

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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DEPT. OF SECRETARY
REGULATORY & SERVICE
BOARD

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

REPLY BRIEF OF WESTINGHOUSE ELECTRIC CORPORATION,
 APPEARING SPECIALLY, ON ISSUE OF LICENSING
 BOARD'S JURISDICTION TO DECLINE
 TO AFFORD PROPRIETARY INFORMATION
 PROTECTION FRM PUBLIC DISCLOSURE

I. INTRODUCTION

In replying to the Brief of the Regulatory Staff dated December 7, 1981, this Reply Brief addresses the questions of whether the Atomic Safety and Licensing Board ("Board") assigned to this proceeding has been accorded jurisdiction from either: 1) the Nuclear Regulatory Commission's ("NRC") rules found in Title 10 of the Code of Federal Regulations (10 CFR) ("Rules"), or 2) the nature of the adjudicatory process to make a determination regarding the proprietary nature of information submitted pursuant to 10 CFR §2.790 (1981), and, if that test is met, then refuse to afford that information protection from public disclosure, after the Regulatory Staff has examined the information and determined that it is proprietary and should be withheld from public disclosure as provided in that

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regulation. Following an examination of the Regulatory Staff's Brief dated December 7, 1981, Westinghouse Electric Corporation ("Westinghouse") asserts that the Board derives authority from neither the Rules nor the nature of the adjudicatory process to make such an independent determination after the Regulatory Staff has properly reviewed the information, concluded that it is proprietary, and determined that it should be withheld from public disclosure.^{1/}

II. BACKGROUND

The background to this matter was related in the Westinghouse and Regulatory Staff Briefs dated December 7, 1981. We will not repeat it here. Apparently, no other party has filed a brief on this issue.

III. THE LICENSING BOARD'S JURISDICTION

The Westinghouse position continues to be that the Licensing Board does not have authority to make such an independent determination under either the Commission's Rules or the nature of the adjudicatory process after the Regulatory Staff has acted on the matter.

^{1/} The Regulatory Staff's letter granting the application of Wisconsin Electric Power Company was from R. A. Clark to R. A. Wiesemann to Westinghouse dated November 20, 1981.

As the Atomic Safety and Licensing Appeal Board ("Appeal Board") has noted,

Congress has vested authority to administer the licensing provisions of the Atomic Energy Act in the Nuclear Regulatory Commission.⁴ The Commission in turn is authorized by the Act to have atomic safety and licensing boards preside over adjudicatory proceedings, which boards may be convened "to conduct such hearings as the Commission may direct."⁵ Thus, like ourselves, licensing boards "are delegates of the Commission and exercise only those powers which the Commission has given [them]."⁶

[Footnotes to this Appeal Board excerpt]

⁴Energy Reorganization Act of 1974, as amended, §201(f) and (g), 88 Stat. 1243, 42 U.S.C. §5841(f) and (g).

⁵42 U.S.C. §2241.

⁶Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1), ALAB-249, 8 AEC980, 987 (1974).^{2/}

A fair reading of the Commission's regulations regarding a Licensing Board's jurisdiction over the matter of trade secrets or privileged or confidential commercial or financial information^{3/} gives the Board the authority to examine the information, make it available to persons who are properly and directly concerned to inspect it, fashion protective orders for

^{2/} Public Service Company of Indiana, Inc. (Marble Hill Units 1 and 2), ALAB-316, 3 NRC 167 at 170 (1976).

^{3/} 10 CFR 2.790(a)(4). This information consistently has been termed "proprietary information" throughout this proceeding. This Reply Brief continues to do so.

this purpose, and hold hearing sessions in camera when the information is produced or offered in evidence. 10 CFR §2.740(c)(6), 2.790(b)(6).

Contrary to the Regulatory Staff's position, the Rules fail to give a Licensing Board more authority than discussed immediately above. Indeed, a logical interpretation of §2.790(b)(6)^{4/} is that the Commission perceived "the presiding officer" to have a distinct role in the process apart from that of "the Commission." If these separate roles do not exist, then one would expect the Commission not to use different terms for the two entities, perhaps by giving the presiding officer the authority to examine the documents pending his or her decision on the application for withholding.

4/ 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 . . . (ii) by the presiding officer in a proceeding; and (iii) 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. In camera sessions of hearings may be held when the information sought to be withheld is produced or offered in evidence. (Emphasis added.)

In its Brief, the Staff fails to give a specific reference to a delegation from the Commission of the authority to make the determination here sought. The reason for the staff's failure to cite specific regulatory authority is clear - there is no such authority. Failing to find any such specific delegation, the Staff's Brief attempts to find authority by indirection. The Staff's indirect interpretation fails to meet the test of Marble Hill, quoted above. The absence of such a specific delegation to the Licensing Board must be interpreted to mean that no such authority exists in an area where the Regulatory Staff has been granted and has exercised jurisdiction. This would be an efficient result, for there is no need for the Licensing Board to assert authority in the area. In the instance at hand, the Commission's authority to make a withholding determination has already been exercised by the Regulatory Staff, as evidenced in its letter dated November 20, 1981.^{5/}

In addition, Westinghouse asserts that the Staff's reliance on Wolf Creek^{6/} is misplaced. First, as the staff recognizes on page 5 of its Brief, the information in Wolf Creek was not an NRC record.^{7/} Second, the information in Wolf Creek was

^{5/} See Footnote 1.

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^{7/} Rather, it belonged to a vendor and was not already in the possession of the NRC or parties to the proceeding.

sought via discovery and there was a dispute as to whether a protective order would be applied to the information. Here, on the other hand, the information at issue has already been made available pursuant to the Board's protective order. Indeed, the only persons with an interest in seeing it who don't already have it are Westinghouse competitors. Third, in the case at hand, the Regulatory Staff already has examined the information and given it proprietary protection. Finally, in Wolf Creek, the Licensing Board, whose decision was the subject of the Appeal Board's determination, had issued its decision January 9, 1976. The rule now being interpreted (§2.790) was not published until March 22, 1976 (F.R. 11808) to be effective April 2, 1976. Thus, the Licensing Board and the Appeal Board^{8/} in that case were acting outside of the context of this more limited rule, and the rule's meaning should not be broadened by the interpretation of facts occurring before it was adopted and when the Commission's Rules pertaining to proprietary information were substantially different than they are now.

Reliance by the Staff on the Commission's memorandum issued June 6, 1972, in the proceeding concerning the acceptance

^{8/} The Appeal Board decision was issued April 27, 1976.

criteria for emergency core cooling systems^{9/} is misplaced. The Commission's memorandum came at a time when the Commission's Rules pertaining to proprietary information were substantially different. Further, the memorandum was issued in the context of a unique rulemaking proceeding unlike the licensing proceeding here.

Reliance by the Staff on §2.790(e), which relates to NRC records, is also misplaced. As stated above, we are not dealing with NRC records and documents.

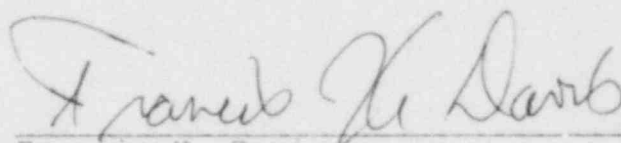
The nature of the adjudicatory process did not enlarge the Board's authority granted by the Commission. The Commission has provided the Board authority in its Rules of Practice to conduct a proceeding fair to all parties, as discussed above in interpreting §§2.740(c)(6) and 2.790(b)(6). Seemingly, the exercise by a Licensing Board of this purported authority would unduly complicate the adjudicatory process by creating an unnecessary administrative morass where the Staff has determined to withhold the proprietary information and the Board second-guesses that decision.

The Regulatory Staff is in a position to render the most reasoned decisions on applications for withholding. Its staff

^{9/} TID-26713, U.S. Energy Research and Development Administration (March 1975).

includes those who know the history of other applications and determinations and rationale used in deciding them. On the other hand, Licensing Boards do not necessarily have this expertise in this somewhat specialized area. In the event that they assert this authority and begin exercising it, inconsistent and unjust decisions may follow and, in the long run, the licensing program may suffer.^{10/}

For the foregoing reasons, Westinghouse urges the Board to refrain from making any determination as to the proprietary nature of Westinghouse information, and to continue in effect the protective order heretofore entered.



Francis K. Davis
Counsel for Westinghouse Electric
Corporation, Appearing Specially
P. O. Box 355
Pittsburgh, Pennsylvania 15230

Dated: December 17, 1981

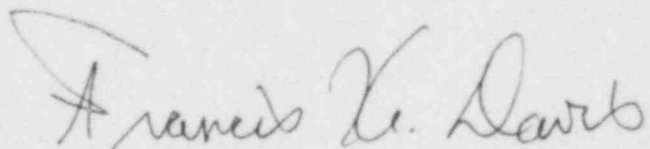
^{10/} Analogous reasoning has been accepted by the Appeal Board in determining that Licensing Boards assigned to hear radiological health and safety and environmental issues should not be presumed to have the expertise to determine antitrust issues as well. Public Service Company of Indiana, Inc. (Marble Hill Units 1 and 2), ALAB-316, 3 NRC 167 at 172 (1976).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the REPLY BRIEF OF WESTINGHOUSE ELECTRIC CORPORATION, APPEARING SPECIALLY, ON ISSUE OF LICENSING BOARD'S JURISDICTION TO DECLINE TO AFFORD PROPRIETARY INFORMATION PROTECTION FROM PUBLIC DISCLOSURE 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 17th day of December 1981.



Francis X. Davis
Counsel for Westinghouse Electric Corporation, Appearing Specially

Dated: December 17, 1981

Westinghouse
Electric Corporation

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OFFICE OF SECRETARY
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December 17, 1981

Peter B. Bloch, Chairman
Administrative Judge
Atomic Safety and Licensing
Board Panel
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

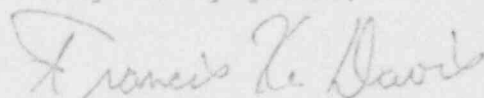
Re: Wisconsin Electric Power Company
Point Beach Nuclear Plant, Units 1 and 2
Docket Nos. 50-266 and 50-301
Operating License Amendment

Dear Judge Bloch:

Enclosed is the "Reply Brief of Westinghouse Electric Corporation, Appearing Specially, on Issue of Licensing Board's Jurisdiction to Decline to Afford Proprietary Information Protection from Public Disclosure." On December 10, you extended the filing date for this Reply Brief from December 11 until today because the Regulatory Staff of the Commission failed to serve me with a copy of their December 7, 1981 Brief on that day. You have asked me to memorialize that conversation in this letter.

You requested as well that I attempt to inform Mrs. Falk of Decade of this extension. My telephone call to her of December 10 was not returned.

Very truly yours,



Francis X. Davis
Counsel for Westinghouse
Electric Corporation,
Appearing Specially

cc: Service List (w/enc.)

UNITED STATES OF AMERICA

USNRC

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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ACT OF SECRETARY
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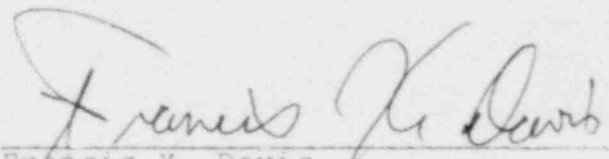
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Dated: December 17, 1981

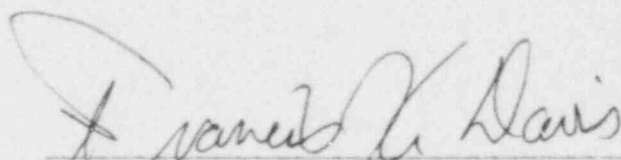
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Francis X. Davis
Counsel for Westinghouse Electric
Corporation, Appearing Specially

Dated: December 17, 1981

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