ("Westinghouse") in support of its claim that certain information previously submitted by Wisconsin Electric Power Company ("WEPCO") in this proceeding should be withheld from public disclosure. In connection with the underlying issue of tube sleeving for steam generators, WEPCO had submitted certain Westinghouse technical information to the Commission with a claim for proprietary protection.¹ On November 13, 1981, Westinghouse submitted the Affidavit of R. A. Wiesemann and the Supplement thereto (hereinafter "the Wiesemann affidavit") addressing

¹The Staff has found the information to be proprietary and accorded it such protection.

why the Westinghouse proprietary information previously submitted in this proceeding should be so withheld from public disclosure. The Wiesemann affidavit was so submitted pursuant to 10 CFR § 2.790(b)(1)(ii)(1981) and Westinghouse has claimed proprietary protection for the affidavit. By its terms, the § 2.790(b)(1)(ii) regulation authorizes an affiant to designate information submitted in the affidavit as proprietary, and states that "such information shall be subject to disclosure only in accordance with the provisions of §9.12 of this chapter."

Section 9.12, in turn, provides that records which are exempt from public disclosure (under § 9.5) shall not be disclosed except in accordance with Part 9 or Sections 2.744 or 2.790. Westinghouse submits that under these provisions, disclosure to Decade of the proprietary affidavits submitted to support a proprietary claim is not authorized.²

II. The Wiesemann Affidavit is Proprietary

A threshold issue is whether the Wiesemann affidavit should be afforded any proprietary protection. Westinghouse

²Westinghouse submitted the Wiesemann affidavit only to the three members of the Board and to the staff counsel, but not to the other parties to the proceeding. The presiding officer has invited a brief from Westinghouse as to whether or not Decade should be permitted to examine the affidavit of R. A. Wiesemann under a protective order (Tr. 810).

The presiding officer also asked the counsel for WEPCO if he were interested in examining the Wiesemann affidavit (Tr. 810). WEPCO counsel declined (Tr. 810). Subsequently, WEPCO counsel inquired as to whether he might be a party to a protective order as an individual, apart from his role as WEPCO's counsel (Tr. 814), but in a later telephone call with counsel for Westinghouse, he withdrew this request.

submits that the regulation is clear that such proprietary protection must be afforded, although it has been stated that there was no "support [for] the rather unparticularized statement . . . that the entire Wiesemann affidavit . . . was confidential," and that Westinghouse should therefore file another supporting affidavit (Tr. 777). In adopting § 2.790(b)(1)(ii), the Commission noted as follows with respect to the need for additional affidavits to support a proprietary claim with regard to an affidavit claiming proprietary protection:

"The Rule also has been amended to permit an owner to include trade secrets or confidential or privileged commercial information in the affidavit without subjecting such supporting information to the procedural requirements of the rule. To do otherwise could result in an unnecessary number of affidavits." 41 Fed. Reg. 11808 at 11809. March 22, 1976.

Thus, the Commission has foreseen the instant situation and has rejected the requirement that a supporting affidavit needs, in turn, an additional supporting affidavit. Accordingly, the Wiesemann affidavit properly should be given proprietary protection by the Commission pursuant to §2.790(b)(1)(ii) of its Rules of Practice.³

³The Chairman cited two Department of Energy (DOE) administrative decisions for the propositions that the Board has jurisdiction in this matter and that documents supporting release be particularized. (Tr. 778-79). These decisions concern interpretations of DOE's regulations published at 10 CFR Part 1004, which implement the Freedom of Information Act (5 USC 552). Here, we are applying the Rules of Practice of the Nuclear Regulatory Commission (NRC) in a non-FOIA context. Moreover, since those NRC Rules of Practice directly govern the protection of proprietary information transmitted to the Staff, Westinghouse respectfully submits that the DOE decisions are inapposite.

III. Decade Should Not Have Access
to the Proprietary Wiesemann Affidavit

There are several reasons why Decade should not be allowed access to the Wiesemann affidavit, even pursuant to a protective order. First, under § 2.790(b)(1)(ii), the information is only subject to disclosure under § 9.12. Under § 9.12, there are three possible paths to discuss concerning disclosure. The first path, Part 9, is inapplicable here because Part 9 is the implementing provision for the Freedom of Information Act ("FOIA") and there has been no FOIA request regarding the instant matter. A second path is the reference in § 9.12 to § 2.790, which is a completely circular reference and hence inapplicable. The third path is the reference to § 2.744, which discusses a disclosure request to the Executive Director for Operations, a request which has not been made here. Thus, under § 2.790 (b)(1)(ii), and its reference to § 9.12, no disclosure to Decade is appropriate or authorized here.

Further, even if the Board were to consider disclosure under § 2.790, such disclosure to Decade here is not appropriate. Decade is not properly and directly concerned with the issues addressed in the Wiesemann affidavit. Section 2.790 (b)(6) provides in part that:

"Withholding from public inspection shall not affect the right, if any, of persons properly and directly concerned to inspect the document. The Commission may require information claimed to be a trade secret or privileged or confidential commercial or financial information to be subject to inspection: . . . under protective order, by parties to a proceeding, pending a decision of the Commission on the matter of whether the information should be made publicly available or when a decision has been made that the information should be withheld from public disclosure." (Emphasis added).

The mere fact that Decade is a party to a Commission proceeding does not, by itself, give that party access to a proprietary affidavit which seeks to explain why underlying information should be held proprietary. The above-quoted excerpt from the Commission's regulations shows that a party must also be properly and directly concerned in the issues addressed in the document. This additional showing has not been made by Decade.

Moreover, this requirement - that a party of a licensing proceeding must show relevance to be able to inspect proprietary information - has been recognized by the Commission in its deliberations on § 2.790(b). The Commission has stated that:

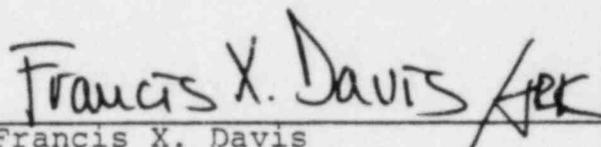
"[u]nder [subsection (b) of § 2.790] a party to a licensing . . . proceeding who needs access to 'proprietary information' may upon a proper showing of relevancy inspect such information under a protective order. . ." (Emphasis added).
41 Fed. Reg. 11808 at 11809. March 22, 1976.

It is clear that Decade has not met its burden of showing how the Wiesemann affidavit is relevant to the contention upon which Decade was admitted. The underlying issue admitted as a contention concerned safety-related aspects of the sleeving process. Decade has been furnished Westinghouse proprietary information dealing with the underlying details of that process pursuant to a protective order.

In this instance, however, the Wiesemann affidavit is concerned with matters as to why the underlying material meets the Commission tests for holding it proprietary. Thus, the Wiesemann affidavit is concerned with competitive and cost considerations of the sleeving process totally divorced from the safety-related issues. Hence, Decade should be denied access to the affidavit even under the

terms of a protective order.⁴

Westinghouse urges the Board to deny Decade access to the proprietary version of the Wiesemann affidavit because of its failure: (a) to comply with the requirements of § 9.12, (b) to demonstrate that it is properly and directly concerned with the content of the Wiesemann affidavit. In the alternative, Westinghouse urges that the submission of the non-proprietary version of the Wiesemann affidavit to Decade be determined to be sufficient.



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Dated: November 25, 1981

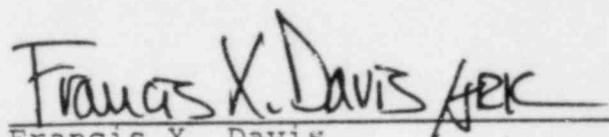
⁴In an effort to resolve this matter, Westinghouse has prepared a non-proprietary version of the Wiesemann affidavit. Should the Board determine that the proprietary Wiesemann affidavit, or portions thereof, be released, Westinghouse requests the opportunity to submit a draft protective order for Board consideration which will accord Westinghouse proprietary information appropriate protection against disclosure. Westinghouse further is prepared to show, should it become necessary, that Decade previously has disclosed proprietary information in an unauthorized manner and should not be permitted in any event to see the Wiesemann affidavit. See my discussion at Tr. 783-84 regarding the unauthorized release by Decade of certain proprietary information submitted by WEPCO in a proceeding before the Public Service Commission of Wisconsin ("PCS") which was subject to a PSC protective order.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the BRIEF OF WESTINGHOUSE ELECTRIC CORPORATION APPEARING SPECIALLY, ON ISSUE OF DECADE ACCESS TO PROPRIETARY DATA PURSUANT TO PROTECTIVE ORDER [11/25/71 Final Draft] in the above-captioned proceeding have been served on those shown on the Service List by deposit in the United States mail, first class, postage prepaid, this 25th day of November, 1981.



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Dated: November 25, 1981

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