December 28, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

LICENSEE'S BRIEF IN RESPONSE TO DECADE'S EXCEPTIONS TO MEMORANDUM AND ORDER AUTHORIZING INTERIM OPERATION WITH UP TO SIX TUBES SLEEVED RATHER THAN PLUGGED

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I. INTRODUCTION

By letter dated July 2, 1981, Wisconsin Electric Power Company ("Licensee") filed with the Director of the Office of Nuclear Reactor Regulation Technical Specification Change Request No. 69. In that Request, Licensee seeks amendment of Facility Operating Licenses DPR-24 and DPR-27 (for Point Beach Units 1 and 2, respectively) to allow operation with steam generator tubes which leak or have degradation exceeding 40% of the nominal tubewall thickness (defined in the Technical Specifications as the "plugging limit"), but which have been repaired by "sleeving."[1] The Technical

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1 The "sleeving" process involves the insertion of "sleeves" (tubes of slightly smaller diameter) inside steam generator tubes

Specifications then in place required that all such tubes be "plugged", which removes the tubes from service.

A petition requesting a hearing was filed by Wisconsin's Environmental Decade, Inc. ("Decade") on July 20, 1981, in response to Licensee's July 2 letter. The NRC gave notice of the proposed issuance of the amendments, including opportunity for a hearing, at 46 Fed. Reg. 40359 (August 7, 1981). An Atomic Safety and Licensing Board was established on August 21, 1981, and, on September 16, 1981, a conference call among the parties was convened to discuss, inter alia, scheduling matters. During that call, counsel for Licensee discussed Licensee's intent to conduct a sleeving demonstration program at Unit 1 during the fall 1981 refueling outage, prior to undertaking a full scale sleeving program. Anticipating that any hearing on Licensee's July 2 Technical Specification Change Request would not be completed and a decision issued prior to the date on which Licensee planned to complete its demonstration program and close up the steam generators in preparation for return to power, "Licensee's Motion For Authorization For Interim Operation of Unit 1 With Steam Generator Tubes Sleeved Rather Than Plugged" was filed on September 28, 1981. By that motion, Licensee sought

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(continued)
to span the degraded or defective portions of the original tubes. Sleeving techniques have been used in the repair of the San Onofre Unit 1 steam generators and at the R.E. Ginna facility.

authorization for Unit 1 to resume power operation after the outage with up to six tubes sleeved rather than plugged, pending the outcome of the hearing on Licensee's July 2 amendment request.[2] "Licensee's Motion For Summary Disposition of Decade Contentions 3-6 As Related To Interim Operation of Unit 1" was filed on October 8, 1981, in support of Licensee's September 28 motion.

In its October 1, 1981 "Memorandum and Order Requesting Additional Information" ("October 1 Memorandum and Order"), the Licensing Board proposed a "show cause" procedure for the resolution of Licensee's request to return to power after the fall 1981 outage with up to six tubes sleeved rather than plugged. A briefing schedule was established, discovery was conducted, and, on October 29-30, 1981, a hearing was held in Milwaukee on Licensee's request for authorization for interim operation. As a result of that hearing, the Licensing Board issued its November 5, 1981 "Memorandum and Order Authorizing Issuance of A License Amendment Permitting Return To Power With Up To Six Degraded Tubes Sleeved Rather Than Plugged" ("Demonstration Program Order"). Decade has filed an undated interlocutory appeal from that order. Licensee responds herein to "Wisconsin's Environmental Decade's

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2 Licensee's request for interim relief with respect to the sleeving of no more than six degraded tubes constituted but a small fraction of the authority sought in Licensee's July 2 request, which could involve the sleeving of several thousands of steam generator tubes in Point Beach Units 1 and 2.

Exceptions and Brief In Support of Exceptions To The Initial Decision of The Atomic Safety and Licensing Board."

II. DISCUSSION

A. The Interlocutory Nature of Decade's Appeal

Although the Licensing Board below has suggested that Decade has the right to appeal the Demonstration Program Order (see Order, at 22), Decade's appeal constitutes an interlocutory appeal which is proscribed by the Commission's Rules of Practice. The law is clear. A person is not allowed to take an interlocutory appeal from an order of a licensing board, 10 C.F.R. § 2.730(f), unless the order has the effect of denying or granting a petition for leave to intervene and/or a request for a hearing. Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 N.R.C. 550 (1981) and ALAB-563, 10 N.R.C. 449 (1979); Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-637, 13 N.R.C. 367, 370 (1981); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-621, 12 N.R.C. 578 (1980) and ALAB-599, 12 N.R.C. 1 (1980); Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-585, 11 N.R.C. 469 (1980) and ALAB-586, 11 N.R.C. 472 (1980) and ALAB-564, 10 N.R.C. 451 (1979); Gulf States Utilities Co. River Bend Station, Units 1 and 2), ALAB-329, 3 N.R.C. 607, 610 (1976); Maine Yankee Atomic

Power Co. (Maine Yankee Atomic Power Station), ALAB-602, 12 N.R.C. 28 (1980); Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-370, 5 N.R.C. 131 (1977); See also The Toledo Edison Co. (Davis-Besse Nuclear Power Station) and The Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-300, 2 N.R.C. 752, 758 (1975).

Decade has not requested discretionary interlocutory review pursuant to 10 C.F.R. § 2.718(i), nor should Decade's exceptions be so construed.[3] Even if Decade's exceptions to the Licensing Board's Order were to be construed as a petition for directed certification under section 2.718(i), it would have to be dismissed. Here again, the law is clear that a request for discretionary interlocutory review will be granted infrequently and sparingly, and then

> only when a licensing board's action either (a) threatens the party adversely affected with immediate and serious irreparable harm which could not be remedied by a later appeal, or (b) affects the basic structure of the proceeding in a pervasive or unusual manner. Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 N.R.C. 533, 536 (1980), and cases cited.

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3 The Appeal Board has noted that although special consideration is sometimes afforded to litigants appearing without benefit of counsel, even the pro se party is expected to familiarize himself with the Commission's Rules of Practice. In any event, Decade appears in this proceeding represented by counsel. Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-563, 10 N.R.C. 449 (1979).

Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-637, 13 N.R.C. 367, 370 (1981); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 N.R.C. 1190, 1192 (1977); Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-572, 10 N.R.C. 693, 694-695 n.5 (1979); Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 N.R.C. 550 (1981); Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-635, 13 N.R.C. 309 (1981).

Decade's appeal meets neither of the two tests laid down by the Appeal Board. Decade clearly is not threatened with "immediate and serious irreparable harm" by the successful conclusion of Licensee's sleeving demonstration program. Had that been the case, Decade had opportunity to seek a stay of the Licensing Board's order. In fact, the Licensing Board rendered its opinion from the bench at the close of the hearing on October 30, 1981, for the express purpose of allowing Decade time to seek such a stay. Tr. 701. See also Demonstration Program Order, at 22. Decade did not seek such a stay. In any event, inflammatory rhetoric notwithstanding, Decade makes no showing that immediate and serious irreparable harm will result from the sleeving demonstration program.[4] As to the Appeal

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4 Notwithstanding numerous opportunities prior to and during the hearing, Decade was unable to explain why the sleeving process, the subject of this proceeding, would be likely to endanger the health and safety of the public.

Board's second test, the Licensing Board's order does not affect the hearing, yet to be scheduled, on Licensee's request for amendment of its Technical Specifications to allow full-scale sleeving of steam generation tubes. For all of the foregoing reasons, Decade's interlocutory appeal should be dismissed.

B. Decade's Exceptions

Decade challenges the Licensing Board's ruling authorizing interim operation of Unit 1 with up to six tubes sleeved rather than plugged as a single error of law "in that it is based upon an implied legal test requiring an intervenor to prove his or her case in order to secure the same hearing at which time the opportunity to make such a proof is customarily provided." The portions of the decision to which Decade has excepted are:

1. Standards for showing cause - Pages 6 to 7;
2. Ruling on Motion For Continuance - Page 8;
3. Admission of test results under trade secret protection - Page 10;
4. Ruling on Contention #3 - Pages 13 to 16;
5. Ruling on Contention #4 - Pages 16 to 17;
6. Ruling on Contention #5 - Pages 17 to 18; and
7. Ruling on Contention #7 - Pages 18 to 19.

Decade's Brief, at 1-2. Even if the appeal were not interlocutory, the exceptions raised are without merit and should be

denied. Licensee addresses each item raised by Decade, seriatim, below.

1. Standards For Showing Cause

As noted above, the Licensing Board proposed a "show cause" procedure for the resolution of Licensee's request for authorization for interim operation with up to six tubes sleeved rather than plugged. October 1 Memorandum and Order, at 8-9. The Licensing Board noted:

> Cause might consist of legal argument or of a substantive matter which should be pursued before the Board can reach a reasonable conclusion concerning the safety and environmental acceptability of the amendment. Cause could include comment on whether the demonstration proposed by WE [Licensee] is important to its overall sleeving program.

The Licensing Board solicited comments on its proposal. None of the parties--including Decade--objected to the "show cause" standard articulated by the Licensing Board. See, Tr. 79, 109, 126-27; Letter, Decade to Board (October 6, 1981); "Licensee's Comments on Licensing Board's Procedure For Good Cause Showing Related To Sleeving Demonstration Program" (October 8, 1981).

The Licensing Board repeatedly restated the standard to be applied in its "show cause" proceeding, prior to the October 29-30 hearing, and summarized its statements of that standard during a conference call with the parties on October 26, 1981. See, Tr. 219-24. Though the Licensing Board phrased the standard in various ways, it is clear that the burden

imposed on Decade was not (as Decade suggests) to prove its contentions, but rather to demonstrate the existence of a dispute as to a material issue of fact. See, e.g., October 1 Memorandum and Order, at 9 ("Cause might consist * * * of a substantive matter which should be pursued before the Board can reach a reasonable conclusion concerning the * * * amendment"); "Memorandum and Order Concerning The Admission of A Party and Its Contentions" (October 13, 1981) ("October 13 Memorandum and Order on Admission"), at 1 (Decade must demonstrate existence of "one or more genuine issues of fact"); Tr. 154 (Decade must show dispute as to "some genuine issue based in the facts"). Thus, the standard which the Licensing Board applied in ruling on Licensee's motion for authorization for interim operation was essentially the standard for summary disposition pursuant to 10 C.F.R. § 2.749--i.e., where the papers of the moving party "show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law," the party opposing summary disposition "may not rest upon the mere allegations or denials of his answer * * * [but] must set forth specific facts showing that there is a genuine issue of fact." Decade has not provided citation to the record to support its assertion that it was required to prove its case in order to defeat Licensee's request for interim relief; Decade has simply mischaracterized the standard which was applied by the Licensing Board.

Further, Decade not only overstates, as a factual matter, the burden imposed on it by the Licensing Board, it also understates, as a legal matter, its obligations as a party to substantiate its allegations. The criteria for summary disposition were the proper standard for application in the instant case. Decade's argument at pages 2 to 3 of its brief--particularly its reliance on Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), 11 N.R.C. 542 (1980) ("Allens Creek") and the Commission's notice of proposed rulemaking published at 46 Fed. Reg. 30349 (June 8, 1981)--is inapposite. Decade has confused the standards for the admission of contentions with the showing which may be required later in a proceeding (for example, in response to a motion for summary disposition or at an evidentiary hearing). At issue in both the Allens Creek decision and the proposed rulemaking is the nature and extent of the bases which a petitioner must advance for his proposed contentions as a precondition to their admission to a proceeding. The notice of proposed rulemaking is simply inapplicable where, as here, contentions have been admitted, discovery has been conducted, and a motion for summary disposition filed.[5] And, ironically,

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5 Decade asserts, at page 3 of its brief, that the Commission has "retreated" from its proposal to amend its regulations to expressly require petitioners for intervention to set forth, prior to admission, the facts on which their contentions are based and the sources or documents to be used to establish those facts. To the contrary, the Commission has recently reaffirmed its intent to pursue that proposal. See 46 Fed. Reg. 58279, 58280 (December 1, 1981).

while Allens Creek provides no support for Decade in the instant procedural context, the decision emphasizes the proprietary of the summary disposition of admitted contentions in circumstances such as those presented to the Licensing Board here. As the Allens Creek Appeal Board noted, in ruling that the licensing board there had improperly refused to admit the petitioner's biomass contention for lack of basis:

> It does not perforce follow, of course, that contention VI [the biomass contention] will have to be taken up at the forthcoming evidentiary hearing on the Allens Creek application. As we emphasized in Grand Gulf, * * * in the context of the geothermal alternative contention there in question, "it will be open to both the applicant and the (NRC) staff to move, pursuant to (10 C.F.R.) 2.749, for summary disposition . . . on the ground that 'there is no genuine issue to be heard' respecting the availability of adequate geothermal sources in the relevant area."

11 N.R.C. at 550. The Appeal Board continued, describing summary disposition as providing "in reality as well as in theory, an efficacious means of avoiding unnecessary and possibly time-consuming hearings on demonstrably insubstantial issues." Thus, in the instant case, the Licensing Board's admission of Decade's contentions to the proceeding did not, as Decade seems to believe, somehow preclude summary disposition and guarantee Decade an evidentiary hearing on its contentions. Compare Tr. at 153 (counsel for Decade asserts that Licensing Board's admission of contentions automatically precludes summary disposition).

Moreover, although the Licensing Board could properly have strictly applied the traditional summary disposition standard in ruling on Licensee's request for interim relief, the Licensing Board delcined to do so. Rather, the Licensing Board ruled that it was only necessary that Decade "demonstrate that there is reason to inquire further. That is, it can either demonstrate the existence of a genuine issue of fact or can show that there is a good reason for the Board to defer judgment until after specific discovery requests are made and answered." Demonstration Program Order, at 5. However, Decade failed to meet its burden even under this lenient standard fashioned by the Licensing Board.

Thus, contrarry to Decade's assertion that the standard imposed by the Licensing Board required it to prove its contentions to defeat Licensee's request for interim relief, the Licensing Board properly applied a summary disposition-type analysis in ruling on Licensee's request, which allowed Decade to either demonstrate the existence of a genuine issue of material fact with respect to its contentions as they related to the sleeving demonstration program or to show the need for deferral of judgment until after completion of specified discovery. Though the standard fashioned by the Licensing Board to assess the showing made by Decade was more lenient than the Board could have imposed, its application afforded Decade an opportunity to defeat Licensee's request for relief simply by demonstrating the need for further discovery.

Accordingly, the Board's application of the lenient standard effectively negated any possible prejudice to Decade resulting from methods of procedural expedition employed by the Licensing Board. Decade's argument that its absolute entitlement to an evidentiary hearing on its contentions is secured by compliance with 10 C.F.R. § 2.714 is without merit.

2. Ruling On Motion for Continuance

Decade's claim that the Licensing Board improperly denied its motion for a continuance of the "show cause" hearing is premised on its allegations that the Licensing Board expedited its consideration of Licensee's request for interim relief to the prejudice of Decade's preparation of its case, and without "any statement of reason as to why the demonstration program was immediately necessary." Decade's Brief, at 4. However, in emphasizing the procedures employed by the Licensing Board to expedite consideration of Licensee's request, Decade wholly ignores the multiplicity of extraordinary opportunities and procedural safeguards which the Licensing Board extended to Decade to negate any possibility of prejudice to Decade. See generally, Demonstration Program Order, at 3. Further, Decade's assertion that the proceeding was expedited without any indication of the immediate need for the sleeving demonstration program is plainly contradicted by the record.

Beginning with the September 16, 1981 conference call among the parties--during which Licensee's request for interim relief was first discussed--the Licensing Board urged Decade to commence discovery, even before a formal ruling on the admissibility of contentions issued. See Tr. 49-50, 60-64, 69-70. In its October 1 Memorandum and Order, at pages 4 to 5 and 10, the Licensing Board reiterated its September 16 order authorizing commencement of discovery prior to admission of contentions, and emphasized that it was "hopeful that it [Decade] will proceed to use this authorization." At the same time, the Licensing Board limited the discovery rights of other parties with respect to Decade, to ensure that Decade's attention was not unnecessarily diverted from preparation of its case. See, e.g., October 1 Memorandum and Order, at 4-5 (discovery not to be had against Decade); "Memorandum and Order Setting Agenda and Rules for October 29-30 Hearing" (October 15, 1981), at 2 (discovery by Licensee permitted "only to the extent that Decade agrees that the scope of the requested discovery will not unduly interfere" with preparation of Decade's case). Notwithstanding the Licensing Board's advice to Decade to proceed to conduct discovery, and its abeyance of discovery against Decade, Decade's first (and only) discovery requests on the sleeving demonstration program were filed with Licensee on October 23, 1981--some 37 days after the Licensing Board authorized discovery by Decade and less than a week before the hearing on Licensee's request for interim relief was scheduled

to begin. Nonetheless, Licensee served its responses to those discovery requests on Decade on October 26, 1981. See generally, Demonstration Program Order, at 3, 10.

In addition to authorizing discovery by Decade prior to admission of contentions, the Licensing Board expressly granted Decade wide latitude in discovery. The Licensing Board's October 13 Memorandum and Order on Admission, at pages 8 to 9, authorized Decade to conduct discovery on the single extraordinarily broad safety contention framed by the Licensing Board, rather than restricting Decade to discovery related to the issues specified in Decade's four proposed contentions accepted by the Licensing Board. See generally, Demonstration Program Order, at 12.

In contrast to Decade's failure to expeditiously avail itself of the discovery process in order to prepare its case, the Licensing Board framed two full sets of technical questions long before Decade sought discovery. See October 1 Memorandum and Order, at 6-8; "Memorandum and Order Concerning Further Board Questions" (October 13, 1981) ("October 13 Memorandum and Order on Board Questions"). The Licensing Board's questions were intended to facilitate discovery by Decade by suggesting "areas in which Decade could have inquired in order to establish a basis for its safety and environmental concerns." Demonstration Program Order, at 11. See also, October 1 Memorandum and Order, at 8. See generally, Demonstration Program Order, at 3-4, 9-11.

Moreover, though the Licensing Board afforded Decade ample time for discovery and fashioned other procedural safeguards prior to the hearing, and therefore could properly have ruled on Licensee's request for interim relief on the basis of the written record and oral argument at the hearing, the Licensing Board also gave Decade numerous opportunities to question the witnesses of the Staff and Licensee at the hearing to attempt to "demonstrate that there [was] reason to inquire further" and thus defeat Licensee's request. See generally, Demonstration Program Order, at 7, 15, 16-17, 20, 21.

The Licensing Board also permitted Decade to make certain untimely arguments in an attempt to meet its burden. For example, the Licensing Board ruled at the hearing that Decade would be permitted to extend its Contention 7 to the sleeving demonstration program notwithstanding the contention's express limitation--by its terms--to the full scale sleeving program. See generally, Demonstration Program Order, at 7, 21. Had Decade fully and timely availed itself of these extraordinary procedural opportunities presented to it, Decade would have more than offset any effects of the expedition of the proceeding.

At page 5 of its brief, Decade attempts to justify its request for a continuance by hyperbolically asserting that it was "required to review in detail thousands of pages of highly technical filings, complete discovery, and respond to dozens of motions and Board filing requirements in the space of

only two weeks after being served with the voluminous filings." Licensee has no idea how Decade computed the number of pages of technical material to be in the "thousands"; Licensee's Sleeving Report--the lion's share of the technical material filed--was less than 250 pages long. Similarly, Decade was required to respond to only two motions--"Licensee's Motion for Authorization for Interim Operation of Unit 1 with Steam Generator Tubes Sleeved Rather than Plugged" and "Licensee's Motion for Summary Disposition of Decade Contentions 3-6 as Related to Interim Operation of Unit 1." (Decade's responses to the two motions were 2 pages and 4 pages, respectively).[6]

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6 In arguing that it was entitled to a continuance, Decade also points to the disparity between the resources available to it and those available to Licensee and the Staff. However, as indicated in footnote 7, infra, the Licensing Board was able to rapidly assimilate the technical material in this case. And, in any event, as the Commission noted in its recently issued "Statement of Policy on Conduct of Licensing Proceedings," CLI-81-8, 13 N.R.C. 452 (1981):

> Fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations. While a board should endeavor to conduct the proceeding in a manner that takes account of the special circumstances faced by any participant, the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations. [Emphasis supplied].

Further, Licensee's technical report was served on the Licensing Board and the Staff on September 29, 1981--one month prior to the hearing--and was the subject of a detailed set of Board questions a mere two days later.[7] See Demonstration Program Order, at 3-4. However, Decade refused to sign an agreement to protect the proprietary information in the technical report, and therefore denied itself access to the report until October 9, 1981, when--in the course of a conference call--the Licensing Board attempted to devise a means to allow Decade to use the document in the preparation of its case.

In accordance with the understanding reached in the October 9 conference call, a copy of the Sleeving Report was delivered to Decade that day. However, though the Licensing Board ordered that Decade notify the Board if it did not accept the terms of the protective agreement offered to it by

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7 The speed with which the Licensing Board was able to digest and to frame questions on the Sleeving Report undermines Decade's claims that it had insufficient time to review the report and frame discovery requests prior to the hearing. In fact, while the Licensing Board had no familiarity with the sleeving process prior to its appointment to this case, Decade was a party to earlier proceedings before the Public Service Commission of Wisconsin ("PSCW") in which Licensee's plans for sleeving the Point Beach steam generators were discussed in detail and, further, Decade received many filings in the San Onofre docket related to sleeving, even before this proceeding began. See "Findings of Fact, Conclusions of Law, Certificate (6630-CE-20), Orders (6630-UI-2, 6630-CE-20) and Supplemental Order (6630-ER-10)" of the PSCW, included as Attachment 2 to "Licensee's Motion For Authorization For Interim Operation of Unit 1 With Steam Generator Tubes Sleeved Rather than Plugged"; Tr. 21, 62.

Licensee, Decade stopped reviewing the Sleeving Report when counsel for Licensee rejected Decade's proferred amendment to the agreement and neither informed Licensee and the Licensing Board that it was no longer reviewing the document, nor requested specific relief. See Demonstration Program Order, at 4-5, 10; Tr. 155-57.

Similarly, "Licensee's Response to Second Round of Licensing Board Questions" was physically served on Decade on October 16. Nonetheless, since that filing included proprietary information and since Decade refused to sign a protective agreement, Decade did not commence its review of the filing until the Licensing Board entered an order on October 20 adopting the terms of the agreement proferred by Licensee. See Tr. 143. Thus, the abbreviation of the period for Decade's review of the technical materials in this case is not attributable to Licensee. As the Licensing Board observed:

> To the extent that these problems [of delay in Decade's review of technical filings] have existed, they are problems of Decade's own creation. They have made it extremely difficult to accept the legitimacy of Decade's quarrels with the speed with which this proceeding was conducted.

Demonstration Program Order, at 10.

Finally, Decade's claim that it had insufficient time to prepare its case must be viewed in the context of the showing it was required to make at the hearing in order to prevail. And, as discussed above, the Licensing Board in this instance was requiring not that Decade present its full case on

the merits (as Decade suggests), but only that it meet a lenient summary disposition standard--i.e., that Decade "demonstrate that there is reason to inquire further" by either "[demonstrating] the existence of a genuine issue of fact or * * * [showing] that there is a good reason for the Board to defer judgment until after specific discovery requests are made and answered." Demonstration Program Order, at 5. In this procedural context, Decade should not be heard to complain that the Licensing Board "unreasonably truncated the time to prepare for the hearing."[8] Decade's Brief, at 3.

Decade's allegation that the Licensing Board expedited consideration of Licensee's request for interim relief without justification is similarly without merit. Decade implies, at page 4 of its brief, that the Licensing Board found fault with Licensee for creating the need for expedition of consideration of its request for interim relief by assuming that a hearing would not be conducted prior to amendment of the Point Beach operating license to authorizing sleeving. However, Licensee's assumption was based on the NRC Staff's practice at San Onofre Unit 1, where the Staff gave no notice of opportunity for hearing prior to full scale sleeving of that plant. See Tr. 24. Recognizing this fact, the conduct of a hearing on sleeving and the accompanying need for procedural

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8 The Commission's Rules of Practice provide 20 days for response to a motion for summary disposition. See 10 C.F.R. § 2.749(a).

expedition of the proceeding for a timely decision is properly characterized as simply something which Licensee perhaps should not have known to avoid, but which Licensee could nonetheless have avoided.

Decade also erroneously charges that the Licensing Board expedited consideration of Licensee's request for interim relief even though "the only stated purpose of the demonstration program was to conduct the physical process of sleeve insertion and not to return the tubes to operation with the sleeves in place." Decade's Brief, at 4. Decade's allegation completely ignores the statement of Mr. David Porter, Licensee's Manager of the Nuclear Engineering Section of its Nuclear Power Department, delivered at the October 29 session of the hearing, Tr. 282-97, as well as Decade's own cross-examination of Mr. Porter on the subject. Tr. 297-333. The Licensing Board recognized that many of Licensee's objectives for its demonstration program could be realized by conducting the sleeving process, then plugging the sleeved tubes (i.e., not returning them to service), which would not require the requested interim relief. However, the Licensing Board further noted that Licensee had both commercial and safety reasons for wishing not to plug the sleeved tubes:

> In particular, WE [Licensee] had stated (without contradiction) that the only kind of plugging which could be utilized on the sleeved tubes would be welded plugs, making it necessary to remove the tubes from service permanently and causing a continuing reduction of coolant flow. In addition, returning to service with sleeved tubes would implement

> WE's "lead tube" concept, giving it operating experience with the leak performance of a small number of tubes and permitting it to destructively evaluate a [sleeved] tube prior to commencing any full scale sleeving program.

Demonstration Program Order, at 8. Thus, contrary to Decade's assertion, the Licensing Board did inquire into the importance to the demonstration program of returning sleeved tubes to operation, and found both safety and commercial reasons for so doing, which justified the Licensing Board's expedited consideration of Licensee's request for interim relief.

3. Admission of Test Results Under Trade Secret Protection

The Licensing Board noted:

> We have had a few problems in the course of this proceeding which bear discussion at the outset. Intervenor has taken a strong, principled stand concerning the right of the public to know about information which may be relevant to the decision of the Board, but which is claimed by Westinghouse to be proprietary. The Board has tried to divorce that confidentiality issue from the consideration of health and safety issues, believing that confidentiality is important but can be resolved separately and expeditiously ***. *** [C]hallenges to the confidentiality of documents need not be resolved prior to the determination of safety and environmental issues.

Demonstration Program Order, at 10. At the close of the October 30 hearing, Decade orally moved for the disclosure of tests "conducted for safety purposes," notwithstanding their proprietary status, on the grounds that "the countervailing interest of the public relating to the safety aspect of ***

[the tests] exceeds any proprietary interest that the vendor may have when it comes to the safety test as opposed to the design parameters." See generally, Tr. 717-23. Decade declined to identify the specific tests which it considered to be within the purview of its motion, taking the position that the parties were "fully alerted ad nauseum" to Decade's arguments. Tr. 720. Since the close of the hearing, a briefing schedule has been established, and a conference call on the subject has been conducted by the Licensing Board. See, e.g., Tr. 748, 772-829; "Licensee's Response To Oral Motion of Wisconsin's Environmental Decade For Disclosure of Proprietary Information" (November 12, 1981); Answer of Westinghouse Electric Corporation, Appearing Specially, To Decade Motion For Public Disclosure of Proprietary Information" (November 12, 1981).

Decade filed an exception to the Licensing Board's "[a]dmission of test results under trade secret protection." Decade's Brief, at 2. However, Decade failed to identify which test results it was asserting should not have been received and accorded protected status, and its reference to page 10 of the initial decision is not enlightening. Accordingly, Decade's vague exception number 3 fails to comply with 10 C.F.R. § 2.762(a)(1), which requires that each exception "[s]tate concisely *** the single error or fact or law which is being asserted in that exception."

Further, Decade did not brief this exception. Exceptions not briefed are considered waived, and are disregarded by the Appeal Board in its consideration of the appeal. See, e.g., Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 N.R.C. 313, 315 (1978); Florida Power & Light Co. (St. Lucie Nuclear Plant, Unit 2), ALAB-435, 6 N.R.C. 541 (1977); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-367, 5 N.R.C. 92 (1977). Thus, Decade has waived any exception it may have had to the Licensing Board's "[a]dmission of test results under trade secret protection."

Finally, due to the vagueness of Decade's statement of its exception number 3, and its failure to brief the exception, one can only surmise which test results are the subject of its exception. Nevertheless, since Decade's motion now pending before the Licensing Board is a motion for the disclosure of all safety-related test results (without reference to whether they were "admitted" at the hearing), Decade's exception would--in any event--appear to be premature, since the Licensing Board has not yet finally ruled on the extent to which the subject test results will be accorded protected status, and since Decade has failed to challenge the Licensing Board's reasoning that Decade's challenge to the confidentiality of the test results need not have been resolved prior to the determination of the safety and environmental matters associated with Licensee's request for interim relief.

4. Rulings On Contentions 3, 4 and 5

Decade also took exceptions to the Licensing Board's rulings on Contentions 3, 4 and 5. See Decade's brief, at 2. However, Decade failed to brief those exceptions. As discussed above, exceptions which are not briefed are considered waived, and are disregarded by the Appeal Board. Thus, Decade has abandoned its exceptions numbered 4, 5 and 6.

In any event, the Licensing Board ruled correctly on Contentions 3, 4 and 5. All three contentions were the subject of "Licensee's Motion for Summary Disposition of Decade Contentions 3-6 As Related to Interim Operation of Unit 1," as well as "Licensee's Motion for Authorization for Interim Operation of Unit 1 with Steam Generator Tubes Sleeved Rather than Plugged.". These filings, including attachments, eatablished that there was "no genuine issue as to any material fact" and that Licensee was "entitled to a decision as a matter of law." Given the patent insufficiency of "Decade's Answer to Licensee's Motion for Summary Disposition and Decade's Statement of Factual Contentions Which Must Be Resolved Prior to a Decision on the Licensee's Motion for Interim Relief" (October 23, 1981), the Licensing Board could well have found for Licensee on the basis of the filings alone.[9]

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9 10 C.F.R. § 2.749(a) provides, in relevant part, that "[a]ll material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party." 10 C.F.R. § 2.749(b) provides, in part, that

However, consonant with its continued deference to Decade throughout the preceeding, the Licensing Board afforded Decade a hearing on its contentions as an additional opportunity to demonstrate the existence of a "genuine issue as to any material fact" with respect to Licensee's request for interim relief. See Tr. 405-492 (hearing on Contention 3); Tr. 493-527 (hearing on Contention 4); Tr. 527-539 (hearing on Contention 5). Decade's argument, and the Licensing Board's reasoning and rulings on those arguments, are concisely summarized in the initial decision. See Demonstration Program Order, at 13-18.

In short, Decade's argument with respect to Contention 3 (which alleges that the proprietary heating process used to join the sleeve to the tube will compromise the integrity of the tube, and may lead to circumferential rupture of the tube) is that Westinghouse Electric Corporation "would not have tests in progress to establish the validity of the joints if there was no genuine of fact to be determined." Tr. 409. However, Decade presented nothing to contradict the

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(continued)
"[w]hen a motion for summary disposition is made and supported ***, a party opposing the motion may not rest upon the mere allegations or denials of his answer." In this instance, though Licensee filed a detailed statement of material facts in support of its motion, as required by the Commission's regulations, Decade's responsive pleading did nothing more than assert simplistically that Decade Contentions 3, 4, 5 and 7 are "relevant" to Licensee's request for interim relief, and should therefore be tried. Decade did not even purport to either admit or deny each of the facts specified in Licensee's statement. Accordingly, the facts set forth in Licensee's statement were "deemed to be admitted."

laboratory tests and engineering studies presented by Licensee which indicate that the joint exceeds applicable ASME Code standards, and the Licensing Board correctly concluded that, as a matter of law, the continuing performance of additional tests does not, in and of itself, demonstrate the existence of a genuine issue of fact to be tried. See generally, Demonstration Program Order, at 13-16.

Decade's Contention 4 alleges that the annulus between the original tube and the sleeve may give rise to "an unexpectedly corrosive environment" if the tube should have a through wall crack which permits secondary water impurities to seep into the annulus. Decade considers it intuitively obvious that the narrow space between the sleeve and tube gives rise to a potentially greater rate of corrosion than an open space (see Tr. 494), but did not controvert the laboratory test results presented by Licensee which demonstrate that the risk of corrosion in the annulus is not greater than that experienced above the tube sheet and in tubesheet crevices. Nor did Decade controvert (except by expressing its doubts) Licensee's assertions that the material from which the sleeves are fabricated is an order of magnitude more corrosion-resistant than the material used to fabricate the original tubes. Accordingly, the Licensing Board correctly ruled in Licensee's favor on Decade Contention 4 as it related to Licensee's request for interim relief. See generally, Demonstration Program Order, at 16-17.

Finally, Decade's Contention 5 asserts that the presence of the sleeves will make the interpretation of eddy current test results extremely difficult and increase the probability that tubes with incipient failures may go undetected and rupture during a loss-of-coolant accident. Though there was some evidence that the presence of the sleeves would make eddy current testing more difficult, Decade did not controvert the Staff's assertion that the area in which testing might be more difficult--the joints--is not an area particularly susceptible to corrosion. Similarly, Decade did not controvert the assertions of the Staff and Licensee that the alleged testing difficulties had no safety implications since the integrity of the sleeved tube would be assured by hydrostatic testing before the tube was returned to service and since leakage between the sleeved tube and the secondary system would be continuously monitored during operation. The Licensing Board therefore ruled correctly on Decade Contention 5 as it related to Licensee's request for interim relief. See generally, Demonstration Program Ordee, at 17-18.

Thus, Decade waived its exceptions to the Licensing Board's rulings on Contentions 3, 4 and 5 by its failure to brief those exceptions. Accordingly, the Appeal Board need not reach the merits of those rulings. However, should the Appeal Board reach the merits of the Licensing Board's rulings on Contentions 3, 4 and 5, those rulings should be upheld.

5. Ruling On Contention 7

Decade also takes exception to the Licensing Board's ruling on Contention 7 (see Decade's Brief, at 2), which alleges:

> The large number of workers required to perform a full scale sleeving program in the highly radioactive environment of the primary side of the steam generator will exceed the ability of the licensee or vendor to provide from their stable work forces. This will necessitate the employment of untrained and transient "jumpers" to perform the bulk of the work which quality may deteriorate as a consequence.

(Emphasis supplied). Because Contention 7 is, by its express terms, limited to the full-scale sleeving program, Licensee did not consider it relevant to the demonstration program and, accordingly, did not move for summary disposition as to its request for interim relief with respect to Contention 7.[10] However, at tbe October 29-30 hearing, the Licensing Board -- in its discretion -- allowed Decade to attempt to defeat Licensee's request for interim relief by attempting to show a

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10 Licensee's failure to include Contention 7 in its written motion for summary disposition is of no moment, particularly in this context where Decade nonetheless discussed Contention 7 in its response to Licensee's motion for summary disposition, where Licensee had less notice than Decade that Contention 7 was arguably relevant to the demonstration program, and where all parties had ample opportunity at the October 29-30 hearing to present their positions as to the existence of an issue of material fact to be tried (regardless of whether that opportunity was formally presented in the context of "showing cause" or "summary disposition").

genuine issue as to a material fact with respect to Decade Contention 7. And, ultimately, the Licensing Board concluded that Decade had failed to establish the existence of such an issue for trial. See Demonstration Program Order, at 18-21.

Decade's arguments focused on allegations that there were serious problems with the quality of the work force working at the channel head in the San Onofre sleeving program, and that the contractor which hired the channel head workers for San Onofre also hired the workers for the demonstration program. Decade failed to controvert Licensee's description of the screening standards and extensive training program for channel head workers, and did not dispute Licensee's assertion that the Point Beach demonstration program workers would be trained and supervised by Westinghouse personnel, whereas the workers at San Onofre were supervised by the hiring contractor. Tr. 552-610. The Licensing Board explored the numerous methods used to supervise and verify the work performed by the channel head workers as a part of the demonstration program (Tr. 611-19), and invited Decade to "imagine" (Tr. 620) or "speculate" (Tr. 622) or "hypothesize" (Tr. 623) as to some type of defective work which might go undetected -- given Licensee's program of supervision and verification -- and which would create a safety hazard. See generally, Tr. 619-28, 632-35. The Licensing Board noted:

> Now, this is, I think, somewhat [un]fair because Applicant has had no opportunity to know what you might speculate about right now, and I would allow you to

> speculate about anything that might not be detected by the procedures that Applicant has, and if you can show me one thing, it seems to me we're likely to find that there is a basis for your contention. We have to at least speculate about something that's going to be done by these workers as a result of their alleged lack of trustworthy performance that would not be detected by the quality assurance program, because that also is part of the record and we want to know that it's a real safety problem, not just something that is going to happen at the site that will have no safety consequences.

Tr. 622-23. Though Decade was able to identify a past error by Licensee (unrelated to sleeving) which was detected by its quality assurance program, without safety significance (Tr. 637-640), Decade was unable even to hypothesize an error which might be made but might not be caught by quality assurance methods, and which would have safety consequences. See generally, Demonstration Program Order, at 18-21. Accordingly, the Licensing Board ruled correctly on Decade Contention 7 (as that contention related to Licensee's request for interim relief), and should be upheld.[11]

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11 This description of the Licensing Board's treatment of Contention 7, and Decade's failure to respond meaningfully is illustrative of the manner in which the hearing on all of the contentions was conducted. Decade was not required to present evidence; rather, it was allowed to bring forth facts in any manner it desired, including speculation of Decade's non-expert representative and questioning of Licensee. Licensee was not accorded these opportunities. See, e.g., Tr. 611-12.

III. CONCLUSION

As discussed above, Decade's appeal from the Licensing Board's November 5, 1981 "Memorandum and Order Authorizing Issuance of A License Amendment Permitting Return To Power With Up to Six Degraded Tubes Sleeved Rather Than Plugged" is interlocutory, and should be dismissed. Even if the appeal were not interlocutory, the exceptions taken lack merit, and should be denied.

Decade's exception to the "show cause" standards applied by the Licensing Board is without merit, since the Licensing Board essentially applied a lenient summary disposition-type analysis which afforded Decade an opportunity to defeat Licensee's request for interim relief simply by demonstrating the need for further discovery.

Decade's exception to the Licensing Board's ruling on Decade's motion for a continuance also lacks merit. Contrary to Decade's assertions, the Licensing Board did require Licensee to demonstrate its need for interim relief, and the multiplicity of extraordinary opportunities and procedural safeguards which the Licensing Board extended to Decade negated any prejudice to Decade which might have otherwise resulted from the expedited consideration of Licensee's request for interim relief.

Decade's exception to the "admission of test results under trade secret protection" fails to comply with 10 C.F.R. § 2.762(a)(1), and was not briefed, and therefore should not be considered on the merits by the Appeal Board. In any event, the appeal on this issue is particularly premature, since the Licensing Board has not yet finally ruled on Decade's motion for the public disclosure of proprietary test results.

Decade also failed to brief its exceptions to the Licensing Board's rulings on its Contentions 3, 4 and 5; those exceptions are therefore waived. In any case, the Licensing Board ruled correctly on Contentions 3, 4 and 5, since Decade failed to establish the existence of a genuine issue as to any material fact relevant to any of the contentions (as they related to Licensee's request for interim relief), and since Licensee was entitled to a decision as a matter of law.

Decade's exception to the Licensing Board's ruling on Contention 7, which expresses concern about the quality of the work performed by channel head workers, also lacks merit. Decade was unable even to hypothesize an error which might be made but might not be caught by quality assurance methods, and which would have safety consequences. The Licensing Board therefore properly found for Licensee.

Accordingly, for all the foregoing reasons, Decade's appeal should be dismissed.

Respectfully submitted,

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Dated: December 28, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Licensee's Brief In Response To Decade's Exceptions To Memorandum and Order Authorizing Interim Operation With Up To Six Tubes Sleeved Rather Than Plugged" were served, by deposit in the U.S. Mail, first class, postage prepaid, to all those on the attached Service List, this 28th day of December, 1981.

Delissa A. Ridgway

Delissa A. Ridgway

Dated: December 28, 1981

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