

1/20/82

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

WISCONSIN ELECTRIC POWER COMPANY

(Point Beach Nuclear Plant,
Units 1 and 2)

Docket Nos. 50-266
50-301

(Repair to Steam Generator Tubes)

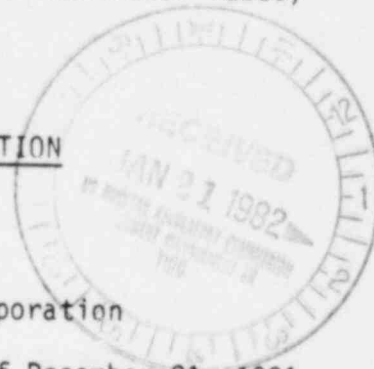
NRC STAFF RESPONSE TO
WESTINGHOUSE MOTION FOR RECONSIDERATION

I. INTRODUCTION

On December 31, 1981, Westinghouse Electric Corporation (Westinghouse) filed a "Motion for Reconsideration of December 21, 1981 Memorandum" (Motion) before the Atomic Safety and Licensing Board (Board) in this proceeding. For the reasons discussed below, the Staff supports those portions of the Motion which address the treatment accorded the affidavit submitted by Westinghouse in support of its proprietary claims. The Staff takes no position on the issue of trustworthiness of Intervenor Wisconsin's Environmental Decade (Decade), as raised by Westinghouse in its Motion.

II. BACKGROUND

On September 29, 1981, Wisconsin Electric Power Company (Licensee) submitted to the Board a document prepared by Westinghouse, entitled "Point Beach Steam Generator Sleeving Report for Wisconsin Electric Power Company, WCAP-9960 (Proprietary)" (Sleeving Report). The Licensee



DESIGNATED ORIGINAL

Certified By Le

8201230035 820120
PDR ADOCK 05000266
G PDR

DSO 5/11

claimed the Sleeving Report contained information of a proprietary nature belonging to Westinghouse, and requested that portions of the Sleeving Report be withheld from public disclosure pursuant to 10 C.F.R. § 2.790. Accompanying the Sleeving Report was a letter dated September 28, 1981 from Robert A. Wiesemann of Westinghouse to Harold R. Denton, Director, Office of Nuclear Reactor Regulation and an affidavit signed by Mr. Wiesemann which together constituted an application for withholding pursuant to 10 C.F.R. § 2.790(b)(1). On October 9, 1981, during an on-the-record telephone conference, the Board indicated that more information was needed from Westinghouse concerning its proprietary claims. Tr. at 95.

On November 12, 1981, Westinghouse, which had not previously been a party to this proceeding, filed, inter alia, a "Special Appearance of Westinghouse Electric Corporation" for the purpose of ensuring confidential treatment of its proprietary information. On November 13, 1981, by letter from Westinghouse counsel to the Board Chairman, Westinghouse submitted a second affidavit signed by Robert A. Wiesemann and a supplement thereto (Wiesemann Affidavit), which addressed the concerns voiced by the Board in the October 9, 1981 telephone conference. Westinghouse claimed pursuant to 10 C.F.R. § 2.790(b)(1)(ii) that the Wiesemann Affidavit was proprietary in its entirety. On November 29, 1981, the Staff notified Westinghouse by letter that the Staff had concluded that the information submitted by the Licensee fulfilled the proprietary criteria of 10 C.F.R. § 2.790(b)(4). The Staff had also concluded that the information should be withheld from public disclosure. On December 21, 1981, the Board issued its "Memorandum and Order (Concerning Preliminary Confidentiality Issues)" (Order). It is

that Order to which Westinghouse has filed its December 31, 1981 Motion for Reconsideration.

III. DISCUSSION

In its Motion of December 31, 1981, Westinghouse has addressed three topics which are discussed in the Board's December 21, 1981 Order. Motion at 2. With respect to these topics, Westinghouse has moved the Board to reconsider the language and conclusions drawn in the Order and to modify the Order accordingly. Motion at 2, 10. For the reasons discussed below, the Staff:

1. Supports Westinghouse's position concerning proprietary markings on the Wiesemann Affidavit;
 2. Takes no position with regard to the issue of Decade's trustworthiness as raised by Westinghouse in its Motion;
 3. Supports Westinghouse's position that the language used by the Board regarding Westinghouse's and the Staff's concern for the public's right to know should be reconsidered.
- A. TREATMENT OF AFFIDAVITS SUBMITTED PURSUANT TO 10 C.F.R. § 2.790(b)(1)(ii) AS PROPRIETARY IN THEIR ENTIRETY IS A LONGSTANDING POLICY AND PRACTICE OF THE NRC.

Westinghouse takes exception to the Board's discussion on pages 18-21 of the Order, where the Board views the lack of "appropriate markings" on

the Wieseemann Affidavit as evidence of a lack of good faith on the part of Westinghouse. Motion at 3. The Board determined that for a document to be claimed confidential in its entirety, as was the Wieseemann Affidavit, the entire document must be reviewed and each section certified confidential. Order at 20. Westinghouse argues that in claiming the whole document as proprietary it followed long-established procedures adopted by the Staff, and was acting in good faith. Motion at 3-4.

The Staff agrees with Westinghouse's position. As stated by Staff counsel during the on-the-record telephone conference of November 17, 1981, the Staff has never required an applicant in his supplemental affidavit to go through a full redaction process. Tr. at 794.

As further support for this statement, the attachment to this pleading is an affidavit of Edward C. Shomaker, Esq., intellectual property attorney with the Office of the Executive Legal Director. As noted by Mr. Shomaker, it has been the longstanding policy and practice of the NRC Staff, at least since April 21, 1976, the effective date of the new 10 C.F.R. § 2.790, to accept in their entirety supporting affidavits claimed to be proprietary by their submitters pursuant to 10 C.F.R. § 2.790(b)(1)(ii). Shomaker Affidavit at 2. This policy and practice was established because the information which is the subject of the agency's focus and the public's need to know is the original or underlying submittal and not the supplemental affidavit. Shomaker Affidavit at 2. Mr. Shomaker also notes, that were there a Freedom of Information Act (FOIA) request for such an affidavit, then the NRC would be required to segregate the exempt from non-exempt portions. Shomaker Affidavit at 3. There is no FOIA request for the Wieseemann Affidavit in these Point Beach proceedings. In the absence of

a FOIA request, the actions taken by Westinghouse in submitting an affidavit claimed to be proprietary pursuant to 10 C.F.R. § 2.790(b)(1)(ii) have been in complete conformity with the longstanding policy and practice of the NRC Staff.

The Board's Order of December 21, 1981, calls into question this longstanding Staff policy of accepting supporting proprietary affidavits in their entirety. Westinghouse argues that (1) the matter of "Public Releases" and the discussion of the "Appropriateness of the Certificate by the Applicant" was not an issue raised by the parties and therefore should not have been addressed sua sponte by the Board; and (2) that if the Board was to question the practice of accepting supplemental affidavits in their entirety as proprietary it should have first identified the practice as an issue and then afforded the affected parties an opportunity to comment. Motion at 2-3. The Staff agrees with these two arguments raised by Westinghouse. The Staff further submits that there is perhaps a difference of opinion between the Board and the Staff in relation to the proper interpretation of 10 C.F.R. § 2.790(b)(1)(ii) of the Commission's regulations. The Board in its Order at pp. 9 and 18-21 indicates that the regulation requires a submitter of an affidavit which contains proprietary information to "portion mark" his affidavit. As noted above, the Staff has a policy and practice which has developed over the past few years of not requiring such marking and that this policy has a practical rationale. However, the basis for this policy is also the Staff's interpretation of the Statement of Consideration for 10 C.F.R. § 2.790 which indicates that information claimed to be proprietary in a supporting affidavit will not be subjected to the procedural requirements of 10 C.F.R. § 2.790. 41 Fed. Reg. 11808 at 11809. March 22, 1976. The Staff's interpretation is that portion marking

is a procedural requirement of 10 C.F.R. § 2.790 for underlying submittals and that affidavits are exempt from such requirements. The regulation at 10 C.F.R. § 2.790(b)(1)(ii) itself states that "the affiant may designate with appropriate markings..." (emphasis added) information in the affidavit claimed to be proprietary. The Staff has never interpreted the "may" language as a requirement for portion marking. The Staff has, however, interpreted the language to mean that all affidavits will be public unless there is a claim for proprietary treatment. In that case the entire claimed portion--whether the whole affidavit or a portion thereof--will only be disclosed pursuant to Part 9 of the Commission's regulations which implements the FOIA.

Further, the Staff agrees that it would have been appropriate for the Board before departing from well-settled agency procedures of longstanding to afford parties affected by this policy and practice an opportunity to comment on this action. See Vermont Yankee Nuclear Power Corp. v. NPDC, 435 U.S. 519 (1977) at pp. 542-43.

Accordingly, for the foregoing reasons, the Staff supports Westinghouse's Motion for Reconsideration on this issue and believes that the longstanding policy of the NRC Staff to accept supporting affidavits as proprietary in their entirety should not be changed.

B. THE STAFF TAKES NO POSITION ON THE INTERPRETATION OF A DISCUSSION TO WHICH IT WAS NOT A PARTY.

In its Motion, Westinghouse seeks reconsideration of the Board's finding that the trustworthiness issue regarding Decade was "utterly without basis."

In support of this request, Westinghouse submits that the Board finding is erroneous and believes the error is the result of a misunderstanding of the information which Westinghouse counsel attempted to communicate in a telephone conversation with the Board Chairman. Motion at 5. This conversation was off the record and the Staff was not a party to it. In these circumstances the NRC Staff as a non-party to the phone conversation takes no position either in support of or in opposition to, this part of Westinghouse's Motion.

- C. THE BOARD'S LANGUAGE IN REFERENCE TO THE STAFF'S AND WESTINGHOUSE'S CONCERN FOR THE PUBLIC'S RIGHT TO KNOW SHOULD BE RECONSIDERED.

Westinghouse objects to the Board's castigation of Westinghouse and the NRC Staff for not having "a more healthy concern for the public's right to know." Motion at 8. While it is not clear in what way the Board feels the Staff has been deficient (See Order at 24), presumably the Board is referring to the Staff's acceptance of the Wiesemann Affidavit as proprietary in its entirety. As noted in the discussion of section A above, both the Staff and Westinghouse were simply following longstanding agency procedures. Additionally, there is no Freedom of Information Act request for the affidavit which would require the segregation of exempt and non-exempt portions. Accordingly, the Staff is at a loss to find anything in the record which would indicate that proper proprietary handling and procedures have not been followed by Westinghouse and the NRC Staff in regard to the Wiesemann Affidavit in question. However, the Staff notes that the only relief

requested by Westinghouse is the deletion of language used by the Board. While this language is an unfortunate choice of words, given the foregoing discussion, it does not affect the conclusions arrived at by the Board.

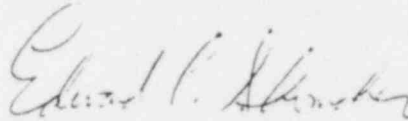
IV. CONCLUSION

Based on the foregoing discussion, the Staff supports Westinghouse's Motion for Reconsideration, parts A and C.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'R. G. Bachmann', followed by a horizontal line.

Richard G. Bachmann
Counsel for NRC Staff

A handwritten signature in dark ink, appearing to read 'Edward C. Shomaker'.

Edward C. Shomaker
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 20th day of January, 1982