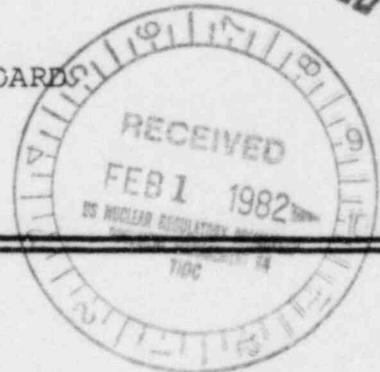


NUCLEAR REGULATORY COMMISSION

ORIGINAL

ATOMIC SAFETY AND LICENSING BOARD



In the Matter of:

WISCONSIN ELECTRIC POWER COMPANY :

Point Beach Nuclear Plant : DOCKET NOS. 50-266-OLA

Units 1 and 2 : 50-301-OLA

DATE: January 28, 1982 PAGES: 912 - 1001

AT: Washington, D. C.

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION

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5 WISCONSIN ELECTRIC POWER COMPANY : DOCKET NO.
Point Beach Nuclear Plant : 50-266-OLA
6 Units 1 and 2 : 50-301-OLA
7 - - - - - x

8 In the Offices of
9 Alderson Reporting Company
400 Virginia Ave., S.W.
10 Washington, D.C.

11 Thursday, January 28, 1982

12 A telephone hearing conference in the above-
13 entitled matter was convened, pursuant to notice, at
14 11:05 a.m.

15 BEFORE:

16 PETER B. BLOCH, Chairman
17 HUGH C. PAXTON
Atomic Safety and Licensing Board

18 APPEARANCES:

19 On behalf of Wisconsin Electric Power Company:

20 BRUCE CHURCHILL, Esq.
LISA RIDGEWAY, Esq.
Shaw, Pittman, Potts & Trowbridge
21 1800 M Street, N.W.
Washington, D.C. 20036

22 On behalf of Wisconsin's Environmental Decade:

23 PETER ANDERSON, Esq.
24 114 Lewis Carroll Street
Madison, Wisconsin 53703
25

1 APPEARANCES (Continued)

2 On behalf of Westinghouse Electric Corp.:

3 BART COWAN
4 FRANK DAVIS
5 JOHN KENRICK

6 On behalf of Nuclear Regulatory Commission:

7 RICHARD BACHMANN
8 STUART TREBY
9 EDWARD SHOMAKER

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1 occurred because at the time of the Ginna incident,
2 which there was a burst steam generator tube, I recall
3 that in this case, we were informed that there were some
4 tubes at Ginna which were sleeved.

5 Now, as I understand it, there are only ten of
6 some 3000 tubes at Ginna which are sleeved.
7 Nevertheless, I have asked the staff and Inspection and
8 Enforcement to inform the Board immediately if the tube
9 which did rupture was a sleeved tube. We have no
10 particular reason to believe that it was, but if it was
11 a sleeve tube that ruptured we would, of course, want to
12 know that in this proceeding.

13 MR. ANDERSON: Mr. Bloch, this is Peter
14 Anderson from Madison. If that communication, if it
15 should occur, could also be conveyed to the parties at
16 the same time, we would greatly appreciate that.

17 CHAIRMAN BLOCH: I assure you that it would be
18 immediately conveyed to the parties.

19 MR. BACHMANN: Judge Bloch, the correct number
20 of sleeve tubes at the Ginna plant is 21.

21 CHAIRMAN BLOCH: And is it roughly about 3000
22 tubes?

23 MR. BACHMANN: Yes, sir.

24 MR. ANDERSON: I would assume, if I could
25 interject -- I don't know this for a fact -- that it

1 would be approximately 3000 per generator, and 6000 for
2 the unit.

3 CHAIRMAN BLOCH: That's also possible. I was
4 trying to indicate that while it could be a sleeve tube,
5 that there was no strong probability of that, and that
6 was why we thought we could wait. The reason the
7 information is not available is that no one is now
8 entering the containment, and therefore, information on
9 whether it was sleeve tube or some other tube is not
10 available.

11 MR. SCHUMACHER: Judge Bloch, just one point
12 of clarification on that. The aren't planning on going
13 in until after Saturday at the Ginna plant, and so they
14 won't know which tube or tubes leaked until after that
15 time. And the sleeving program that is ongoing at Ginna
16 involves Babcock & Wilcox and not the Westinghouse
17 sleeving program that we're discussing here.

18 CHAIRMAN BLOCH: I understand. This was --
19 the Ginna plant experience was, however, cited in our
20 record as being prior experience that was somewhat
21 supportive of the safety of sleeving in general.

22 The next matter that I would like to address
23 before we begin is that I was informed that there is
24 some concern on the part of the parties as to what
25 exactly would be considered at the hearing we might have

1 on confidentiality issues.

2 I wish to refer to our December 21, 1981
3 memorandum on pages 23 and 24, which is the best
4 available example of the way in which we did apply the
5 balancing process which we see as applicable to the
6 determination of the Westinghouse proposal, originally
7 made by Wisconsin Electric Power Company, that documents
8 that were submitted should be held confidential.

9 In addition, there was a paragraph subsequent
10 to that in the order, memorandum rather, page 25, which
11 discussed a couple of the issues. That said, I think,
12 that the subject of today's conference is the most
13 efficient method of proceeding, in order to be able to
14 determine the pending confidentiality issues.

15 I would remark before you begin that at this
16 point, the Board is not inclined to consider that
17 information about the processes involved ought to be
18 released. The principal real issue appears to be
19 whether some or all of the tests, the safety tests,
20 ought to be released.

21 How shall we begin? Do the parties have a
22 notion as to who wishes to begin first?

23 MR. COWAN: Yes. This is Bart Cowan from
24 Westinghouse. Before we begin, perhaps there is another
25 preliminary matter that we might comment on. We have

1 had a number of telephone conversations with Decade, and
2 specifically, I have had a number of telephone
3 conversations with Mr. Anderson, and we have reached an
4 agreement with respect to a modification of the
5 protective agreement that was attached as Attachment A
6 to the Board's Supplementary Order of January 7, 1982.

7 We forwarded to Decade a copy of the revised
8 or modified protective agreement in our letter to Decade
9 dated January 15, 1982, and Mr. Anderson, on behalf of
10 Decade, executed the protective agreement and returned
11 it to me with his letter of January 22, 1982. And a
12 copy of Mr. Anderson's letter and the agreement was sent
13 to the -- directly to the Board.

14 CHAIRMAN BLOCH: Subject to further
15 reconsideration, which I do not anticipate will be
16 necessary, the agreement as signed and adopted by the
17 parties is hereby adopted as the Order of this Board.

18 MR. COWAN: That's what we were requesting,
19 Mr. Chairman, and I sent a letter to the Board on
20 January 26, 1982, with a copy to all parties requesting
21 just that, so that I think your statement and Order will
22 take care of the matter.

23 CHAIRMAN BLOCH: I have one more preliminary
24 matter, and that is that our decision on the Motion to
25 Reconsider has been completed. It's entirely a

1 secretarial matter at this point, and we expect it will
2 be available for pickup by 4:00 p.m. tomorrow.

3 The decision does not change any of the
4 substantive determinations, but does explain in somewhat
5 greater detail what we meant when we said there was a
6 lack of good faith and explains that we really did not
7 mean moral culpability when we were saying that, and
8 that the statement on the lack of concern for the public
9 interest was somewhat overstated, but we did mean to say
10 merely that our interpretation of the regulation and the
11 purposes of the regulation is different from the
12 parties'.

13 We will, of course, also mail that decision
14 out as soon as it's available.

15 DR. DAVIS: Judge Bloch, this is Frank Davis
16 from Westinghouse. I have one preliminary matter, if I
17 might. I believe that you placed the telephone call and
18 when you cut off conversation, the reporter is also
19 discommunicated from all other parties, so that we will
20 not be able to order transcripts at the end.

21 CHAIRMAN BLOCH: Oh, when I cut off, the line
22 is cut off? Is that correct?

23 DR. DAVIS: That's right, that's the
24 experience I've had, Your Honor. So if you would be so
25 kind as to --

1 CHAIRMAN BLOCH: I will not disconnect at the
2 end of the call, in that case. Thank you very much for
3 that. I've been doing it now five different times.

4 DR. DAVIS: Each time we've been cut off, so I
5 had to call the reporter back.

6 CHAIRMAN BLOCH: All right.

7 MR. BACHMANN: Judge Bloch, this is Richard
8 Bachmann of the staff. I might ask at this point that
9 if we could have the various parties identify each and
10 every person who is participating before we go on to the
11 more substantive matters here?

12 CHAIRMAN BLOCH: Okay, we can do that. We had
13 an informal roll call by the telephone operator. May I
14 ask the reporter if you already have the names of the
15 people on the line?

16 REPORTER: No, I don't.

17 CHAIRMAN BLOCH: Okay then, let's do that.
18 Mr. Bachmann, for the staff?

19 MR. BACHMANN: For the staff, myself, Richard
20 Bachmann, and also with me is Stuart Treby, Assistant
21 Chief Hearing Counsel, and Edward Shomaker, attorney for
22 the staff.

23 CHAIRMAN BLOCH: For Westinghouse?

24 MR. COWAN: This is Barton Cowan. I have with
25 me Frank Davis from the Westinghouse Law Department and

1 my partner, John Kenrick.

2 CHAIRMAN BLOCH: For intervenor?

3 MR. ANDERSON: Wisconsin's Environmental
4 Decade is by Peter Anderson.

5 CHAIRMAN BLOCH: And for Wisconsin Electric
6 Power Company?

7 MR. CHURCHILL: Bruce Churchill, and I have
8 with me Lisa Ridgeway.

9 CHAIRMAN BLOCH: Unless the parties object, I
10 think it would be appropriate, since it is
11 Westinghouse's proposal that its documents be given
12 trade secret status, that Westinghouse begin by
13 proposing procedures for us to use.

14 MR. COWAN: Fine, Mr. Chairman, and as a
15 preliminary matter, we have talked briefly with each of
16 the other parties who are on the line about the possible
17 procedures.

18 We think that a hearing date should be
19 established for the Board to conduct a hearing, if a
20 hearing proves necessary. The Board's present Order
21 establishes February 16 as a hearing date. It is my
22 understanding that some of the other parties have some
23 difficulty with that. We have a difficulty with that
24 date, and so after we get through the procedures, we're
25 going to suggest several possible alternative dates.

1 CHAIRMAN BLOCH: We no longer consider that
2 date to be a firm one.

3 MR. COWAN: Fine, Mr. Chairman.

4 We think that all parties who wish to should
5 be required by the Board Order to file testimony on the
6 issue or issues that are to be considered here, such
7 that the testimony is actually received by the other
8 parties ten days in advance of the hearing date. And
9 I'm assuming for this purpose that the hearing date will
10 be some time in March. If the hearing date were in
11 February, that ten-day period might have to be shortened
12 down to seven days.

13 Let me repeat that. All parties who wish
14 should file testimony such that it is in the hands of
15 the other parties ten days in advance of the hearing
16 date. Then after the parties have received the
17 testimony, the parties should notify the Board not less
18 than five days in advance of the hearing date, whether
19 they desire to cross examine on this pre-filed
20 testimony, and whether they desire to submit any
21 additional testimony in the way of rebuttal or response
22 to the pre-filed testimony.

23 If none of the parties wants to cross examine,
24 and none of the parties desire to submit any rebuttal or
25 response testimony, and if the Board does not desire to

1 cross examine and does not desire any unaddressed issue
2 being addressed with some supplemental testimony, then
3 we believe the matter can go forward without a hearing.
4 And in such a case, we would propose that the pre-filed
5 testimony be admitted as the testimony of the parties
6 who have submitted it as if it was read, and that would
7 be the testimony on the record for this purpose.

8 CHAIRMAN BLOCH: Two questions, Mr. Cowan. If
9 the party desires to cross examine, would you oppose our
10 requiring that there be an ex parte communication to the
11 Board be disclosed subsequently after cross examination
12 takes place concerning the proposed scope of cross
13 examination and the schedule for it, so that we can
14 decide whether we need to hold a live hearing in
15 Wisconsin or whether it can be accomplished by telephone.

16 MR. COWAN: We would not oppose that. In
17 fact, our next suggestion was that if any of the parties
18 -- and obviously, if the Board -- wished to cross
19 examine, that they would have to let the Board know
20 within at least five days in advance of the hearing
21 date. And then presumably, we would go forward with the
22 hearing, but the Board might wish to explore with that
23 party or parties the nature or scope of the cross
24 examination to see whether, in fact, a hearing in
25 Wisconsin is required.

1 CHAIRMAN BLOCH: And would the method that we
2 proposed for exploring that be acceptable? That is, the
3 filing of a cross examination plan that would be
4 disposed immediately after the cross examination is
5 accomplished.

6 I suppose if it's by telephone it can't be
7 immediately after, but it would have to be disposed
8 promptly after.

9 MR. COWAN: I suppose -- the reason I'm
10 hesitating is I suppose it turns a little bit on the
11 depth with which the Board would explore with the party
12 the nature of the cross examination. If the exploration
13 was well, how much cross examination would you have, how
14 much time would you estimate and what general areas,
15 then I don't think we have any objection. But if the
16 exploration was well, what points do you want to bring
17 out and why do you think those are best brought out by
18 cross examination, and where do you see the problems in
19 the testimony, then I do think we would have a problem
20 with an ex parte exploration.

21 CHAIRMAN BLOCH: I'm thinking more of the
22 former than of the latter; an outline of the subjects to
23 be covered and an estimate of how long each would take
24 to be accomplished.

25 MR. COWAN: Can we hold on that until a little

1 later? I'd like to consider that here, and can we come
2 back to that question, Mr. Chairman?

3 CHAIRMAN BLOCH: Let us do that.

4 MR. COWAN: I should state that if -- just so
5 that the parties know and so that the Board knows --
6 that if we find that we -- if we, Westinghouse, believe
7 that we need to cross examine and probably if we find
8 that we need to file any additional testimony by way of
9 rebuttal or response, that our inclination -- it's
10 stronger than an inclination -- that our position will
11 almost certainly be that we would want to do that in an
12 actual face-to-face hearing where all the parties are
13 present.

14 So that if it turns out -- and we don't know
15 whether Decade will be filing testimony or not, and of
16 course, we might want to cross examine on something the
17 staff said that they filed testimony -- if it turns out
18 that we want to cross examine on that, unless the nature
19 of the cross examination is a very summary type of
20 thing, we are going to be requesting an actual hearing
21 at that time.

22 I say that just for a full disclosure and not
23 because that decision has to be made right now.

24 CHAIRMAN BLOCH: Appreciate that. Mr. Cowan,
25 under our rules, do you think you're entitled to a

1 hearing on this issue, or do you think it's
2 discretionary with the Board?

3 MR. COWAN: I believe that if the Board is
4 going to make factual findings, as I think it has to in
5 this area, that we would be entitled to a hearing.

6 CHAIRMAN BLOCH: So, it's not a safety or
7 environmental issue, it's a procedural issue?

8 MR. COWAN: From the Westinghouse standpoint,
9 we view the disclosure of our proprietary information,
10 or the potential disclosure of our proprietary
11 information, as a substantive matter, and so we would
12 think that we're entitled to a hearing on a substantive
13 matter, whether the procedures of the Commission --

14 CHAIRMAN BLOCH: I am not sure that I would
15 disagree with the need for such a hearing depending on
16 what the issues are, but I do want to clarify the
17 procedural status. In particular, so you think you're
18 entitled to a hearing, and my understanding of the
19 Administrative Procedure Act is that licensing matters
20 do not generally require hearings under that Act. And
21 this being an information determination, I just am not
22 sure of the legal basis for thinking that a face-to-face
23 hearing would be required.

24 MR. COWAN: I think there are two bases for
25 that. One is, of course, the rules of practice for the

1 domestic licensing proceedings in Part 2, which
2 contemplate I think a hearing on the record. And if
3 this is, in fact, an issue which is proper to be taken
4 up by the Licensing Board within the framework of the
5 Wisconsin licensing proceeding, then we think it's
6 governed by the rules in Part 2, and under those rules
7 we think that any factual determination we're entitled
8 to a hearing on.

9 Beyond that, we would think that as a matter
10 of due process, we would be entitled to a hearing,
11 whether or not the rules of the Commission so provide,
12 where the end result could be the depriving of us of
13 property rights that we have in information.

14 CHAIRMAN BLOCH: And is there a specific
15 section of Part 2 that I should be particularly aware of?

16 MR. COWAN: Not off the top of my head, Mr.
17 Chairman, because I have to tell you that I have not
18 researched it quite from this angle. I don't believe
19 there is any specific provision in Part 2 that says, for
20 example, that with respect to the determination of
21 proprietary information matters or with respect to the
22 determination of procedural matters, that parties are
23 entitled to a hearing on the record. There's no
24 specific language of that. I think the whole thrust of
25 Part 2, however, is to have adjudicatory proceeding that

1 encompasses all of the issues, and those issues that are
2 before the Board, it seems to me, if they properly
3 include this issue, should have a hearing.

4 MR. CHURCHILL: Your Honor, this is Bruce
5 Churchill. I agree with Mr. Cowan, and maybe I could
6 just make two quick points.

7 Number one, I believe this to be a substantive
8 matter rather than procedural in the sense that the
9 outcome of this could possibly affect the substance of
10 the hearing in the sense that if Westinghouse were
11 forced to disclose information, they might be then in a
12 position where they would have to withdraw that
13 information, the factual information, as the basis for
14 the record upon which the applicant is relying in
15 prosecution of its application for a license amendment.

16 And secondly, I think that once we go down the
17 road of requiring testimony, of having submitted
18 testimony, it becomes a factual evidentiary basis. And
19 while I don't have a specific citation to Part 2 in
20 front of me, I think the entire fabric of Part 2 sets
21 forth a procedure for giving the parties the right for a
22 hearing on the factual and evidentiary matters that are
23 introduced, including the rights of cross examination
24 and rebuttal and so forth.

25 And I think that once we do start with the

1 filing of testimony containing factual information upon
2 which the Board will rely in making its decisions, that
3 a complete reading of Part 2 would entitle the parties,
4 or any party who wants it, all of its rights under Part
5 2, including cross examination.

6 I don't think that precludes the parties from
7 agreeing that they wouldn't need a hearing, if all the
8 parties agreed, even though evidence was submitted in
9 writing. But I do think the party would be entitled to
10 a full hearing on it.

11 CHAIRMAN BLOCH: Do I hear any further
12 argumentation on this that is different either because
13 it disagrees or adds material new argument?

14 (No response.)

15 There being none, Mr. Cowan, would you like to
16 complete your presentation, please?

17 MR. COWAN: Yes. Whether or not there is a
18 hearing, we think that after the hearing or after the
19 date that the Board determines that there is not going
20 to be a hearing, that there should be a briefing
21 procedure. We would suggest that there be simultaneous
22 briefs filed by the parties perhaps 20 days after the
23 conclusion of the hearing. We would suggest less time
24 than that except that as a practical matter, it takes
25 around five to ten days for us to get a copy of the

1 transcript.

2 And then that provision be made for some
3 responsive briefs, ten or 15 days after the filing of
4 the direct briefs. So the matter would be before the
5 Board based upon the record at the hearing, plus briefs,
6 because a number of the points that would be involved
7 may well have more legal input to them than they have
8 factual determinations.

9 CHAIRMAN BLOCH: How would you time the
10 simultaneous briefs, in terms of a schedule?

11 MR. COWAN: Well, we would take whatever the
12 hearing date, and I'm assuming for the moment that the
13 reporting would be such that we would be able to get a
14 transcript within a certain period of time that is
15 relatively short. We would take whatever the hearing
16 date is, and if that date is X, the first briefs would
17 be due on X plus 20 days.

18 CHAIRMAN BLOCH: Why don't we make it receipt
19 of transcript plus 18 days, just to account for that
20 possible delay?

21 MR. COWAN: Eighteen days after receipt of
22 transcript will be fine, Mr. Chairman.

23 CHAIRMAN BLOCH: When I say let us make it
24 that, I'm saying -- that's consistent with what you're
25 saying, and, of course, with other parties.

1 MR. COWAN: Yes. The mechanism by which we
2 figure out the days is important only in the sense that
3 we want to make sure that all the parties have the
4 transcript of the hearing, if there is a hearing, in
5 front of them with enough time to use that transcript in
6 the briefing procedure.

7 And then we would suggest after the briefs are
8 filed, perhaps 15 days later each party could file a
9 response to the other side's brief, if they so chose.

10 CHAIRMAN BLOCH: Mr. Cowan, is there any
11 possibility that there might be even lesser need for
12 cross examination? That is, that it could be resolved,
13 depending on what the facts are, through deposition
14 rather than through a telephone or an onsite hearing?
15 In which case, we ought to have the person explaining
16 why he needs to have a face-to-face cross examination,
17 at least explain why he hasn't decided he could do it by
18 deposition instead.

19 MR. COWAN: Each party, of course, would be
20 entitled to present at a deposition, so in that sense, a
21 deposition could substitute for a hearing, but the Board
22 would not be present at a deposition. And either to the
23 extent the Board might have cross examination questions
24 or to the extent that there might be problems at a
25 deposition, and to the extent that credibility is an

1 issue, we think that it's important to have the Board
2 present if, in fact, cross examination is desirable.

3 CHAIRMAN BLOCH: I just wanted to have the
4 parties keep in mind that what we want to do is to
5 resolve this issue with as little time and involvement
6 for everybody as we can, and if a deposition would serve
7 the purpose of the party, then we should know that.

8 MR. COWAN: From our standpoint, if we -- if
9 Deade is going to be filing testimony, a deposition
10 might well be satisfactory from that standpoint, but if
11 there is going to be cross examination of our witnesses,
12 I think that we would probably want to have the Board
13 present at such cross examination.

14 CHAIRMAN BLOCH: I was suggesting that we
15 don't know the specifics right now, and if it was a very
16 limited kind of cross examination, that might
17 conceivably not be necessary.

18 MR. COWAN: Our experience has been that
19 hearings of this type have taken between one and two
20 days in other contexts, -- and we've never had one quite
21 in this context, but in other contexts this type of
22 hearing usually takes more than just a few questions.

23 CHAIRMAN BLOCH: Okay. Have you completed,
24 Mr. Cowan?

25 MR. COWAN: On the procedural aspects, I have

1 completed, Mr. Chairman, at least our suggestions. And
2 as I think I have indicated here, we have had some
3 discussion with the parties on this, and this represents
4 our thoughts with regard to possible procedures, but we
5 have obviously flexibility.

6 With regard to the dates, we would suggest as
7 a possible date the 10th of March, which is a Wednesday,
8 if there has to be a hearing, as our first choice of
9 dates for the hearing. We do that taking into account
10 our knowledge, at least limited, of some of the other
11 parties' problems and some other dates. There certainly
12 would be a number of other dates that would be
13 acceptable to us.

14 We would like to address the issue -- after we
15 get the procedures down, we would like to spend a little
16 bit of time defining the issue that is going to be
17 addressed in the testimony and the nature of that issue.

18 CHAIRMAN BLOCH: Okay, let us try to get to
19 that second.

20 Mr. Churchill, are there ways in which you
21 disagree with Mr. Cowan's position?

22 MR. CHURCHILL: No. I do have a question of
23 clarification, though. And we talked about simultaneous
24 briefs filed 18 days after receipt of transcript of the
25 hearing. I presume we would also have briefs if there

1 were no hearing.

2 CHAIRMAN BLOCH: That had occurred to me,
3 also. I thank you for bringing that up.

4 MR. COWAN: I thought I mentioned that. I
5 would time the -- if there were no hearing, I would then
6 say the briefs are due 18 days after the scheduled date
7 of the hearing. If it has not been held, of course.

8 CHAIRMAN BLOCH: Mr. Churchill, is that all?

9 MR. CHURCHILL: One other point. On the date,
10 March 10 is acceptable to us. However, for our
11 convenience, both Ms. Ridgeway and I have a big
12 operating license hearing starting March 23rd down in
13 New Orleans, and it would be inconvenient for us to do
14 it any later than March 10. But March 10 is okay.

15 CHAIRMAN BLOCH: Mr. Anderson, would you like
16 to comment, please?

17 MR. ANDERSON: Yes. This portion of the
18 discussion, as I announced both in the advance notice we
19 provided to the Board and the parties during the last
20 telephone conference from our concern that we may be
21 getting too far down the side roads and losing track of
22 the main issue. And our thought was that it may well be
23 that the whole dispute here could be tried basically on
24 the law and the policy without that much real dispute as
25 to what the facts were. And we support what Mr. Cowan

1 said.

2 I would just elaborate in terms of a small
3 elaboration and in light of the conversation, that
4 instead of individual phone calls to the Board's
5 secretary five days before the scheduled date of the
6 hearing, that we might want to schedule at that time a
7 telephone conference so that we can all talk at the --

8 (The phone line was disconnected.)

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1 CHAIRMAN BLOCH: My apologies to you, Mr.
2 Anderson, since you were interrupted. My understanding
3 from the NRC operator is that workmen were doing work on
4 her panel and that that disrupted the call from the
5 operator's panel.

6 MR. ANDERSON: I thought it was a sleeve on
7 the tube telephone line that was rupturing.

8 CHAIRMAN BLOCH: I was sure that would occur
9 to you.

10 Mr. Anderson, would you like to continue?

11 MR. ANDERSON: Yes. The suggestion I was
12 making just in terms of a slight elaboration on Mr.
13 Cowan's proposal was that instead of individual calls to
14 the Board's secretary five days before the scheduled
15 hearing that we have a conference call scheduled at
16 which point we would each state if we desired cross
17 examination and then go immediately to the second phase;
18 and if any party does want cross examination, they will
19 state at that time the scope and the nature so the Board
20 can decide whether there is sufficient justification for
21 the hearing to be held.

22 CHAIRMAN BLOCH: Mr. Cowan, do you have any
23 problem with that suggestion?

24 MR. COWAN: We would have no problem with a
25 conference call as Mr. Anderson suggests rather than

1 individual calls. That has a lot of merit, I think, and
2 it could be done either way.

3 CHAIRMAN BLOCH: Mr. Anderson, would you like
4 to continue?

5 MR. ANDERSON: Yes. And secondly, we wanted
6 to suggest another slight elaboration, that if we do go
7 this route that the schedule of that hearing date be
8 clearly labeled in the notice as a contingent date so
9 that there would be no problem with adequate notice for
10 cancellation of that hearing date.

11 And lastly, we'd like to have any scheduling
12 order indicate the specific procedures to be followed in
13 the event that either testimony or briefs contains
14 proprietary or alleged proprietary information as to
15 what protective measures should be adhered to.

16 CHAIRMAN BLOCH: Would you like to give me
17 your suggestion on how we should go about that?

18 MR. ANDERSON: I'm not that conversant
19 specifically with the procedures used, but I just want
20 one to note if it should not go to docket, for example,
21 if it should go to the Board, for them to dispose of it
22 in a way that would go to Docketing in a protected
23 manner or whatever.

24 I don't know the procedures, and I don't want
25 to make any suggestion without being familiar with the

1 logistical processes there. But I just wanted to
2 indicate if we're alerted to the procedure that's
3 proposed, that's asked for in advance, it would be less
4 problems in that.

5 CHAIRMAN BLOCH: Mr. Anderson, I would
6 consider that testimony filed would be in the nature of
7 affidavits bearing on the confidentiality of other
8 documents, and therefore, the ruling which we already
9 made on the Weissman affidavit would be applicable, and
10 therefore we would expect that there would be
11 determinations made as to which portions were
12 confidential, and if that were done carefully we would
13 expect not to have to consider that at all further in
14 the proceeding.

15 MR. ANDERSON: Well, to be precise, we had no
16 contemplation ourselves or anything in any testimony we
17 submitted or affidavits being allegedly proprietary.
18 But it is our present contemplation of how this will
19 unfold that references in our brief will refer to, for
20 example, specific illustrative examples from the
21 Sleeving Report which are alleged to be proprietary.

22 And I wanted to know what procedure you wanted
23 us to do in terms of distribution of that brief and
24 submission of that brief.

25 CHAIRMAN BLOCH: The other parties will have a

1 chance to comment, but those sections should be
2 bracketed by you and marked as having been claimed to be
3 confidential by the other parties. And then we will
4 have to decide a method by which there can be a deleted
5 copy made available. If it's not extensive, you might
6 be willing to provide us with a second copy which just
7 whites out those portions.

8 MR. ANDERSON: Do you want these dual copies
9 to go to you or to the normal services which includes
10 Docketing?

11 CHAIRMAN BLOCH: The most important recipient
12 is Docketing. The parties and the Board should get the
13 copy with just the bracket on it, the brackets so we
14 will know what's deleted.

15 MR. ANDERSON: Yes. But do you want the copy
16 with those brackets and the words in the brackets given
17 to the Docketing and Service?

18 CHAIRMAN BLOCH: No. The Docketing and
19 Service need not receive anything with the brackets on
20 it. The parties may correct me or the staff may, but I
21 don't think they need to.

22 MR. DAVIS: Your Honor, this is Frank Davis.
23 I have been following a procedure of leaving the
24 brackets in and the markings indicating what sections
25 we're claiming apply to that bracketed portion and then

1 masking the words within the brackets.

2 As I saw it, the importance of leaving the
3 brackets in is to indicate to the reader that that was
4 not some sort of misprint or unexplained absence but
5 rather meant something.

6 CHAIRMAN BLOCH: That's exactly the procedure
7 that I was suggesting; that the Docketing Section should
8 get a deleted copy which has the brackets but not the
9 contents of the brackets. And then of course it should
10 be clearly marked on the cover as containing proprietary
11 information on all those copies in which the proprietary
12 information is actually included; that is, the copies
13 that are mailed to the Board and to the other parties.

14 MR. DAVIS: And then the unexpurgated copies
15 would go to the parties and the Board.

16 CHAIRMAN BLOCH: Well, the unexpurgated copies
17 would, and the expurgated copy would go to Docketing.

18 MR. COWAN: Mr. Chairman, we would ask that
19 the Decade, if we're talking about the briefs for a
20 moment, the Decade filed the unexpurgated copy -- that
21 is, the copy that contains the proprietary information
22 in their brief, and that upon our receiving it -- and
23 indicate in that copy what they believe is proprietary
24 -- and upon our receiving it we would call, I would call
25 Peter Anderson or whoever Mr. Anderson designates and

1 would advise him as to whether we think there is any
2 other information in that brief that might be
3 proprietary before he files the nonproprietary brief
4 with the Docketing and Service Section and makes it
5 publicly available.

6 CHAIRMAN BLOCH: Mr. Anderson, is that
7 acceptable?

8 MR. ANDEPSON: As long as we understand that
9 Mr. Cowan meant to say was alleged to be proprietary as
10 opposed to what is proprietary, that's acceptable with
11 us.

12 MR. COWAN: It's understood that from your
13 standpoint it's always only alleged to be proprietary.

14 MR. ANDERSON: Thank you, Mr. Cowan.

15 MR. COWAN: Okay. But we have found that
16 sometimes things slip through otherwise, and so we would
17 ask for that. And I think if that's acceptable, and I
18 understand that it is, that would be the procedure on
19 the briefs.

20 I might say that we always make every effort
21 to write these briefs from our standpoint in a
22 nonproprietary way without using any proprietary
23 information. What we sometimes do is use the technique
24 of having a brief with an appendix, and when we have
25 proprietary information, we just place that in the

1 appendix and then we can just delete the appendix from
2 the nonproprietary version so that the brief reads
3 smoothly.

4 There are a number of techniques, and I can
5 talk privately with Mr. Anderson on some of them, that
6 I've seen used to minimize the problem in briefing.

7 CHAIRMAN BLOCH: That all sounds very
8 helpful. We do adopt the procedure that Mr. Cowan just
9 suggested and to which Mr. Anderson consented.

10 Mr. Anderson, you may continue.

11 MR. ANDERSON: I'd like to restate it in a
12 single place so that I'm clear exactly what we're
13 doing. I would send a proposed unexpurgated version
14 with the brackets where we believe there are allegations
15 for proprietary claims to the parties, and nothing would
16 be sent to Docketing, and that of course it would go to
17 the Board as well.

18 Upon confirmation of that or proposed
19 additional deletions, we'd make an expurgated copy and
20 send it to Docketing and Service, is that correct?

21 CHAIRMAN BLOCH: That's my understanding, with
22 this one proviso, that if there is a serious conflict
23 between Westinghouse and Intervenor as to whether
24 something is claimed to be proprietary, the Board could
25 be called on to resolve that.

1 MR. SHOMAKER: Chairman Bloch, I just have one
2 other clarification, if I will.

3 We really have two different docketing areas.
4 We have the central docket file and we have the docket
5 automatically in the public document room. The central
6 docket file almost always receives the proprietary
7 version of any submittal and they protect it as such,
8 and that's not a publicly available file. The other
9 docketed file area is available for the public document
10 room.

11 So I'd suggest that the proprietary claimed
12 version, a copy go to the central file and then go
13 through the same procedures you just outlined for the
14 nonproprietary version.

15 CHAIRMAN BLOCH: That sounds acceptable except
16 since that will be a more official version of our
17 record, it sounds to me that the copy to be sent to the
18 central file should be deferred until after Mr. Cowan
19 and Mr. Anderson have talked so that it will contain all
20 of the appropriate brackets.

21 Is that acceptable, Mr. Shomaker?

22 MR. SHOMAKER: That's acceptable. I just
23 wanted to make it clear that the central file in the
24 Phillips Building by docket will eventually have the
25 proprietary or claimed proprietary version.

1 MR. COWAN: Yes. Our understanding is the
2 same, but the Chairman's comment just before that we and
3 Mr. Anderson would have an opportunity to talk before
4 the copy went to that central docketing is proper; that
5 is, we'd like them to get only one proprietary version
6 and that being the one that is finally agreed is from
7 our standpoint proprietary and from Mr. Anderson's
8 standpoint as alleged to be proprietary.

9 CHAIRMAN BLOCH: Mr. Anderson, would you like
10 to continue?

11 MR. ANDERSON: Before that could I ask what
12 the official name of the central file is in a formal
13 sense? Is it just called Docketing Service Central File?

14 CHAIRMAN BLOCH: Mr. Shomaker?

15 MR. SHOMAKER: It's designated as central file.

16 MR. ANDERSON: So Central File, Nuclear
17 Regulatory Commission, Washington, D.C.?

18 CHAIRMAN BLOCH: Isn't that, Mr. Shomaker, the
19 copy that's usually just addressed to the secretary?

20 MR. SHOMAKER: If you wanted to send it to the
21 person who handles that it's Steve Scott. Send it to
22 his attention and I'll already alert him of it.

23 MR. ANDERSON: And when we make the central
24 file submittal it will go to Steve Scott in the
25 Technical Information and Document Control Branch.

1 CHAIRMAN BLOCH: But Mr. Shomaker, hasn't
2 everything that's been filed been getting to the central
3 file?

4 MR. SHOMAKER: Yes, it has. Mr. Anderson just
5 asked who handled that or whose attention you could send
6 it to.

7 CHAIRMAN BLOCH: Okay. But ordinarily if you
8 just addressed it to the Office of the Secretary, which
9 is how it's usually done, it gets there, right?

10 MR. SHOMAKER: Yes.

11 CHAIRMAN BLOCH: Okay.

12 MR. DAVIS: I'd like to clarify one point. I
13 was not aware of this procedure where there was one
14 office within the Commission which should be getting a
15 copy of the proprietary documents with the proprietary
16 information contained within the brackets. I haven't
17 been doing that. I've just been sending three masked
18 copies to the general address, Secretary of the
19 Commission.

20 I will endeavor to promptly correct that and
21 get a copy to the central file.

22 CHAIRMAN BLOCH: Mr. Davis, I think we'd
23 appreciate that because I think that may be necessary
24 for the appeal record.

25 MR. COWAN: The other thing is that when we

1 send it into the central file, and I assume when Decade
2 does, they need to mark on the envelope, on the outside
3 of the envelope that it contains proprietary information.

4 CHAIRMAN BLOCH: Mr. Anderson.

5 MR. ANDERSON: That completes what I have to
6 say in this point of the agenda.

7 MR. COWAN: Can I make a comment on one other
8 part of the handling of the hearing and the briefs? And
9 that is that it may be that the testimony that is
10 prefiled would in and of itself contain some proprietary
11 information. I don't know yet what the shape of that
12 testimony will look like from our standpoint, so I don't
13 know if it will or will not.

14 But it may also be that if a hearing is
15 necessary that at some point in the hearing it will be
16 necessary to have an in camera portion of the hearing.

17 CHAIRMAN BLOCH: I understand that. In terms
18 of the markings on the testimony, I have stated that it
19 is my belief that the appropriate markings criteria,
20 which we explained in our previous decision, could
21 pertain to the testimony, because I would consider even
22 the testimony to be in the nature of affidavits
23 supporting the confidentiality of underlying documents.

24 Would the staff like to comment?

25 MR. BACHMAN: Yes, sir. The March 10th date

1 is fine as far as the staff is concerned. In fact,
2 probably any day after --

3 I would like to comment and ask that --

4 CHAIRMAN BLOCH: I'm sorry. Mr. Bachman, you
5 said "any day after" and then it was cut off.

6 MR. BACHMAN: Excuse me. Any day starting
7 with the week of the 23rd, 24th of February on to and
8 including March 10th would be all right with the staff
9 as far as a hearing date.

10 CHAIRMAN BLOCH: Before you continue, Mr.
11 Anderson, you had no problem with March 10th, did you?
12 Did you want it earlier?

13 MR. ANDERSON: No, that's satisfactory, sir.

14 CHAIRMAN BLOCH: Okay. Mr. Bachman, please
15 continue.

16 MR. BACHMAN: On a procedural matter, though,
17 the staff requests that the Board set some day certain
18 for the submission of the post-hearing briefs rather
19 than after receipt of the transcripts because we may
20 have many varying times of receipt, and if we could just
21 set a date say 20 days after the day the hearing was to
22 commence, in case it didn't --

23 CHAIRMAN BLOCH: Hello, Mr. Bachman?

24 MR. BACHMAN: Yes, sir. Can you hear me?

25 CHAIRMAN BLOCH: You said "didn't" and then

1 you trailed off.

2 MR. BACHMAN: I'm sorry. We seem to have some
3 problems with this connection.

4 The staff would like to have a day set or a
5 date set so many days after the close of the hearing for
6 filing of post-hearing briefs rather than relying upon
7 date of receipt of transcripts, since there will
8 probably be many varying days of receipt, if that would
9 be all right with you, sir.

10 CHAIRMAN BLOCH: That sounds acceptable.

11 Are there any further comments on scheduling
12 matters before we try to further clarify the subject
13 matter of the hearing?

14 MR. COWAN: Only this, Mr. Chairman. I assume
15 that the inclination of the Board would be to schedule
16 the hearing, if a hearing is necessary, in Milwaukee,
17 Wisconsin. We don't have any objection to that as such;
18 however, it may be that everyone involved in the
19 hearing, if Decade does not file any testimony or if
20 Decade files testimony but there is no cross examination
21 on it, that everyone involved in the hearing other than
22 Mr. Anderson and perhaps Miss Falk would be located in
23 Washington and/or Pittsburgh. And it may be that we
24 will have, for example, two or three people as witnesses
25 in addition to the lawyers here, and the staff may have

1 some witnesses in addition. So that I would at least
2 like to leave open for consideration the possibility
3 after we see what the hearing is shaping up to be, the
4 possibility that the hearing be held in Washington.
5 Obviously we'd be delighted to host everyone in
6 Pittsburgh, but I guess that's too much to hope for. So
7 the possibility that the hearing be in Washington if it
8 turns out that all or substantially everybody would be
9 coming to us from Washington.

10 CHAIRMAN BLOCH: Mr. Cowan, the only thing
11 that concerns me is that I'm not sure what our
12 obligations are in terms of public notice, and if there
13 is a 15-day requirement, as there may be, I'm not sure
14 how I can notice the hearing in two different places.

15 MR. COWAN: Yes, sir. We of course wouldn't
16 know until we got to five days before the hearing where
17 it was going to be, I guess.

18 CHAIRMAN BLOCH: Yes. I think we have to be
19 more definite than that. Now, if you were able to
20 negotiate with Mr. Anderson and somehow get him to agree
21 to a Pittsburgh or Washington location, that would be
22 acceptable to us. I don't see any reason why we would
23 have to have a Wisconsin place unless Intervenors
24 insisted on it, in which case it seems to me that it's
25 related to their amendment and that the amendment

1 proceedings generally are in that location.

2 MR. COWAN: Let me talk with Mr. Anderson
3 separately from this phone conversation. Perhaps we can
4 come up with something. Maybe we can't, but let me talk
5 with him.

6 CHAIRMAN BLOCH: Okay.

7 Are there any other comments on scheduling
8 matters?

9 MR. CHURCHILL: Yes. I have one observation.
10 I think Mr. Anderson's first point was talking about
11 going off down side roads a little prematurely, because
12 he thought maybe it was possible that his case would be
13 an argument on policy and law rather than on submitting
14 evidence. I think this procedure is consistent with
15 that. If Mr. Anderson does not choose to submit
16 evidence, he can simply pass up that phase of it and
17 start in on his brief when we come to the briefing
18 phase; because I think Mr. Cowan's proposal was that all
19 parties who desire to would file testimony as of that
20 time. So he wouldn't be required to file testimony, and
21 if he did want to make his arguments on policy and law,
22 we have the briefing schedule which is perfect for that.
23 MR. ANDERSON: Let me, if I may, interject to
24 be clear. We're not saying there are no issues of
25 fact. We're saying that the issues of fact are

1 probably, if we contemplate things correctly, not going
2 to be in dispute, so we would be arguing facts. It's
3 just that I don't think there's a need, as I understand
4 the issue now, to have an adjudicatory hearing to
5 resolve disputes because I don't think there will be any
6 factual disputes, if I understand what's going to come.

7 CHAIRMAN BLOCH: You think that most of the
8 dispute will be over the interpretation of the facts.

9 MR. ANDERSON: Right. And the application of
10 which policy and what weight and so forth. And the
11 adjudicatory hearing, of course, is only needed if it's
12 a dispute over fact.

13 CHAIRMAN BLOCH: Okay. We will get to those
14 questions in a moment. That's not directly related, I
15 think, to the scheduling at this point.

16 Are there any other strictly scheduling
17 comments? In that case I am prepared to establish a
18 hearing schedule. I'd like to point out that the
19 purpose of this schedule is to help us to achieve an
20 efficient resolution of confidentiality issues in this
21 case, and I urge all of the parties to make their
22 filings in a way that keeps that basic objective in
23 mind. That means that testimony should be organized in
24 a way which will make it possible to be efficient in
25 disposing of these issues, clearly laid out and

1 organized so that we can group issues together as much
2 as possible.

3 That said, I will set a hearing date for March
4 10, 1982 in Milwaukee, Wisconsin with a possible change
5 in date upon subsequent agreement of the parties --
6 excuse me -- of location.

7 Prior to that date, ten days before that date
8 all parties should have received written testimony which
9 would be submitted at that hearing on behalf of each of
10 the parties. Five days after the receipt of the
11 pretrial testimony the Board will schedule a telephone
12 conference to discuss the most efficient means of
13 proceeding from that point. So that conference would be
14 held on March 5th, which is a Friday.

15 MR. CHURCHILL: Your Honor, ten days before
16 the 10th I believe falls on a Sunday.

17 CHAIRMAN BLOCH: I see. So that means that it
18 would be received on the 1st of March. Okay. Why don't
19 we change that? Let's not have it received on the 1st
20 of March. Let's have it received on the 26th of
21 February. The testimony of the parties should be
22 received by other parties by Friday, the 26th of
23 February; and then our telephone conference will be
24 scheduled for 11:00 a.m., Friday, February 26th.

25 MR. ANDERSON: March 5th.

1 CHAIRMAN BLOCH: Excuse me. March 5th.

2 Excuse me. That's correct.

3 MR. COWAN: And 11:00 of course is Eastern
4 Standard Time?

5 CHAIRMAN BLOCH: Eastern Standard Time. That
6 will help other parties wake up in time for our hearing.

7 MR. CHURCHILL: Your Honor, I won't be
8 available on March 5th. I'll be in Tulsa at a
9 demonstration involving another hearing.

10 CHAIRMAN BLOCH: That's a coincidence. I'm
11 also not available on March 5th. We had better schedule
12 that for March 8th.

13 MR. ANDERSON: Could I suggest, if it's all
14 right with the parties, that since we're going to be
15 filing it in advance of ten days, on the 26th, we may
16 want to schedule the conference call for the 4th to give
17 more adequate notice of whether there's going to be a
18 hearing on the 10th.

19 MR. COWAN: I agree with Mr. Anderson. I
20 think the 4th or even the 3rd. If we get the testimony
21 received by February 26, we would know by the following
22 Wednesday, March 3, whether or not we're going to have
23 cross or whether or not there's going to be a need for
24 additional testimony in the way of rebuttal or
25 supplementary testimony.

1 CHAIRMAN BLOCH: Let's make it March 4th at
2 10:00 a.m., because I will be leaving for Tulsa that
3 afternoon, as will probably Mr. Churchill.

4 After the hearing date simultaneous briefs
5 will be due from the parties on March 22nd, 1982, and
6 rebuttal briefs, if required, will be due on April 6th,
7 1982. Those are not weekends. I've checked that.

8 MR. COWAN: Did you say March 22?

9 CHAIRMAN BLOCH: March 22.

10 MR. COWAN: That's about 12 days after the
11 hearing?

12 CHAIRMAN BLOCH: I see. You want it later.
13 All right.

14 MR. COWAN: Well, because if there is a
15 hearing on the 10th, we wouldn't have the transcript
16 probably until the 15th or 16th at the best.

17 CHAIRMAN BLOCH: Let's make it March 31, March
18 31, 1982, and an additional -- I guess April 13th would
19 be a more appropriate date for the reply briefs. Okay.
20 I'm sorry that that was in such a patched up manner of
21 setting up a schedule, but we're trying to do it
22 rapidly. I hope that the transcript will be clear on
23 the dates that we have set.

24 Now, Mr. Cowan, you had further matters that
25 you'd like clarified.

1 MR. COWAN: Yes, Mr. Chairman. We would like
2 to address the question of what issue is to be addressed
3 in the testimony. To that purpose we've reviewed the
4 transcripts and the Board orders. As we understand it,
5 the issue that Decade has raised with regard to whether
6 the information we are claiming to be proprietary should
7 be disclosed to the public is not over the numbers, if
8 you will, or the process involved in our proprietary
9 Sleevng Report but rather over the conclusions to be
10 drawn from those numbers.

11 So as we understand it, the issue that we will
12 be addressing is whether the test results in the form of
13 the conclusions drawn from the test and the conclusions
14 drawn from the numbers should be publicly disclosed, but
15 not the question of whether the actual test numbers
16 themselves and not the question of whether the actual
17 process involved in the test should be disclosed.

18 CHAIRMAN BLOCH: Mr. Cowan, I think the
19 Board's interest is a little broader than that. I agree
20 with you that we are not interested in the actual
21 process, but we are interested in the names and
22 descriptions of the tests and possibly in the data in
23 the tables. We have not predetermined that those will
24 be released, of course, but it seems to me that we
25 should examine the Commission's balancing test both with

1 respect to the nature of those tests and the names of
2 the tests and to the data that's been submitted in
3 support of demonstrating the safety of the Sleaving
4 Project.

5 MR. COWAN: As we understand it, that would be
6 broader than what Decade's request was in the prior
7 hearing transcripts.

8 CHAIRMAN BLOCH: We can clarify that.

9 Mr. Anderson, is it broader?

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1 MR. ANDERSON: Yes, it is. Let me try and do
2 it this way to make it clear. I think we have now three
3 categories of matters to determine.

4 One is the question of process. In that
5 regard, just to reiterate, we're not challenging the
6 proprietary nature of that, but neither are we conceding
7 that. It's just not one of our overriding issues, so
8 we're just letting that pass. But it may not be
9 construed, interpreted as a concession that it is
10 proprietary. It's just not a challenge to it.

11 Next there's the question of the test, and I
12 think now we have two kinds of test matters. One is the
13 question of the actual test numbers being used and the
14 second is how you interpret those test numbers. And we
15 would extend our challenge to be both.

16 To be clear with an illustration, if the test
17 is a test of runup of 15 days and we think it should be
18 20 days, we would like to be able to put in the public
19 domain that a 15-day test is an inadequate time period
20 to use. And so if I understand what Mr. Cowan is asking
21 correctly, it is broader than I think he contemplated,
22 our contemplation.

23 CHAIRMAN BLOCH: But what you're saying now
24 doesn't seem to be any broader than what I've just
25 said.

1 MR. ANDERSON: No, it's exactly what you've
2 said.

3 CHAIRMAN BLOCH: Do you think what you said is
4 broader than what I said?

5 MR. COWAN: Let me say that that does
6 represent a broadening from what we understand the
7 transcripts to say. For example, in the transcript of
8 the hearing on October 30 at page 632, when the matter
9 of public disclosure was being discussed, a Ms. Falk,
10 who was responding, said that: "While we have stated
11 several times over and over for the record that our
12 concern with trade secrets does not go to numbers, it
13 does go to conclusions that are drawn from those
14 numbers."

15 So we understood that what Decade was
16 interested in, both from this and from other indications
17 in here, was disclosure of the conclusions or, as Mr.
18 Anderson has now said, the interpretations of the test
19 numbers and not the actual numbers themselves.

20 We understand the Board now to be saying that
21 it's interested in looking at the numbers also.

22 CHAIRMAN BLOCH: Well, at least if that is a
23 separate issue which you can present to us. It may well
24 be that the public interest in the actual numbers is
25 somewhat less than either in the conclusions or in the

1 nature of the tests. But I think we are obligated to
2 balance the public interest against the confidentiality
3 interest with respect to that category of information as
4 well.

5 MR. COWAN: Let me, just so that there's no
6 mistake in our minds concerning this, indicate that we
7 do not intend to address, unless we're told we should
8 otherwise, the proprietary nature of the underlying
9 Weissman affidavit. That's a peripheral issue on what
10 we think is a peripheral issue anyway, and having worked
11 out an arrangement under which Decade will be getting
12 that underlying affidavit, we do not intend or we do not
13 see as an issue to be addressed the question of the
14 proprietary nature of the underlying affidavits that
15 were submitted.

16 CHAIRMAN BLOCH: Mr. Cowan, I don't follow
17 you. I thought there was basically one section of that
18 affidavit still in some contest and that that was the
19 subject of the motion to reconsider. Am I incorrect?

20 MR. COWAN: That is the subject of the motion
21 to reconsider. But in terms of the hearing, we
22 understand the hearing to be --

23 CHAIRMAN BLOCH: That's right, because we will
24 have decided the motion to reconsider. There's no need
25 to continue discussing it.

1 MR. COWAN: I must confess I'm slightly
2 confused, then. As I understand it, the purpose of this
3 hearing is to present testimony on the merits of the
4 confidentiality issue with respect to the claim of
5 proprietary on the sleeving report itself and other
6 documents, other substantive documents.

7 CHAIRMAN BLOCH: That's correct. We've
8 already resolved the questions about the Weissman
9 affidavit.

10 MR. COWAN: Of course I haven't seen the
11 Board's order on the motion to reconsider. But assuming
12 that that affidavit is not being made publicly available
13 as a result of the Board's order, we don't see any
14 addressing in this hearing of the issue of the Weissman
15 affidavit. And if that is not the correct assumption,
16 we still did not understand this hearing to be for the
17 purpose of presenting testimony with regard to the
18 proprietary nature of the Weissman affidavit.

19 CHAIRMAN BLOCH: Those assumptions are all
20 correct.

21 MR. COWAN: Then let me turn to the other
22 aspect of the hearing and what it should address. As we
23 understand it, the issue before the Board involves, from
24 the standpoint of the regulations, the questions that
25 would be involved in a consideration under 10 CFR

1 Section 2.790(b)(5), namely considerations of what are
2 commonly called the balancing tests; and that for
3 purposes of this hearing at least, the question of
4 whether the underlying information sought to be withheld
5 is proprietary is not the issue to be addressed in the
6 hearing.

7 So that our testimony would be addressing the
8 2.790(b)(5) question of whether -- and 2.790(b)(5)
9 states that if the Commission determines, pursuant to
10 paragraph (b)(4) of this section, that the record or
11 documents contain trade secrets or privileged or
12 confidential commercial or financial information, the
13 Commission will then determine: One, whether the rights
14 of the public to be fully apprised as to the bases for
15 the proposed action outweighs the demonstrated concern
16 for protection of a competitive position; and, two,
17 whether the information should be withheld from public
18 disclosure pursuant to this paragraph.

19 Our testimony as we understand it, the
20 testimony to be filed by the parties, would not address
21 the determination of whether or not the information is
22 in fact proprietary.

23 CHAIRMAN BLOCH: I would agree with that, Mr.
24 Cowan, with two possible caveats, and that is that to
25 the extent that individual pieces of the information

1 might be available in public sources, that would be
2 relevant to (b)(5) also. That is, you're claiming
3 generally that the whole web of things is confidential
4 because of the structure of the process and the tests
5 and the general nature of Westinghouse's interests. If
6 some portions are confidential it could bear on (b)(5)
7 -- I mean are public.

8 And in addition, the amount of harm to
9 Westinghouse obviously is crucial to the balancing test
10 in (b)(5), even though it's also considered in (b)(4),
11 in (5).

12 MR. ANDERSON: May I be heard, sir?

13 CHAIRMAN BLOCH: Sure, Mr. Anderson.

14 MR. ANDERSON: I just want it to be clear that
15 we are challenging the entire trade secret claim and we
16 are not at this point, until the record is more fully
17 developed, able to oblige Mr. Cowan and say we can
18 prejudge what the facts will develop, whether or not
19 it's one or the other parts of the trade secret
20 requirements that have or have not been met.

21 So we're not -- we have, number one, disputed
22 the entire trade secret claim at the initiation of this
23 dispute; and secondly, we may in fact want to argue any
24 one of the bases for trade secret have not been met.
25 And we at this point simply could not prejudge which of

1 those claims we'll be asserting.

2 CHAIRMAN BLOCH: Mr. Cowan, I guess that if
3 Decade is interested in that, we have said that they
4 have a right as a party to be raising these questions.
5 So --

6 MR. COWAN: We understand. But Mr. Chairman,
7 I'm really disturbed about that, because I have both
8 read the transcripts and the Board orders, of course,
9 and reviewed this, and we understand that that is, if I
10 understood Mr. Anderson correctly, what he just said is
11 directly contrary to the position that Decade has
12 previously taken.

13 MR. ANDERSON: I don't have a citation, Mr.
14 Cowan, but this issue arose subsequent to the hearing or
15 in the outgrowth of the hearing already. And we
16 specifically clarified, I have a distinct recollection,
17 that the challenge was not so limited, and we did it on
18 one or two occasions. I don't, admittedly, have a
19 citation with me.

20 To be quite frank, it appears to me at this
21 point from what we now know the basic thrust of what
22 we're talking about is the question of the balancing
23 test. But I don't have the full record before me. I
24 just want to be clear that we can't prejudge until that
25 record is before us and limit ourselves in any way.

1 I think it was Mr. Bachmann or his
2 predecessor, Mr. Trebiori, who specifically asked for
3 that clarification in one prior instance, and we made
4 that explicitly clear at that time. So in terms of the
5 thing you're asking, has there been advance notice of
6 this, I think the answer is this.

7 CHAIRMAN BLOCH: Mr. Anderson, maybe I can
8 clarify this a little bit. It seems to me that while
9 you are still contesting the proprietary nature of the
10 document, I take it that you really are not contesting
11 any of the first three criteria for the proprietary
12 nature, that is whether the information has been held in
13 confidence -- that's been stated in an affidavit and not
14 contradicted -- whether the information is of a type
15 customarily held in confidence by its owner, and whether
16 there's -- I guess you are questioning whether there's a
17 rational basis therefore; is that correct?

18 MR. ANDERSON: That's correct. You're right
19 about the first two, however.

20 CHAIRMAN BLOCH: And you're also not
21 questioning whether the information was transmitted to
22 and received by the Commission in confidence?

23 MR. ANDERSON: That's correct.

24 CHAIRMAN BLOCH: You may be contesting, but I
25 suppose as to most of the testing you're not contesting,

1 that the information is available in public sources.

2 MR. ANDERSON: We don't know that for a fact
3 right now. I would say on prior occasions Wisconsin
4 Electric has made claims of proprietary protection over
5 documents which were then or immediately thereafter
6 public documents. I don't know if Westinghouse has
7 suffered from the same inconsistency, but I know
8 Wisconsin Electric has.

9 MR. COWAN: There's no inconsistency there.
10 Let me say that it is perfectly appropriate under
11 certain circumstances to claim that information which is
12 publicly available is nonetheless within the context of
13 a report proprietary. There are numerous examples that
14 could be given, but that has been done both inside and
15 outside the nuclear industry.

16 If you spend a lot of money, for example, and
17 you determine that some very simple process that is well
18 known and written up in basic texts is the way to handle
19 a problem, the fact that you are handling the problem
20 with that simple process, after having spent a lot of
21 money to make sure that it's all right, is in fact
22 proprietary if nobody else knows it, and the only way to
23 protect it is by claiming proprietary protection for
24 that, which in other contexts might be available in the
25 public records.

1 So there is no inconsistency there.

2 CHAIRMAN BLOCH: Mr. Anderson, you were
3 talking.

4 MR. ANDERSON: I think we're perhaps getting a
5 little bit into what's going to be the briefs on the
6 subject. All I wanted to indicate is that, while on a
7 frank responsive basis we contemplate the focus of the
8 dispute being the balancing test, we're not prepared
9 without the record being complete to foreclose an
10 argument that it's not in fact proprietary in the first
11 instance as well.

12 And I think -- I don't have a citation with me
13 -- we have made that representation clear on a request
14 for clarification on prior occasions.

15 CHAIRMAN BLOCH: Mr. Cowan already has
16 submitted -- excuse me. Westinghouse has submitted
17 substantial affidavits on that. It may well be that
18 additional affidavits are not needed and that it'll be
19 tried on briefs. But I guess Mr. Anderson says that
20 this issue is open and therefore we will have to decide
21 it.

22 Mr. Cowan?

23 MR. COWAN: I don't have -- frankly, this
24 surprised me a little bit. I don't have the citations
25 right in front of me on the transcript, where I

1 understood that for purposes of this proceeding that the
2 question was a question of whether the public shouldn't
3 be entitled to see the proprietary information
4 notwithstanding the proprietary claim, and that there
5 wasn't an issue over whether or not those affidavits
6 were satisfactory to carry a hearing.

7 CHAIRMAN BLOCH: Without the specific
8 citations, the Board finds it difficult to accept that,
9 because Mr. Anderson's performance today in refusing to
10 even say that the information was proprietary is
11 consistent with our recollections of the way Decade has
12 conducted itself throughout this proceeding.

13 (Pause.)

14 Furthermore, Mr. Cowan, it would be a problem
15 to look at a single place in the record, because I think
16 this has come up repeatedly on the record. In fact, I
17 think Mr. Churchill documented in one footnote what must
18 be tens of mentions, tens of times that this subject has
19 been mentioned.

20 MR. COWAN: Obviously, without the record
21 citation I can't expect the Board to come to any
22 position other than the one it has adopted. I guess all
23 we can do is reserve the right to come back if it turns
24 out that it is an issue that we ought to carry further.
25 At this point there's no way that I can go through the

1 material and do that.

2 CHAIRMAN BLOCH: Do you need any further --
3 does the staff wish to comment on this?

4 MR. BACHMANN: Yes, we do, Your Honor. This
5 is Rich Bachmann again.

6 I'd like to clarify something that the staff
7 has considered here, and that is it appears from our
8 looking at the record that what is in issue here, the
9 substantive information that's in issue, is Table 6.3-1
10 of the sleeving report. We haven't really been able to
11 find any other particular information that was brought
12 up at the hearing that Decade felt should be disclosed.

13 Could we get a clarification on that?

14 CHAIRMAN BLOCH: Mr. Anderson?

15 MR. ANDERSON: Could you give that citation to
16 me again, Mr. Bachmann? 6-3 what?

17 MR. BACHMANN: It was Table 6.1-3.

18 MR. ANDERSON: What page is that on?

19 MR. BACHMANN: That's on pages 6.20 and 6.21
20 of the sleeving report, because I recall, and if you'll
21 check the transcript, we specifically discussed that at
22 the hearing on the 29th.

23 MR. ANDERSON: One more time, can you give me
24 the table, the table number?

25 MR. BACHMANN: Surely. It is Table 6.1-3.

1 (Pause.)

2 MR. ANDERSON: Well, I can only respond if
3 it's permitted to be on a preliminary basis, because
4 this is a complicated question you're asking. But if
5 it's understood to be preliminary based upon juggling
6 these notebooks on my knee, it appears that that table
7 is what we were discussing as a summary, as bounding the
8 summary of the test results that were the focus of
9 discussion.

10 I would imagine that there must be narrative
11 in other portions of the sleeving report that deal with
12 that type of a summary. Is that right, Mr. Bachmann?

13 MR. BACHMANN: I'm not really sure of that. I
14 do know that during the hearing that that table came up
15 quite frequently, and that would be very -- that seemed
16 to be the gist of the dispute about the information that
17 was claimed to be proprietary. And I just wanted to
18 clarify that.

19 I don't believe that there was any discussion
20 at the hearing on either the 29th or 30th of October
21 regarding any narrative that went with it. I believe
22 that we talked specifically about specific tests and
23 specific results. And I just was trying to get a
24 clarification on that.

25 MR. ANDERSON: I guess to answer that, Mr.

1 Bachmann, you're asking a more detailed question than I
2 could answer thumbing through this at this juncture,
3 without giving your question more careful thought. All
4 I could say at this juncture is that my memory does
5 corroborate that that was a summary table that bounded,
6 I think, subject to check, the kinds of matters that we
7 were claiming did not appear to meet the various tests
8 for trade secret protection.

9 CHAIRMAN BLOCH: Mr. Anderson, my concerns do
10 go further, on behalf of the Board. Certainly 6.1-1,
11 which is a summary of test program issues, and 6.1-2 are
12 relevant. And also, we have on several occasions
13 expressed our concern that we haven't had a coherent
14 presentation of what is and is not known for public
15 scrutiny of our record, and we are generally interested
16 in knowing how much informed people in the public can
17 know about the basis for our decision based on our
18 current record and what can be done to improve that
19 level of available information.

20 MR. COWAN: Mr. Chairman, this is Burt Cowan
21 again.

22 In light of some of the discussion that's
23 taken place over the last 10 minutes or 15 minutes, I
24 think it's important that we know exactly what
25 information from among that which we are claiming is

1 proprietary in the sleeving report is now being
2 considered for possible disclosure to the public. If I
3 understand correctly, it is something beyond Table
4 6.1-3, but I'm not certain how far beyond. And I think
5 we're entitled to know what we have to address our
6 testimony to with regard to information that is sought
7 to be disclosed to the general public before we file the
8 testimony.

9 CHAIRMAN BLOCH: Mr. Cowan, I think that the
10 procedural setting is somewhat different from what you
11 say. My understanding is, as I've tried to explain in
12 Board orders, that a document has been submitted for our
13 record. Ordinarily documents are released to the
14 public, and Westinghouse is proposing that the document
15 be withheld.

16 Now, the question is whether all or part of
17 that proposal should be accepted by the Board.

18 MR. COWAN: Mr. Chairman, in all due respect
19 we think that is entirely too broad. We think that when
20 we submit a proprietary document and submit the
21 underlying information, and leaving aside the
22 jurisdiction question of the Board, when we submit a
23 proprietary document and submit the underlying
24 affidavits in accordance with the Commission's
25 procedures, as we think we've done in this case, and

1 there is a question of either whether the information is
2 in fact proprietary or whether, assuming it is
3 proprietary, it should nonetheless be disclosed to the
4 public, we believe we are entitled to know, in order to
5 address at the hearing, what information specifically we
6 have to be worried about as potentially being made
7 available to the public.

8 For example -- there are many reasons for
9 this, Mr. Chairman. But one of them, for example, is we
10 have a right to withdraw proprietary information from
11 the Commission under the regulations and under the
12 statutes. And if we think that the information that is
13 being addressed is narrow, our determination on what to
14 do with regard to that right could be totally different
15 than the question if the information is very broad and
16 across the board on consideration.

17 MR. ANDERSON: Could I try and get us over the
18 hump this way, Your Honor, and that is to say that it is
19 our interpretation, it is our challenge -- though we are
20 not of course presuming to speak for the Board in its
21 own concerns, but in terms of looking at the table of
22 contents in the sleeving report, WCAP, WCAP-9960, that
23 it's chapters 6, 7, and 9 which have the test results,
24 which encompass the test results and the inspectability
25 results that we think are directly relevant to the

1 safety and operation of the plant. And the preceding
2 sections would be focused on the question of the process
3 itself, which we don't have the same overriding concern
4 with respect to.

5 Would that help you, Mr. Cowan?

6 CHAIRMAN BLOCH: Well, the Board has also
7 stated, Mr. Anderson, to be helpful to Mr. Cowan, that
8 we are not interested in the underlying process, just in
9 test results and the nature of the tests.

10 Mr. Cowan, is that helpful?

11 MR. COWAN: I'm not sure that it is, Mr.
12 Chairman. The comment by Mr. Anderson on chapters 6, 7
13 and 9, if we are only addressing the proprietary
14 information that is contained or claimed in chapters 6,
15 7 and 9, that is somewhat helpful. But I would have to
16 -- in more time than it would take to do in this phone
17 call, I would have to take a look specifically to see if
18 that is the definition.

19 MR. CHURCHILL: Your Honor, this is Mr.
20 Churchill. I would like an opportunity to comment on
21 this discussion at the appropriate time.

22 CHAIRMAN BLOCH: This seems to me to be an
23 appropriate time, if you would be helpful to us.

24 MR. CHURCHILL: At the conclusion of the
25 October 30th hearing, after you had read your initial,

1 your decision on the sleeving demonstration issues, we
2 then went into the proprietary information issue. And
3 at that time the licensee specifically stated and
4 requested -- and I'm referring to page, transcript page
5 718 -- that if the intervenor wanted to raise a
6 proprietary issue he should first come forward with
7 something in the form of a motion or reasons why
8 information should not be held proprietary and define or
9 identify the material that they think should not be
10 proprietary and give reasons.

11 Mr. Anderson declined. He said he didn't want
12 to do that. And on page 720 he said: "I think Mr.
13 Churchill is fully alerted ad nauseam to the position we
14 are taking."

15 And then the Chairman, Judge Bloch, said to
16 Mr. Anderson: "Is it your position that all of the
17 legal arguments you wish to make and all of the factual
18 arguments that you wish to make have already been made
19 on the record at this proceeding?"

20 Mr. Anderson replied: "With respect to the
21 issue of whether trade secret protection is required at
22 all, that's correct."

23 And I bring this out to point out that I
24 thought it was appropriate, and I specifically
25 requested, that he identify the information and give his

1 reasons, and he declined, saying it is already on the
2 record of this transcript. And therefore this goes to
3 the first issue we were talking about, as to whether
4 we're interested in the numbers or whether we're
5 interested in conclusions to be drawn.

6 And I then have to refer back to page 632,
7 which Mr. Cowan referenced, where Ms. Falk said: "And
8 while we have stated several times, over and over for
9 the record, that our concern with trade secrets does not
10 go to numbers, it does go to the conclusions that are
11 drawn from those numbers, and the trade secret order we
12 are under now applies to both."

13 And so as far as the scope of a hearing, Mr.
14 Anderson cannot now come in at this late date and try to
15 broaden his motion, because we left it at the end of
16 that hearing that his motion was contained in the record
17 of that day and a half hearing and the parties were
18 specifically charged to respond to that motion as if it
19 were contained in this transcript. And he made it very
20 clear that it contained everything.

21 MR. ANDERSON: May I respond to that, sir?

22 CHAIRMAN BLOCH: Please, Mr. Anderson.

23 MR. ANDERSON: I think what Mr. Churchill is
24 doing is taking Ms. Falk's comment out of context and
25 misinterpreting it. The words that she was using were

1 simply shorthand words for the distinction between
2 process, installation, versus test, and I think that's
3 quite clear from the entire context of the transcript.

4 If there is in fact a valid basis for
5 misinterpreting it, I think it's now been clarified.
6 But I think we do not accept Mr. Churchill's statement
7 that that's what the transcript states to be our
8 concern. I think in our view the transcript is quite
9 clear the distinction was between the process of
10 installing it and the test of the process's adequacy.

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1 CHAIRMAN BLOCH: It has been understanding all
2 along that Decade has been interested in the public
3 release of the information concerning the tests. I'm
4 not sure what that specific site about numbers means,
5 but the principal effect of this discussion on this
6 hearing really has little to do with the scope of the
7 hearing we're going to conduct.

8 It has much more to do with possible grounds
9 for appeal, because the Board has become educated in
10 Section 2.790 in the course of reading and analyzing the
11 briefs filed in this proceeding, and we do think that it
12 is our obligation to decide whether to grant all or part
13 of Westinghouse's proposal. And we believe that that
14 obligation goes to all of the information about the
15 tests that have been conducted.

16 MR. COWAN: Mr. Chairman, let me make sure
17 that Westinghouse's position is on the record clearly.
18 We think we are entitled, prior to having to address
19 testimony to the subject, to having a definition on the
20 record as to what information it is that is at risk, if
21 you will, of disclosure to the public. And we do not
22 think that saying it's all of the tests, or saying the
23 definition in terms other than by specific reference to
24 the documents that are being considered and the portions
25 of the documents that are at risk is satisfactory.

1 CHAIRMAN BLOCH: I understand that position.
2 You are not at this point citing a specific section of
3 the regulations or specific case law, are you, Mr. Cowan?

4 MR. COWAN: No. We think elementary due
5 process, Mr. Chairman, means that if our proprietary
6 information, which is private property, is going to be
7 taken away from us and given out to the general public,
8 that we are entitled to know what information might be
9 seized so we can know how to address that information in
10 our presentations of fact and presentations of briefing
11 to the Board.

12 CHAIRMAN BLOCH: Now, to be clear, the
13 principal issue is not whether we are going to seize
14 that information, but whether we're going to return it
15 to you. Although we did raise in our Order the
16 possibility that in this proceeding, the right to return
17 that information has been forfeited or waived, and that
18 also is an appropriate subject for argument at this
19 proceeding.

20 MR. COWAN: Mr. Chairman, let me state so that
21 the Chair understands and so that there is no mistake
22 about it. The Section 2.790 has a provision in it that
23 says that we are entitled before information is put into
24 the Public Document Room, to receive notice of the
25 intention of the Commission to put it in the Public

1 Document Room and make it publicly available.

2 That we are further entitled to withdraw that
3 information, and if we request to withdraw that
4 information, that the Commission will return that
5 information to us and will not publicly disclose it.

6 Just so that there is no mistake about it, Mr.
7 Chairman, the general counsel of the Commission, in
8 argument to the Third Circuit Court of Appeals, United
9 States Court of Appeals for the Third Circuit in
10 Philadelphia, over this very section, agreed that we had
11 an absolute right -- I will repeat those words, an
12 absolute right -- to withdraw proprietary information or
13 information claimed to be proprietary from the
14 Commission.

15 And in part, the Third Circuit's decision in
16 the case of Westinghouse vs. the NRC as to the validity
17 of these regulations, turned on that statement and that
18 representation on behalf of the Commission in the Third
19 Circuit.

20 So there is no issue in this case, as I see
21 it, as to whether or not we have a right to withdraw the
22 information. We have not asked for a withdrawal of the
23 information. I think it hasn't come to that and we
24 don't normally go in those directions. I can only think
25 of one or two instances where Westinghouse has ever

1 withdrawn information from the Commission, and those
2 were instances that are not directly relevant here.

3 But we don't see any issue and we don't intend
4 to address the issue of withdrawal of information from
5 the Commission, and we don't see any waiver on anything
6 that has been done of our right to withdraw information
7 from the Commission.

8 MR. ANDERSON: Could I ask for the citation of
9 that case, Mr. Cowan?

10 MR. COWAN: Is this Mr. Anderson?

11 MR. ANDERSON: Yes, it is.

12 MR. COWAN: I can give you the citation. I
13 don't have that page right here, but I can give you the
14 citation.

15 MR. SHOMAKER: Ed Shomaker. The citation is
16 555 Fed. 2d, 82 (1977) Third Circuit, and the area that
17 he's discussing is page 92.

18 MR. ANDERSON: Thank you, sir.

19 CHAIRMAN BLOCH: Mr. Cowan, the specific
20 question that was surfaced in the Board's Decision on
21 page 25 relates to whether in this proceeding, since we
22 went ahead and acted on the information already, whether
23 the fact that we were permitted to go ahead and act on
24 the information attenuates that rule.

25 Now, I wish to assure that we will, of course,

1 not release any information to the public and you will
2 have all the opportunities possible to appeal any ruling
3 that we make, if it should turn out to be adverse.
4 Which is by no means clear.

5 But I do consider that there is a possible
6 issue in this case about waiver of the right that you've
7 just spoken about, and if you choose not to brief it
8 then you will not brief it, and you will have no
9 argument that you've been denied the opportunity to
10 brief it.

11 MR. COWAN: Mr. Chairman, since there is no
12 issue because we haven't asked at this point to withdraw
13 the information, we don't see how there can be an issue
14 to brief on any request that hasn't been made.

15 But beyond that, Mr. Chairman, if I understand
16 the Board correctly, they're saying that when we are met
17 with a question of proprietary information, and whether
18 we are proper in withholding it, that if we pursue our
19 remedies to try to demonstrate that the information is
20 proprietary and that it should be withheld from public
21 disclosure, we might be doing so at the risk of waiving
22 our right to withdraw the information later. Is my
23 understanding correct?

24 CHAIRMAN BLOCH: No, I guess what the Board is
25 suggesting that we need to be briefed on is whether we

1 must always decide first whether the information is
2 confidential before we act on it, so that you can be
3 able to recover it and receive it back before an
4 important public action has been taken. But that if we
5 are permitted to go ahead and act on confidential
6 information, that the situation might be somewhat
7 different.

8 MR. COWAN: In all due deference, the
9 representation by the general counsel of the Commission
10 to the Third Circuit was a flat-out, absolute,
11 unqualified statement to the Third Circuit. The
12 representation was that in the event that the Commission
13 determines contrary to a claim by an applicant, that
14 information claimed to be proprietary is not
15 proprietary, or the Commission determines that it's
16 going to put such information in the Public Document
17 Room, in the event the Commission does determine to do
18 that, in any event the applicant would always have the
19 right thereafter to withdraw the information under the
20 Commission's regulations of 2.790.

21 CHAIRMAN BLOCH: Well, of course, we will have
22 to review that case because you have cited it to us, and
23 it may well be that you're correct on that point.

24 MR. COWAN: Well, the case doesn't say that,
25 Mr. Chairman. This was a representation in oral

1 argument. There are some intimations in the case, in
2 the decision concerning this. The decision was
3 basically that the proprietary rule of the Commission as
4 represented in 10 CFR Section 2.790 were a valid
5 undertaking by the Commission in the face of the
6 challenge that there were problems with the rules on
7 various grounds.

8 CHAIRMAN BLOCH: I notice that in the context
9 of rulemaking, that if the Commission acts on
10 proprietary information in the course of a rulemaking,
11 it cannot be returned. Is that correct?

12 MR. COWAN: That is right, and that is the
13 only exception, and that was pointed out in the oral
14 argument at the Third Circuit who recognized that
15 exception, and therefore, when we submit proprietary
16 information for rulemakings, we do it under totally
17 different methods. I don't mean the method of
18 determining whether it's proprietary is different, but
19 our determination as to whether to submit it is
20 different. The determination of how much proprietary
21 information to submit in connection with a rulemaking is
22 different, et cetera.

23 In a licensing proceeding, our position has
24 always been that we want the Board and we want the
25 parties to have the benefit of all of the proprietary

1 information, and so we have always taken the position
2 that because we think we're entitled to protect it and
3 because we have the ultimate possibility, if everything
4 goes wrong, of withdrawing the information, that we
5 provide the proprietary information relatively freely.

6 MR. ANDERSON: May I be heard, sir?

7 CHAIRMAN BLOCH: Yes, Mr. Anderson.

8 MR. ANDERSON: We have no idea at this
9 juncture whether this issue will ever affect our
10 interest. But just in the event it may do so, I want to
11 be quite clear that we would object to the concept that
12 the general counsel in an oral statement in a court can
13 define what the law is, and I just want that to be
14 clear. We would object to that being used as binding
15 this Board, to the extent that such a ruling would ever
16 adversely affect our interest.

17 CHAIRMAN BLOCH: The Board now would like to
18 rule that this particular subject is closed, since we're
19 going to have plenty of opportunity to brief underlying
20 issues in this case. The question is now whether we
21 need to further clarify the scope of the hearing which
22 has been scheduled for March 10th, on a contingent basis.

23 MR. CHURCHILL: Your Honor, I was in the
24 middle of my remarks, and I hadn't finished, when we
25 went off on the issue of the waiver. I have a point

1 that I think is very important to make, and it does have
2 to do with the scope of hearing, and I think based on
3 the dialogue that we've just had, the scope of the issue
4 here becomes even more important.

5 I would like to cite Section 2.760(a),
6 entitled "Initial Decisions in Contested Proceedings on
7 Applications for Utility Operating Licenses." That
8 section says that in any initial decision, the Board
9 rules on the matters that have been put in controversy by
10 the parties. And in this case, it's been very clear on
11 the record, on the transcript pages that I read before,
12 that the issue that has been put in controversy by the
13 parties is contained in those transcripts, and Mr.
14 Anderson so stated in no uncertain terms.

15 And therefore, it may well be that this will
16 be the subject of briefs, but Mr. Anderson has waived
17 any right to come in now and broaden the scope of his
18 request for the Board to hear an issue of proprietary
19 information.

20 And furthermore, in the same Section 2.760(a),
21 it contains the Commission's so-called sua sponte rule.
22 The Board will not hear issues not put into controversy
23 unless they involve -- unless they determine that it
24 involves a serious safety, environmental or common
25 defense and security matter.

1 And in our response to their oral motion, we
2 argued strongly that the court's jurisdiction in this
3 issue is limited to the issue raised by Mr. Anderson in
4 his motion at the conclusion of that hearing.

5 And therefore, I don't think -- and it is our
6 position -- that the Board really does not have the
7 jurisdiction to make a determination of whether
8 information ought to be released beyond that which Mr.
9 Anderson advocated, or Mr. Anderson's counsel advocated,
10 during that hearing.

11 CHAIRMAN BLOCH: Mr. Churchill, the Board has
12 rejected that position in one decision and it is the
13 subject, again, of our reconsideration decision that you
14 can pick up at 4:00 tomorrow. And we just reject that
15 position when it pertains to a proposal that information
16 be kept proprietary.

17 MR. CHURCHILL: Well, I can see, Your Honor,
18 that perhaps the Board might want to inquire itself into
19 looking at other information related to Mr. Anderson's
20 request in order for him to make a determination of
21 which specific information of the information at issue,
22 whether or not it should be released. But I don't
23 believe that the Board can go beyond that which Mr.
24 Anderson himself or which Decade itself has raised.

25 And that is why it is very important -- and I

1 agree with Mr. Cowan -- that we know specifically what
2 information we're talking about. And as I said before,
3 I don't believe that that can go beyond the information
4 that Mr. Anderson and Ms. Falk themselves have
5 articulated at the hearing, since they specifically
6 declined to clarify. They said we rest with the record
7 as it now stands.

8 Now, on the issue of whether or not we are
9 going to -- the balancing issue of whether the
10 proprietary information should be requested or whether,
11 in fact, we are still arguing over one or more aspects
12 of whether or not the information is indeed proprietary,
13 I think the transcript also makes it clear that Decade
14 itself has stated -- and the full context of the
15 transcript makes this clear -- that they are not
16 challenging the proprietary nature of it; they are only
17 challenging the balancing act that the Commission should
18 perform in order to determine whether the proprietary
19 information should be released.

20 We have briefed that on pages 3 and 4 of our
21 November 12, 1981 response to their brief. And I could
22 point out in this context on page 722 of the transcript
23 that Mr. Anderson stated at the bottom: "The
24 countervailing interest of the public relating to the
25 safety aspects of it exceeds any proprietary interest

1 that the vendor may have when it comes to the safety
2 test as opposed to the design parameters."

3 In other words, he is saying we're not
4 questioning whether it's proprietary; we think that the
5 issue here is something -- is a question of whether the
6 public has an interest that exceeds the proprietary
7 interest. This is in addition to what we discussed in
8 our brief.

9 That matter I don't think, and I didn't
10 intend, to be characterizing this as a request for
11 reconsideration of the order. I am making these remarks
12 in the context of defining the scope of the proprietary
13 issue which is, in fact, at issue at this hearing.
14 Which, as I said before, I think takes on increasing
15 importance in light of Mr. Cowan's concerns and comments.

16 CHAIRMAN BLOCH: It seems to me that the
17 principal objections that relate to the balancing test
18 are factual issues which, to some extent, bear on the
19 proprietary nature question. I don't see that there is
20 a great deal more evidence that will be required because
21 we also must make a formal determination on the
22 proprietary nature of the documents, as well as on the
23 balancing test.

24 Mr. Churchill, do you think that that is
25 incorrect?

1 MR. CHURCHILL: Yes, I do, Your Honor. I
2 think that the Commission itself, through its staff, has
3 made a determination that the information is
4 proprietary. I think that Mr. Anderson has not put that
5 into controversy in this hearing. And therefore, the
6 Board does not have the jurisdiction to make a
7 determination of whether or not it's proprietary. I
8 think -- and this is sort of in summary -- that the
9 Board's jurisdiction in this case is the balancing act
10 of whether or not the proprietary interest outweighs the
11 public interest to know. And furthermore, that that is
12 limited to very specific information, which we have to
13 glean from looking at the remarks made by Decade during
14 the November 29, 30 hearing. I am sorry, that's October
15 29 and 30.

16 CHAIRMAN BLOCH: Mr. Churchill, I'm not sure
17 that I understand the distinction between (b)(4) and
18 (b)(5) in terms of our authority under (e). Could you
19 explain that to me?

20 MR. CHURCHILL: Excuse me, which section of
21 the regulations are you referring to?

22 CHAIRMAN BLOCH: The 2.790(e) permits us to
23 enter orders consistent with Section 2.790, and both
24 Section 2.790(b)(4) and (5) talking about the Commission
25 making decisions. The Commission will consider in

1 (b)(4) five elements, and in (b)(5) there's the
2 balancing act.

3 How is the jurisdiction of the Board different
4 under (b)(5) and (b)(4)?

5 MR. CHURCHILL: I don't think it is different
6 under (b)(5) and (b)(4) due to anything gleaned from
7 2.790. I think it is 2.760(a) that is what is
8 controlling in this case, and that says that the
9 jurisdiction of the Board in an operating license
10 hearing, which is what we have here, is the issues put
11 into controversy by the parties.

12 And my remarks have gone to the point that Mr.
13 Anderson was given every opportunity to define and
14 clarify and set out the issues that he was putting into
15 controversy, and make it very clear that the issue that
16 he was advancing was contained in the transcript.

17 And when we go to the transcript, we see that
18 it's clearly limited to the second test; that is, the
19 balancing test, that he was not questioning the
20 proprietary nature of it.

21 If, in fact, he had raised that issue and he
22 had asked the Board to look for it and the Board took
23 jurisdiction over that question, perhaps the answer
24 would be different. But not only did he not, but he
25 specifically declined to do so when, at the conclusion

1 of that hearing, I urged that he do just that.

2 CHAIRMAN BLOCH: Mr. Churchill, at this point
3 I think it's clear that you have preserved this point
4 for appeal. I think it's also clear that the Board has
5 rejected it, and I'd prefer not to hear further argument
6 on that sua sponte rule and its effect on this
7 proceeding.

8 MR. COWAN: Mr. Chairman, one footnote perhaps
9 on the dialogue of the last five or ten minutes. Our
10 understanding of 2.790(4) and (5) and their
11 inter-relationship is that unless there is a
12 determinatio by the Commission that information is
13 proprietary, under 2.790(b)(4), that you never reach the
14 balancing test under 2.790(b)(5). And that therefore,
15 2.790(b)(5) has as its predicate, a determination by the
16 Commission pursuant to paragraph (b)(4) that the
17 information submitted is proprietary.

18 So that while some of the factual
19 consideration as to whether or not the balance falls in
20 favor of withholding information under (b)(5) may be the
21 same as some of the factual considerations under (b)(4);
22 that the two determinations are separable and separate.

23 Therefore, what has been said about what the
24 issue is involved here as to whether it is a balancing
25 issue or whether it is an issue of the underlying

1 proprietary information matter under (b)(4) is indeed an
2 important question.

3 CHAIRMAN BLOCH: Mr. Cowan, my point is that I
4 think we the Board must address both of those questions,
5 but that my view of the record at present is that you
6 have already placed in evidence almost all of the
7 evidence you will probably need to put in on (b)(4).
8 Now, you may choose to supplement it because we have not
9 formally ruled on that question.

10 I think the principal contest is over (b)(5),
11 but we have not formally ruled on (b)(4). Mr. Anderson
12 asks that we do so and it seems to me appropriate that
13 we should do so.

14 MR. COWAN: I guess our basic problem is that
15 under (b)(4) we have put in not only what we consider to
16 be a prima facie position, but far more than that. And
17 therefore, in the absence of anything in the record that
18 indicates what our problem is or why somebody thinks we
19 haven't met the (b)(4) test, other than just a statement
20 that we haven't met them, we're not quite sure what
21 there is on any given -- any one of these points under
22 (b)(4) to put in.

23 CHAIRMAN BLOCH: Mr. Anderson, can you be at
24 all helpful as to what challenge, if any, -- real
25 challenge -- that Westinghouse might face under (b)(4)?

1 MR. ANDERSON: Before we do that, can I
2 indicate this. When Mr. Bachmann -- and this is a
3 slight digression, with your permission, sir -- Mr.
4 Bachmann first called me and asked if this time was
5 acceptable for a phone conference, I indicated to him
6 that I have a board of directors meeting at noon, which
7 started two minutes ago, to approve various actions
8 including this one.

9 Obviously, Mr. Bachmann could not have
10 anticipated that there would be such insistence upon
11 repetitively re-arguing the same issue, but I am in an
12 extreme time bind at this juncture. And if I could
13 just, to perhaps facilitate things, just ask as a
14 courtesy if the parties would not spend such an
15 exorbitant time on minor matters and we could move more
16 quickly, my conflict would not be such a pressing
17 problem for me.

18 But to try and be responsive, I think the
19 burden of proof lies with the person claiming trade
20 secret protection. We are not conceding that the
21 documents in Chapters 6, 7 and 9 and related chapters in
22 the other reports are either proprietary or that the
23 balancing test would debilitate the trade secret
24 protection.

25 I think that once that challenge is made, the

1 burden lies with them. And if we dispute their prima
2 facie showing and we don't submit any rebuttal
3 testimony, then he is home free. But I think that the
4 burden of proof cannot be shifted by the request he's
5 making. And I think, to be responsive in a non-legal
6 sense, I indicated to the Board and the parties
7 previously, we anticipate that the major focus of the
8 dispute will be the balancing test.

9 CHAIRMAN BLOCH: Mr. Cowan, maybe it would
10 assure you some to hear the Board state that if there is
11 some element of surprise in testimony filed by Decade,
12 that it would, of course, be appropriate for you to
13 request time to respond to it, and that there's no
14 necessity for you to try to anticipate everything that
15 might possibly be filed in the world.

16 MR. COWAN: That helps me some, Mr. Chairman,
17 but there is the other aspect, and that is that we think
18 the material that we have put in on the (b)(4) question
19 of whether this amount of material is proprietary or not
20 that it -- not only prima facie carries our burden, but
21 it goes way beyond that. And in any further proceeding,
22 we think we are entitled to know where the challenge is
23 coming from with respect to what we have put in.

24 And whether one speaks in terms of burden of
25 going forward, which would be the legal point, or

1 whether one speaks in terms of the process right to know
2 what it is that's being attacked and what it is that we
3 have to meet, me thinks that unless there is some
4 problem with our present affidavits, which are in the
5 record, and that problem is identified to us, that we
6 don't have a fair opportunity to meet the concern that
7 is involved under the (b)(4) test. And it may be that
8 Decade will choose not to put in any further testimony
9 and any additional information, but merely argue that
10 there is something defective or flawed in what we have
11 put in. And we think we're entitled to know that so
12 that we can put in whatever additional material there
13 might be.

14 On any one of these tests there is a broad
15 range of material from which our affidavits are
16 selective as to what is put in. So that the material in
17 the affidavit is not so extensive with every possible
18 presentation we might make on each of the (b)(4) points.

19 MR. ANDERSON: I think we have reached the
20 attenuated end of legal reasoning here. Westinghouse
21 and the Licensee have the chance to respond to any
22 testimony we file; they have a chance to respond to any
23 brief we file. There is no issue.

24 CHAIRMAN BLANCH: I would like to know, Mr.
25 Cowan, if there really is anything seriously that we

1 need to do further to clarify the scope of the hearing.

2 MR. COWAN: I'll go back to the other point I
3 made. We think we are entitled to know what information
4 specifically within the report is at risk. Mr. Anderson
5 said Chapters 6, 7 and 9; I've had a brief chance to
6 consider that. Chapter 6, for example, is 93 pages plus
7 three appendices, and 80% of it is identified as being
8 proprietary, roughly 80%. So just spelling out Chapter
9 6 doesn't really tell us because it has all kinds of
10 things in it, both -- some of which would fall on one
11 side of a definition of test results and some of which
12 would fall on the other side of the definition of test
13 results.

14 So that we do not think that by identifying
15 Chapters 6, 7 and 9, that we have been fairly advised as
16 to what information we have to be concerned about that
17 might be publicly disclosed, if the Board does not
18 accept our version of the (b)(4) and (b)(5) submittal,
19 or the (b)(5) submittal, as the case might be.

20 CHAIRMAN BLOCH: Mr. Cowan, as I see it, the
21 task is for you to organize your thoughts about the
22 different kinds of information contained in the Sleeving
23 Report, and to present your arguments, your evidence and
24 legal arguments about whether or not that information
25 should be disposed, and that basically, the choice of

1 what was to be withheld was made by Westinghouse when it
2 inserted the brackets, and that it is very difficult to
3 limit the question of the granting of the proposal to
4 withhold information, beyond what we've already done,
5 which is to state that we're primarily interested in the
6 tests, the nature of the tests, the data from the tests
7 and the interpretation of the results from the tests.
8 Those may be very different categories which you can
9 address as a group, indicating which parts of the
10 document you think fall within each of those groups.

11 But I really do not see how it is possible at
12 this point to restrict the subject matter further than
13 that.

14 MR. COWAN: Just so it's clear on the record,
15 we object to the procedure adopted as we understand it,
16 whereby we do not have within the framework of the
17 Sleeving Report an identification of what specific
18 tables, pages or portions of pages from among those
19 which we claim are proprietary are the material to be
20 addressed.

21 MR. ANDERSON: Mr. Chairman, we argued the
22 same thing I think it's now seven times. If we continue
23 doing it an eighth time, I'm going to miss my meeting.
24 Could I ask for a ruling that's definitive --

25 CHAIRMAN BLOCH: I think, Mr. Cowan, that we

1 both understand each other at this point, is that
2 correct?

3 MR. COWAN: I understand the Board's ruling,
4 yes, sir.

5 CHAIRMAN BLOCH: So unless there is a further
6 request for clarification, the conference will be
7 completed. Is there a further request?

8 MR. SHOMAKER: Yes, there is, Your Honor.
9 This is Ed Shomaker from the staff. Could I just make a
10 couple points?

11 CHAIRMAN BLOCH: Please. Hopefully they are
12 to the scope of the hearing and not to further
13 disputation with the Board's ruling.

14 MR. SHOMAKER: We believe that the Board does
15 have the jurisdiction to rule on (b)(4) and (b)(5)
16 arguments for matters that are properly in controversy.
17 The question of whether it's in controversy or not -- we
18 don't think it is. We support what Westinghouse has
19 said there.

20 But let me go right on. In the burdens of
21 proof questions and in the procedural method of going
22 forward, the ultimate protector of his own information
23 is the proprietary owner. That's clear. Westinghouse
24 will either protect its information and provide that it
25 needs that protection, or not.

1 But the proponent for public disclosure has a
2 responsibility of filing a motion and supporting that
3 motion with a statement of facts which justifies why
4 their action or why their motion should be supported.

5 I have a few case cites that I think I'd like
6 to share with the people here. They can look it up at
7 their leisure, but it supports the proposition that
8 there is a burden on the part of Decade, as the
9 proponent or public release, to articulate their reasons.

10 The Monticello case, --

11 MR. ANDERSON: Before we go on, if I could,
12 with your kindness, intrude, Mr. Shomaker, I simply have
13 to request formally at this juncture that we have a
14 continuance of this hearing. I gave an advance notice
15 to Mr. Bachmann that I had a 12:00 conflict. I am
16 needed in this meeting right now, and it's obviously
17 going to go on for some time. And I'm going to be at
18 quite a disadvantage if I have to rush through my
19 argument, if there's any response needed, in this kind
20 of time conflict.

21 MR. SHOMAKER: I have three case cites and
22 then I'll get off. I would argue it, but I won't. I'll
23 just give the case cites.

24 MR. ANDERSON: I'm not trying to stop you from
25 arguing. I'm just saying I have a time conflict at this

1 juncture. I just want to be clear on that.

2 MR. SHOMAKER: I understand, but let me get
3 these in. 4 AEC at page 398, that's the Monticello
4 case. 6 AEC at page 167, that's the Point Beach Unit 2
5 case, and 4 AEC at page 439, footnote 1.

6 CHAIRMAN BLOCH: Mr. Shomaker, these stand for
7 what proposition?

8 MR. SHOMAKER: They talk about the different
9 burdens on the proponent for disclosure of -- the
10 proponent for disclosure must show the relevancy and
11 need for public disclosure, and that such disclosure is
12 not contrary to the public interest and would not
13 adversely affect the rights of any person.

14 Those are procedural requirements established
15 by the agency in previous licensing actions. And we
16 don't believe that Decade has fulfilled those procedural
17 requirements.

18 CHAIRMAN BLOCH: This is entirely new
19 information to the Board; these citations have not been
20 available to us.

21 Mr. Anderson?

22 MR. ANDERSON: I would like to request if I
23 may that we not --

24 CHAIRMAN BLOCH: When would you be able to
25 meet again with us?

1 MR. ANDERSON: I can meet again in one hour
2 from now. Or if you want another day, I could meet on
3 Monday. I need one hour right now, but --

4 CHAIRMAN BLOCH: I think the Board needs an
5 opportunity to review the citations that it has just
6 been given, and I think we ought to convene again in one
7 hour, if that's acceptable. Any comments on that?

8 MR. COWAN: Can we take about an hour and 30
9 minutes?

10 CHAIRMAN BLOCH: An hour and 30 minutes would
11 be quarter to three?

12 MR. COWAN: That's right, Mr. Chairman.

13 CHAIRMAN BLOCH: All right, we will reconvene
14 at 2:45.

15 I would like, if he would, for Mr. Shomaker to
16 stay on the line after we go off the record, to repeat
17 those citations for me. The meeting is adjourned until
18 2:45.

19 MR. ANDERSON: Could I thank you for the
20 courtesy of the adjournment, sir?

21 CHAIRMAN BLOCH: You're very welcome.

22 We are now off the record.

23 (Whereupon, at 1:15 p.m. the hearing in the
24 above-entitled matter recessed, to reconvene at 2:45
25 p.m. the same day.)

NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the

ATOMIC SAFETY AND LICENSING BOARD

in the matter of: Wisconsin Electric Power Company (Point Beach Nuclear
Plant, Units 1 & 2)

Date of Proceeding: January 28, 1982

Docket Number: 50-266-OLA & 50-301-OLA

Place of Proceeding: Washington, D. C.

were held as herein appears, and that this is the original transcript
thereof for the file of the Commission.

Suzanne Young

Official Reporter (Typed)

Suzanne Young

Official Reporter (Signature)