

NUCLEAR REGULATORY COMMISSION

ORIGINAL

ATOMIC SAFETY AND LICENSING BOARD

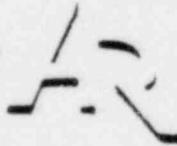
In the Matter of:

WISCONSIN ELECTRIC POWER COMPANY :
: (Point Beach Nuclear Plant, : DOCKET NOS. 50-266-OLA
: : 50-301-OLA
Units 1 & 2) :

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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WISCONSIN ELECTRIC POWER COMPANY :
: Docket No.
Point Beach Nuclear Plant : 50-266-OLA
: 50-301-OLA
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Units 1 and 2 :
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In the Offices of
Alderson Reporting Company
400 Virginia Avenue, S.W.
Washington, D. C.

Monday, February 1, 1982

A telephone hearing conference in the

above-entitled matter was convened, pursuant to notice, at
11:05 a.m.

BEFORE:

JUDGE PETER B. BLOCH, Chairman
JUDGE JERRY KLEIN, Member
Atomic Safety and Licensing Board

APPEARANCES:

On behalf of Wisconsin Electric Power Company:
BRUCE CHURCHILL, Esq.
LISA RIDGEWAY, Esq.
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1800 M Street, N.W.
Washington, D.C. 20036

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On behalf of Westinghouse Corporation:

BART COWAN, Esq.
FRANK DAVIS, Esq.

On behalf of Wisconsin's Environmental Decade:

PETER ANDERSON, Esq.
114 Lewis Carroll Street
Madison, Wisconsin

On behalf of the Nuclear Regulatory Commission:

STUART TREBY, Esq.
EDWARD SHOMAKER, Esq.
RICHARD BACHMANN, Esq.

1 for this morning at 11 a.m.

2 Before we begin, I have an announcement. I
3 have before me the briefing papers that were used at a
4 Commission briefing on January 28, 1982, discussing the
5 Ginna tube rupture incident.

6 The relevance at this time to this proceeding
7 is that in the course of that briefing, a table was
8 released to the press in which it was stated that Point
9 Beach 1 had 12 sleeves installed to date, the upper
10 joint is 6 mech, m-e-c-h, ext, e-x-t-, which I think is
11 a misprint, and it should be e-x-p for mechanical
12 expansion, and six brase upper-joint tubes. The lower
13 joint was formed through a mechanical expansion.

14 Similarly, the San Onofre tubing was described
15 as including some mechanical expansion, some brase, and
16 some dual upper joint. Dual is defined through
17 double-asterisks as a brased joint in tandem with
18 mechanical expansion.

19 I wonder, Mr. Schomaker, if you are aware that
20 this release was made, and what procedure you would like
21 to suggest for discussing the possible relevance of this
22 public release to the confidentiality issues pending
23 before us.

24 MR. SCHOMAKER: Chairman Bloch, I was not
25 aware of the press release and, quite frankly, have no

1 opinion at this point. I just heard about it. I don't
2 know whether that compromises any of the information
3 claimed to be proprietary or not. I can't address that
4 at the moment.

5 CHAIRMAN BLOCH: Mr. Cowan, would you like to
6 address what procedures we should have, so that we can
7 get comments from the parties on this document which, of
8 course, you probably had not seen until I just read it
9 to you.

10 MR. COWAN: That is correct, Mr. Chairman. I
11 was not aware of the document until you mentioned it on
12 the phone.

13 CHAIRMAN BLOCH: Could the staff arrange to
14 distribute this document to the parties. It is from the
15 press briefing on January 28, and it was distributed by
16 Harold Denton.

17 MR. TREBY: That would be no problem.

18 CHAIRMAN BLOCH: Then, possibly within the
19 briefing schedule that we have already arranged, if
20 there are any necessary comments on the applicability of
21 that to this case, they could be made at that time.

22 I also would like to disclose that before I
23 went home last week, I am forgetting whether it was
24 Thursday or Friday, I spoke to staff. I had reviewed
25 the citations that were given by staff, and I had also

1 received a rather lengthy telephone memorandum that
2 staff had informed the parties of additional citations
3 that it was interested in discussing.

4 I asked that the staff be prepared to respond
5 to a few questions that I asked, and one of them was the
6 effective date of 2.790; second, whether any of the
7 citations that were given deal directly with Section
8 2.790; and third, what the relevance of the cases was.

9 I am about to come to that, but before we do
10 that, I would like to ask Mr. Schomaker a preliminary
11 question.

12 MR. SCHOMAKER: Yes.

13 CHAIRMAN BLOCH: I would like to ask whether,
14 in your opinion, Section 2.790, by requiring in Sections
15 (b)(1)(2) that a full statement be filed together with
16 the documents would ordinarily contemplate, subject to
17 the discretion of the Board that determinations on
18 confidentiality would be based on the full statement,
19 rather than on prolonged hearings.

20 MR. SCHOMAKER: I don't understand what you
21 mean by full statement versus hearings. Section
22 (b)(1)(2) says that the affidavit which is filed
23 accompanying the proposal that a document be withheld
24 from public disclosure, in whole or in part, should
25 contain a full statement of the reasons on the basis of

1 which it is claimed that the information should be
2 withheld from public disclosure.

3 CHAIRMAN BLOCH: I am asking whether you think
4 that that language suggests that since there is a full
5 statement of reason, that ordinarily, subject to the
6 discretion of the Board as has been exercised in this
7 case and will be exercised, the documents that are filed
8 should be the basis for determination, and it was not
9 anticipated that there would be full hearing on every
10 proposal for confidentiality.

11 MR. SCHOMAKER: That is true.

12 CHAIRMAN BLOCH: Now, having said that, would
13 you like to proceed with the answers to the questions
14 that I asked by telephone last week?

15 MR. ANDERSON: Before he does that, I would
16 like to, if I may, sir, interpose an objection.

17 CHAIRMAN BLOCH: Please.

18 MR. ANDERSON: This issue of how to proceed
19 with the issue of trade secrets on this sleeving report
20 was thrashed out at some extensive length two or three
21 months ago, where the staff was represented by two
22 lawyers, and the licensee was represented by two
23 lawyers. It has also been the subject of a continuing
24 discourse as to the matter of proceeding over this
25 period of time.

1 A resolution of how to proceed has been given
2 by the Board, and now we have a situation where
3 literally at the 11th hour, on the eve of the hearing,
4 the staff has brought in yet a third attorney who has a
5 new legal theory, and seeks to basically open up the
6 last two or three months' worth of prior decision.

7 It seems to me the preliminary question to ask
8 and have answered first is whether there is good cause
9 shown to reopen this issue. Otherwise, if we allow this
10 occur without the requirement for good cause being shown
11 for the lack of timeliness, there will simply be no
12 certainty and no ability to plan on an orderly basis,
13 and the proceeding will be seriously undermined.

14 So we would make a specific motion that the
15 request that is being made, whatever it is and whatever
16 form it is, by Mr. Schomaker, be made in the context of
17 his first making a good cause showing as to why it is
18 being raised at this hour.

19 CHAIRMAN BLOCH: Mr. Anderson, just one
20 question. I understand that the narrow we are
21 addressing now is the nature of the prehearing notice to
22 which Westinghouse is entitled, so that it has a fair
23 opportunity to present its case.

24 Is it your understanding that there was a
25 prior ruling on that narrow question?

1 MR. ANDERSON: I understood Mr. Schomaker to
2 be opening up a bigger shoebox than that one. I
3 understand it to embrace the question of whether we have
4 to file a motion and show support as an Intervenor to a
5 challenge to a trade secret claim, as well as the one
6 you are making.

7 CHAIRMAN BLOCH: Those overlap, if I
8 understand what you are saying. Since the question is
9 notice, there could possibly be a question as to whether
10 either the Intervenor, or possibly the Board, would have
11 to file some more particularity of what is at issue
12 before we go to hearing.

13 MR. ANDERSON: I think the issue of whether
14 the licensee or the special appearance of Westinghouse
15 -- whether they were entitled to first have a written
16 motion with every single word that we object to itemized
17 was an issue that was raised, I think, at the hearings
18 in Milwaukee, if I recall correctly. I would admit that
19 I don't have a citation for that. As I recall, and this
20 is based on my recollection, the Board ruled that it
21 would not be the case that that would be necessary.

22 The answer to your question is, yes, it
23 hasn't, in essence, be ruled upon. This might be a
24 slight shading variant of that, but it is not
25 sufficiently different to distinguish it without a good

1 cause showing for its being made.

2 CHAIRMAN BLOCH: Mr. Anderson, I would like to
3 reserve ruling on your motion until later, and I would
4 like to ask that when parties speak, that they address
5 the merits of Mr. Anderson's motion.

6 Is that an acceptable way to proceed.

7 MR. ANDERSON: It is more time consumptive,
8 but if it is your wish, we will abide by it.

9 CHAIRMAN BLOCH: I would appreciate that. I
10 think it could be more time consumptive, but I prefer
11 that we discuss the merits of this issue also, so that I
12 don't commit something that is clear error if I am not
13 understanding of the precedents for the Commission.

14 MR. ANDERSON: I understand exactly what you
15 are saying, sir.

16 CHAIRMAN BLOCH: Mr. Schomaker, it is your
17 turn.

18 MR. SCHOMAKER: I agree that we are discussing
19 a narrow procedural question which could have overlap
20 and require a request that Decade file a motion to more
21 adequately or more succinctly set out the information
22 that is at risk.

23 Let me say a couple of things first. We think
24 that this is the first opportunity, the first logical
25 opportunity that the staff has had to raise the case

1 cites, and to discuss the procedural question of what a
2 person does in raising the question of what should or
3 should not be considered proprietary, and whether that
4 information should be released to the public.

5 CHAIRMAN BLOCH: Mr. Schomaker, on that point,
6 Applicant argued, or they call themselves Licensee, all
7 along that we are not allowed to raise issues sua
8 sponte. I see some overlap between the issue that they
9 raised and what you are now saying. Couldn't you have
10 raised those arguments at that time?

11 MR. SCHOMAKER: I don't think so, Your Honor.
12 The issues that are now before us were constantly being
13 put aside so that you could get on with your main
14 proceeding, and your main hearing. You said that you
15 were going to -- In your Order of December 21st, on page
16 25, you talked about setting up a procedural phone
17 conference to talk about whether we would have a
18 conference on the merits or a hearing on the merits.

19 So all along it has been postponed until this
20 time. Now, we are in the process of deciding whether
21 there will be a hearing, and what format, and what
22 matters will be litigated at that hearing. I think this
23 is the logical time to bring it up.

24 The staff is very concerned about the
25 broadening of the scope of the issues to be litigated

1 beyond those raised earlier by Decade. We, again, are
2 slightly raising the 2.760(a) question. I call your
3 attention to the Comanche Peak Units 1 and 2 Order that
4 the Commission issued on December 29, 1981, and that is
5 at CLI-81-36.

6 The Commission, in page 2 of that Order,
7 said: "The Board has confused its inherent power to
8 shape the course of the proceeding --

9 CHAIRMAN BLOCH: Mr. Schomaker.

10 MR. SCHOMAKER: Yes.

11 CHAIRMAN BLOCH: I have ruled twice that I
12 don't consider this to be an issue of sua sponte. I
13 understand the Comanche Peak case to deal entirely with
14 sua sponte.

15 I would like you to comment on the
16 interpretation of Section 2.790, which I believe
17 mandates that we undertake this consideration. Section
18 2.790(b)(3) says, "The Commission shall decide," and it
19 doesn't say that it should wait for a motion from
20 anybody. Do you disagree with that?

21 MR. SCHOMAKER: That is in the context of a
22 document submitted in the licensing process, in the
23 absence of a hearing. We have taken it into a different
24 context now.

25 CHAIRMAN BLOCH: Wait, how could that be in

1 the absence of a hearing when it comes up in the
2 procedural sections that deal with hearings? I don't
3 understand that at all. I would have thought that in
4 the absence of a hearing, it would have been in Part 9,
5 and in addition to which there would have been no
6 Licensing Board to rule.

7 I don't see how, "The Commission shall
8 determine" would have been written in this section at
9 all. It just would not be in Part 2.

10 MR. SCHOMAKER: When we wrote the regulation,
11 this determination, we contend, is largely the staff's
12 determination.

13 CHAIRMAN BLOCH: Why is it in Part 2 if it is
14 the staff's determination?

15 MR. SCHOMAKER: Because it is a document
16 submitted in the licensing process, and not all those
17 documents are litigated. Most of the documents go into
18 the docket file, and are just available as part of the
19 whole licensing package, not necessarily at a particular
20 point to be litigated.

21 So most of the information that comes in
22 claimed to be proprietary, a determination by the staff
23 is made, acting on behalf of the Commission. That is
24 the determination that normally is discussed in (b)(3).

25 CHAIRMAN BLOCH: Mr. Schomaker, in Part 9,

1 wouldn't you already have to make a determination?

2 MR. SCHOMAKER: We don't have to make a
3 determination in Part 9 unless there is a Freedom of
4 Information Act request, which mandates a
5 determination. In the absence of that, we do receive
6 information pursuant to Part 9, and no determination is
7 made. If it comes in under a claim, that claim is
8 honored until there is a reason to review the claim, and
9 the reason is a Freedom of Information Act request.

10 CHAIRMAN BLOCH: Please continue.

11 MR. SCHOMAKER: You asked me to address Part
12 2, Section 2.790. It was first promulgated by in 1955,
13 and became effective in 1956. It was in an entirely
14 different format at that time. It was modified
15 subsequently in 1967 to take into account the Freedom of
16 Information Act, and the promulgation of Part 9 of our
17 regulations implementing the Freedom of Information
18 Act.

19 It was modified again in 1972 after the
20 Monticello case, to clarify the administrative record,
21 to put a little more burden on the person claiming
22 something to be proprietary, to provide the staff with
23 information that would help them determine whether the
24 information is proprietary or not.

25 The most recent and the most broad scope of

1 2.790, the one that we are currently using, was modified
2 in 1976 and became effective on April 21st, 1976. It
3 requires an application accompanied by an affidavit, and
4 goes through the different criteria that we are
5 discussing, and which the staff applied in considering
6 the Westinghouse sleeving report data.

7 Section 2.790 has been with us for many
8 years. Ever since the Freedom of Information Act, the
9 staff has been concerned about the balance of what is
10 properly protected and what Commission rights override
11 that protection and make that document publicly
12 available. Also, since the 1967 amendment, there has
13 been a right to withdraw the information.

14 The second question you asked, which of the
15 cases that I cited cite Section 2.790, and I also
16 provided all these cases to the other parties.

17 The Point Beach case at 8 AEC 152, at page
18 164, implies the 2.790 ruling. I think it is clear as
19 they presently stand that the laws and the Commission
20 regulations permit certain information --

21 CHAIRMAN BLOCH: If you are going to talk
22 about that case, and cite something from it, I would
23 like enough of the facts to understand the holding of
24 the case and the relevance of the holding, as well as
25 the specific passage that you are going to cite.

1 MR. SCHOMAKER: This the licensing proceeding
2 for Point Beach 2, and it was the initial operating
3 license stage. There were intervenors, of course, and
4 several different contentions raised. In one of the
5 contentions, the intervenor elected not to review
6 certain proprietary data, or data claimed to be
7 proprietary by Westinghouse, and claimed that they did
8 not want to take part in secret law, and that they felt
9 that it was inappropriate to have proprietary documents
10 in the hearing process.

11 The intervenors were offered an opportunity to
12 review the Westinghouse claimed documents, subject to a
13 protective order, and then go into an in camera
14 proceeding. They declined to take advantage of that
15 opportunity, and they continued to protest that
16 information should not be proprietary.

17 That issue was decided in the Appeals Board
18 case at 6 AEC, page 152, at the beginning of the case.

19 CHAIRMAN BLOCH: You cited 8 AEC the last
20 time. Is it 6 or 8?

21 MR. SCHOMAKER: It is 6 AEC 152. There is a
22 section of that decision that talks about the
23 proprietary issues. The Board claimed that the
24 intervenors elected, to their own prejudice, to contest
25 the disposition of claimed proprietary matters in lieu

1 of preparing their case with respect to fuel
2 densification. They failed to exercise due diligence in
3 the conduct of the discovery process.

4 The intervenors then appealed to the Licensing
5 Appeal Board, and that is ALAB decision 137 at 6 AEC
6 491. The Atomic Safety Licensing Board devoted an
7 entire section of its decision to exceptions concerning
8 proprietary data. That discussion begins at 6 AEC page
9 509, and continues to 6 AEC 514.

10 In those pages, the Appeal Board decided that
11 the treatment of proprietary data, and the opportunity
12 to review that data under a protective order that were
13 offered by the Board was the appropriate action to take,
14 and that intervenors declined to take that opportunity
15 at their own prejudice.

16 I cited those cases to show a couple of
17 things. One, to show that 2.790 has been discussed in
18 previous AEC cases, and that is basically why I showed
19 all of these.

20 CHAIRMAN BLOCH: Mr. Schumaker, I don't
21 understand. The holding that you just gave me of the
22 Appeal Board doesn't seem to be related to whether or
23 not the information should be released to the public.

24 MR. SCHOMAKER: They gave intervenor, the
25 Board did and then the Appeal Board, an opportunity to

1 have a hearing such as you are giving an opportunity to
2 Decade now, to come forward and provide a motion so that
3 you could litigate which issues are or are not
4 proprietary.

5 The intervenors declined to take advantage of
6 that. They did not brief it, they did not make a
7 motion, and the information was not publicly released.
8 There wasn't any balancing on the other side, because
9 intervenors did not take advantage of an opportunity to
10 force that balancing.

11 There wasn't any sua sponte requirement of the
12 Board to balance in favor of public disclosure. The
13 Board did not raise that issue, it did not get to it
14 because it was not made by one of the parties. They
15 didn't feel that there was an overriding responsibility
16 to take this question up themselves.

17 CHAIRMAN BLOCH: The discussion of the Appeal
18 Board seems, from your initial discussion, to have been
19 addressed to the question of whether the intervenors
20 forfeited their substantive claim, not to whether or not
21 they forfeited their claim to consideration of
22 confidentiality; is that not correct?

23 MR. SCHOMAKER: Intervenors refused to take
24 any stand as to whether the information was or was not
25 proprietary. They objected to the treatment of

1 information being proprietary in the hearing process.

2 On page 510 of 6 AEC, I am quoting from the
3 case, "Throughout the remand proceeding, intervenors
4 made it clear that they were objecting not the
5 classification as proprietary of any particular
6 information, but rather to the Commission's general
7 policy which permits certain information to be accorded
8 proprietary protection."

9 In three separate motions, intervenors took
10 the position that their trial preparation could not
11 proceed as long as they were required to execute
12 "illegal" agreements. They maintained that the
13 documents had been tendered to them "only on the
14 condition that we agree that they are proprietary." It
15 goes on from there.

16 CHAIRMAN BLOCH: The consequence was that the
17 rulings on the merits that were made by the Licensing
18 Board were sustained, is that the consequence, or was
19 there an explicit ruling on whether or not these
20 documents should be released to the public?

21 MR. SCHOMAKER: On pages 513 and 514, the
22 Appeal Board, at the bottom of 513 and the top of 514,
23 talked about the burden of proof with respect to
24 proprietary. They maintained that the information was
25 still proprietary. Intervenors had an opportunity to

1 challenge that, and they failed to challenge, they
2 failed to exercise their opportunity, and the
3 information was withheld as proprietary.

4 The reason I have cited these cases was not
5 really to get into an isoteric argument of their
6 particular holding, it was to show that there was a
7 rational basis.

8 There has been a past practice, when faced
9 with a question of whether something is or isn't
10 proprietary, by a proper motion by a party, a motion to
11 disclose or a motion to compel, that the Commission has
12 made the parties identify the portions that are at risk,
13 and get on with the proceeding. The most recent cite
14 for that is the Diablo Canyon case, and I will give you
15 the cite, 12 NRC at page 10.

16 CHAIRMAN BLOCH: I read that case because it
17 was your most recent cite, and I am not impressed by its
18 applicability because it dealt with a security plan, and
19 it was a discovery request and not a request for public
20 disclosure. It seem to me to be a very different
21 category of information to require broad proof, this the
22 proof itself would have disclosed portions of the plan.

23 MR. SCHOMAKER: The procedures are the same,
24 and at that time, 2.790(d)(1) deemed security plan
25 information to be commercial or financial within the

1 meaning of 9.5(a)(4) of the Commission's regulations,
2 bringing it back into the ambit of 2.790.

3 What you have is very similar, we feel,
4 procedurally. There was a sanitized security plan, and
5 there was a full security plan.

6 CHAIRMAN BLOCH: We were talking about release
7 under a protective order in that case, weren't we?

8 MR. SCHOMAKER: On memory in Diablo, I don't
9 have the cite here, is that the protective order was a
10 compromise. The first requests were to have the
11 information made publicly available. The compromise was
12 to accept a protective order, and it was a very tightly
13 drawn protective order.

14 The point I am making now is that the motion
15 for disclosure of additional information identified the
16 chapter, the page, the section, the sub-section, and the
17 subject matter of each item of information sought. This
18 was the procedure the Board required.

19 I am asking the Board here to go through the
20 same procedural analysis, to have the moving party,
21 Decade, identify the pages, the chapter, the section and
22 sub-section of the information that is currently claimed
23 to be proprietary by Westinghouse that Decade feels
24 should not have that distinction and should be made
25 publicly available.

1 CHAIRMAN BLOCH: Assuming, for the time being,
2 that the Board cannot go beyond what Decade raised, I
3 would like to know whether it would be fair to say in
4 this proceeding that Decade, as Decade did say, that it
5 was challenging the withholding of all the tests,
6 possibly without the numbers, I am not sure of that, I
7 would have to check that. They wanted the tests, which
8 means the identity of the tests, and the conclusions
9 drawn from the tests, to be released.

10 Would it be fair to say that while there is a
11 lot of information relating to that specific concern,
12 that there isn't a great deal of ambiguity as to which
13 portions of the document are involved in that particular
14 statement?

15 MR. COWAN: Mr. Chairman, Westinghouse would
16 like to be heard on that.

17 MR. SCHOMAKER: You said, all tests. In the
18 transcript of last Thursday, Decade enumerated three
19 very broad chapters. That is just not distinct enough
20 to tell the party, whose information is at risk, how to
21 develop their strategy, and what is going to be
22 litigated.

23 The staff would like to move that the Board
24 order Decade to file a statement of fact revealing the
25 relevancy and necessity of the public release of

1 identified portions of the information claimed to be
2 proprietary by Westinghouse.

3 CHAIRMAN BLOCH: Mr. Cowan, I heard you. I
4 will get to you in just a moment. If you don't, I would
5 like to continue for a while with the staff.

6 MR. COWAN: That is fine, Mr. Chairman.

7 CHAIRMAN BLOCH: The authority for that
8 particular language is language that you have taken from
9 a particular case, the identity and necessity?

10 MR. SCHOMAKER: Yes, relevancy and necessity,
11 I am taking that from cases that I cited earlier. I am
12 specifically taking it from the Midland case at 4 AEC
13 page 714.

14 CHAIRMAN BLOCH: We did not discuss that one.
15 Is it also in the Point Beach case?

16 MR. SCHOMAKER: The language is. Just a
17 moment.

18 In the Point Beach before the Board, at 6 AEC
19 page 155, the Board said that it would afford
20 intervenors another opportunity following the close of
21 the hearing of affirmatively demonstrating whether any
22 of the data which may have been accorded proprietary
23 protection should not be withheld from public
24 disclosure. That is the same situation that we face.

25 CHAIRMAN BLOCH: The relevance and necessity

1 don't come in that, right?

2 MR. SCHOMAKER: I cannot find the words
3 "relevance," and "necessity."

4 CHAIRMAN BLOCH: In terms of that particular
5 case, could you describe roughly the nature of the
6 proprietary information and the argument that was made
7 about its release? Were they talking about a document
8 like this one, or a specification of any kind?

9 I guess you told me that it was a direct
10 challenge to the regulations, and that they were not
11 even willing to discuss the document.

12 MR. SCHOMAKER: The intervenors in that case
13 were taking a stand against all proprietary data.

14 CHAIRMAN BLOCH: They didn't say, for example,
15 we think you ought to release certain tests that have
16 safety significance, and everything related to those
17 safety related tests which would be a reason, I would
18 think, some reason for releasing things to the public.

19 MR. SCHOMAKER: The point that was being
20 contested there was fuel densification, and that
21 included data and video tapes of the Point Beach 1 fuel
22 examination analysis of the fuel densification matter by
23 Westinghouse, the fuel supplier, and a similar analysis
24 by other fuel vendors. It would have to include test
25 data in the fuel densification issue, but I don't see

1 that that particular type of information is delineated
2 in the text.

3 CHAIRMAN BLOCH: That is not what I was
4 asking. I was asking whether you think that under the
5 test established in that case, that is the intervenor
6 has to show a reason for release to the public, whether
7 Decade's statement about the need for the public to know
8 about test data on safety related issues already meets
9 that test.

10 MR. SCHOMAKER: We have looked over the
11 transcript, and there are many different references to
12 which items could be or could not be at issue. I think
13 that Decade, in complying with the motion the staff has
14 asked you to order them to comply with, would give us a
15 clean record to go into a hearing and litigation. We
16 need something that succinctly lays out what is at
17 issue.

18 CHAIRMAN BLOCH: Mr. Schomaker, do you think a
19 fair interpretation of the record would exclude
20 consideration of the numbers in the tables because of a
21 statement made by Decade at the hearing?

22 MR. SCHOMAKER: Decade made several statements
23 that they were not interested in certain items. It was
24 attributed, I believe, to Ms. Falk at that time in the
25 transcript.

1 I understand that there is a discussion of how
2 closely to limit Decade. I think that your
3 jurisdiction, the Board's jurisdiction can decide high
4 tightly to hold Decade to what the transcript says, that
5 is within your discretion. I don't know which numbers
6 you are talking about.

7 MR. CHURCHILL: Transcript page 632, I think,
8 is the reference.

9 MR. COWAN: Lines 12 through 16, the statement
10 by Ms. Falk.

11 CHAIRMAN BLOCH: Mr. Churchill, did you find
12 in your review of the record that there were other
13 statements in the transcript that might have
14 implications that went much more differently from that
15 particular statement on transcript 632?

16 MR. CHURCHILL: I did not, but I am not
17 prepared to say that I have gone through it that
18 carefully so that I could respond right now.

19 CHAIRMAN BLOCH: All right.

20 Mr. Schomaker, have you basically concluded?

21 MR. SCHOMAKER: Let me just restate that I
22 would like you to consider that motion that I made, that
23 you ask Decade for a more detailed statement revealing
24 its relevancy and necessity.

25 In addition, the staff does not contest your

1 jurisdiction in this area to decide the (b)(4) and
2 (b)(5) issues, but we still maintain that if the Board
3 intends to go beyond what Decade has claimed to be at
4 issue here, we would like the opportunity to brief the
5 issue of whether such action is beyond the authority of
6 the Board. We are looking at the sua sponte question.

7 CHAIRMAN BLOCH: Could you tell me, before you
8 finish, just one more thing.

9 Which do you think would be the least
10 burdensome method of requiring Decade to make some
11 further specification that would fulfill the legitimate
12 needs of Westinghouse to notice?

13 MR. SCHOMAKER: They now have access to the
14 underlying proprietary documents, the sleeving report
15 and analysis. All they do is develop a table to cite
16 the pages and the sections that they believe should not
17 be afforded proprietary treatment.

18 CHAIRMAN BLOCH: Would it be acceptable if
19 instead they gave you a list of the citations that they
20 thought ought to be given proprietary treatment, and
21 they said that they were challenging all the rest?

22 MR. SCHOMAKER: I don't think that that would
23 be sufficient.

24 CHAIRMAN BLOCH: It is just a list that you
25 are after, you are not after an explanation of the

1 balancing test for each piece of information specified?

2 MR. SCHOMAKER: I think that Decade's
3 statement of fact should get into why they believe that
4 there should be a balance in favor of public disclosure,
5 and also identify the portions that need to be
6 released.

7 CHAIRMAN BLOCH: All right, you have now
8 completed?

9 MR. SCHOMAKER: There is only one last thing.
10 The staff has additional cases that talk about
11 relevancy and necessity, and we can argue over the
12 applicability. But if you want them, if the parties
13 want them, I will compile a list.

14 CHAIRMAN BLOCH: I would only want them if
15 they, first of all, cite 2.790.

16 MR. SCHOMAKER: All right.

17 CHAIRMAN BLOCH: Do any of those cases cite
18 2.790?

19 MR. SCHOMAKER: The Point Beach case does, and
20 I have already mentioned that.

21 CHAIRMAN BLOCH: Yes, but the others that you
22 were going to list for us?

23 MR. SCHOMAKER: The Monticello case at 4 AEC
24 page 399 -- Just a moment.

25 Monticello at 4 AEC 399 talks about the

1 ambiguity between the Commission's regulations 10 CFR
2 Part 2 and 10 CFR Part 9. That ambiguity was later
3 resolved by a Federal Register amendment. Basically,
4 the question was, do we withhold proprietary data
5 pursuant to Part 9, or we withhold it pursuant to Part
6 2. The Part 2 they are discussing is 2.790. They write
7 it out, but that is the Part that they are discussing.

8 There are several other cases.

9 CHAIRMAN BLOCH: The language that is relevant
10 was the same language then as it is now?

11 MR. SCHOMAKER: The regulation is more
12 stringent today as far as the requirements on the
13 proprietary owner for perfecting his claim. But the
14 issue of the ability to withhold the information and the
15 ability to balance has always been with 2.790.

16 CHAIRMAN BLOCH: On the Monticello and Point
17 Beach cases, was the requirement of a detailed affidavit
18 stating full reasons in effect at the time of those
19 cases?

20 MR. SCHOMAKER: No.

21 CHAIRMAN BLOCH: Do you think that possibly,
22 along the lines that I have suggested at the beginning
23 of this conversation, that requirement was intended to
24 be a way of resolving these issues without the extensive
25 kind of notice and hearing that seems to have been

1 required in these previous cases?

2 MR. SCHOMAKER: It was a method for developing
3 an administrative record for the staff's determination.
4 In the Commission's papers for the modification and
5 revision of Part 2.790, the extensive Commission papers
6 that went to the changes in 1976, it mentions that in
7 light of Monticello and in light of rulemaking
8 proceeding, the staff and the Commission need a better
9 administrative record upon which to base the holdings.
10 That is why 2.790 was modified.

11 CHAIRMAN BLOCH: It says, "and the
12 Commission," I take it that means, and the Licensing
13 Board, also. Is there any implication in the
14 modification of 2.790 that the burden of specifying the
15 reasons for withholding was on the submitter of the
16 information?

17 MR. SCHOMAKER: The burden ultimately lies
18 with the submitter of the information to protect his own
19 information and tell why it doesn't require public
20 disclosure. Westinghouse is prepared, and has met that
21 burden at least in a prima facie showing up to this
22 point.

23 If we go into litigation, it still has the
24 ultimate burden of proving that their information needs
25 protection, but there is a trade-off. After they have

1 made their prima facie showing, they need to know what
2 is going to be litigated, and that is the burden of
3 proof shifting that is discussed by the Appeal Board in
4 the Point Beach proceeding at pages 513 of 6 AEC. That
5 shifting of the burden is discussed there.

6 CHAIRMAN BLOCH: Mr. Cowan, there have been a
7 number of points made. Would you please attempt to not
8 duplicate what has been said, but I would like you to
9 have a fair opportunity to address those at this time.

10 MR. COWAN: Thank you, Mr. Chairman.

11 I am not sure that I can recall every point,
12 but let me take up the points as I heard some of them at
13 least.

14 I heard a question on whether the proprietary
15 information in the Point Beach case and in other cases
16 involved tests and test data. I am not sure how that is
17 relevant with regard to the procedures that both cases
18 adopted, but as a comment --

19 CHAIRMAN BLOCH: Mr. Cowan, maybe I can
20 clarify that because that I think those were my
21 remarks.

22 I think it wasn't whether the previous cases
23 dealt with tests and test data. I was concerned with
24 whether or not the fact that Decade has already
25 specified that it is interested particularly in tests

1 and test data, and the public's right to know about that
2 data, met the requirements for a specification?

3 MR. COWAN: I do not think that meets the
4 requirements for a specification. We don't think that,
5 when we are under a balancing test where one element of
6 the balancing test is the right of the public to be
7 fully apprised as to the basis for an effect of a
8 proposed action, that merely by saying the public needs
9 this information, and saying that the public needs test
10 information in order to be fully apprised meets the
11 burden of going forward on Decade.

12 In other words, it is not in our view
13 satisfactory to say, the need for release is because the
14 public needs to have the information being released.
15 The question is why. We don't see that their saying
16 that the public needs that test information meets that
17 burden.

18 CHAIRMAN BLOCH: That may be an evidentiary
19 conclusion, or it could be a procedural one. Suppose
20 that Westinghouse showed nothing whatever about the need
21 to keep the data back, then wouldn't it be enough to
22 merely state that the public has an interest in knowing
23 about safety?

24 MR. COWAN: I am not sure that I understand
25 the hypothetical, Mr. Chairman, because in order to

1 submit the proprietary information in the first place,
2 Westinghouse is required by Commission regulations, as a
3 proposer that the information be withheld, to submit
4 information as to the proprietary nature of it and why
5 it should be withheld, and why disclosure would cause
6 substantial harm to Westinghouse's competitive
7 position.

8 So by definition, we don't reach that
9 hypothetical you posed, because we would always have to
10 have the affidavit going in, and as a minimum there
11 would be that much information in the public record from
12 our standpoint.

13 CHAIRMAN BLOCH: So you think that as a
14 condition of creating a challenge, there should be a
15 statement of a genuine issue of fact about the balance?

16 MR. COWAN: We think that there is a burden,
17 once we have established a prima facie showing, which we
18 think we have here, that it is incumbent upon the person
19 or party seeking disclosure to go forward and identify
20 not only portions of the information specifically for
21 which public release is sought, but also to disclose the
22 relevance and necessity of releasing that information.

23 CHAIRMAN BLOCH: Would you try to continue?

24 MR. COWAN: You asked the question as to
25 whether numbers were excluded from consideration due to

1 Decade's statement. As we argued in the last session of
2 this conference call, we think that Decade is bound by
3 what it said on that transcript page 632. Indeed, they
4 said that the numbers were challenge.

5 You asked the question about the balancing
6 test. It is obviously, we think with regard to each
7 piece of proprietary information which Decade seeks to
8 have disclosed, that there be an indication of why that
9 particular or those pieces of proprietary information
10 must be disclosed.

11 We don't think a broad sweep or an argument
12 that says the thing taken as a whole needs to be
13 disclosed meets the test, anymore than a broad sweep
14 saying that all of the information taken as a whole
15 should be withheld from public disclosure would meet the
16 test.

17 Indeed, that is the very reason why, when
18 there is a question like in this case, we go back and
19 identify each piece of the information, or each portion
20 of the information that we think should be withheld. We
21 think that the obligation here is co-extensive with our
22 obligation insofar as how much detail needs to be gone
23 into here.

24 CHAIRMAN BLOCH: Mr. Cowan, the cases that you
25 are relying on for that, are they the same cases staff

1 is relying on?

2 MR. COWAN: For that last proposition, Mr.
3 Chairman, frankly there are no cases that I am aware of
4 one way or the other. We think the cases the staff has
5 cited are the appropriate cases to be considered in
6 terms of what the Commission Boards have said in
7 adjudicatory proceedings on withholding of proprietary
8 information.

9 We think, although the formulation of 2.790
10 has changed over the years, especially with regard to
11 what an applicant for withholding has to submit, on the
12 essential points these cases lay out the procedures that
13 have been adopted by Commission Boards and the
14 Commission in the past.

15 There is one other case that has both
16 historical and, perhaps, precedential value. The
17 subject of proprietary information was a major subject
18 for consideration in the rulemaking proceeding on
19 emergency core cooling systems, which was an
20 adjudicatory proceeding.

21 There are some things that were adopted by the
22 Licensing Board conducting that hearing, and were later
23 approved by the Commission, that we think are relevant
24 or might be relevant to this case here. For example,
25 that Licensing Board found specifically in so many words

1 that the tests and test data are proprietary
2 information, and are entitled to protection.

3 So there are some lessons to be drawn from
4 that case, and perhaps from some others, but basically,
5 we agree with the staff's interpretation of the cases
6 that they have cited.

7 CHAIRMAN BLOCH: Mr. Cowan, do you have a
8 title on the ECCS proceeding, that is not a published
9 document?

10 MR. COWAN: Oh, yes, the order on proprietary
11 were all published, Mr. Chairman. I don't have those
12 here, but I will be happy to furnish those to the Board,
13 either by letter or by telephone call.

14 CHAIRMAN BLOCH: Unless someone on the line
15 already knows them.

16 MR. COWAN: The rulemaking itself was
17 Rulemaking 50-1, but the specific orders, I would have
18 to go back into the files and research. What I did was
19 researched so far as our memoranda, our internal
20 memoranda contained references to those to refresh my
21 memory on this. I will have to go back and pull that
22 order.

23 CHAIRMAN BLOCH: Was the ECCS proceeding
24 before or after the modification in 2.790?

25 MR. COWAN: The ECCS proceeding began in

1 January 1972 and finished in 1973, so it would have been
2 prior to the more recent modifications of 2.790. But,
3 as I pointed out earlier, the history of the
4 modifications of 2.790 will show that in a number of
5 instances the prior procedural aspects, and the prior
6 handling of proprietary information was carried
7 forward.

8 CHAIRMAN BLOCH: One difference possibly is
9 that the change was made in order to give some
10 recognition to the policies of the Freedom of
11 Information Act.

12 MR. COWAN: In the 1976 or so amendments to
13 the Section 2.790 --

14 CHAIRMAN BLOCH: Prior to the Freedom of
15 Information Act.

16 MR. COWAN: I think that the major reason, or
17 a major reason for the change in the mid-1970s to 2.790
18 was in order to require the applicant to provide a
19 record on which the staff, when there was a proprietary
20 question, could adequately weigh the validity of the
21 proprietary position being asserted by the applicant for
22 withholding.

23 CHAIRMAN BLOCH: Even if that was required
24 because the staff did not have to do it under the
25 Freedom of Information Act?

1 MR. COWAN: Would you say that again, Mr.
2 Chairman, I missed that.

3 CHAIRMAN BLOCH: Wasn't the necessity for the
4 staff to have that increased guidance that they had to
5 be able to respond to FOIA requests?

6 MR. COWAN: I don't think so, Mr. Chairman.
7 The staff had an obligation or the Commission had an
8 obligation to respond to FOIA requests long before the
9 1976 amendments to 2.790.

10 CHAIRMAN BLOCH: Have you other points?

11 MR. COWAN: I guess one thing that would
12 follow from this last point is that 2.790 cases are not
13 necessarily the only relevant cases in determining the
14 meaning and the appropriate procedures to be followed
15 with regard to this area. There may be some other cases
16 beyond those which specifically cite 2.790.

17 I don't have any other points that I picked
18 up, Mr. Chairman, on the discussion or dialogue that you
19 had with Mr. Schomaker on the staff with regard to this
20 area.

21 We think, as I said in the earlier session of
22 the telephone conference, that we are entitled to a fair
23 delineation of what it is that we are facing in this
24 proceeding. There are several aspects of that.

25 This whole discussion has revolved around the

1 balancing test, and we don't understand, with regard to
2 whether the information is entitled to protection short
3 of the balancing test, what it is in our submittals that
4 is being challenged, if anything.

5 With regard to the (b)(4) determination, we
6 think we are entitled to have some specificity on that.
7 We think we are entitled to a delineation in the
8 documents of what portions specifically, and not by
9 reference to hundreds of pages or even tens of pages,
10 Decade wishes to have disclosed to the public, and the
11 reasons why and the relevance and necessity for doing
12 so.

13 CHAIRMAN BLOCH: Mr. Cowan, if we were to
14 limit the subject to the balancing test, I am not sure
15 how much of a burden ought to be imposed on Decade if
16 they are relying on a general argument that the public
17 needs to know about safety.

18 For example, there could be differences, I
19 imagine, with respect to some of the tests that you have
20 done, because Westinghouse's investment, their value for
21 the particular release might be more troublesome to
22 them, and some of the tests might have more value than
23 others in terms of their release. I don't understand
24 how Decade could be expected to know that, or
25 differentiate among the specific tests in terms of their

1 value to Westinghouse.

2 What is it in terms of notice that you need
3 specification for?

4 MR. COWAN: Mr. Chairman, the general argument
5 about the public needs to know about safety was the
6 consideration that went into the Commission coming up
7 with the present 2.790 rule than the prior rule. The
8 Commission has already concluded that, and as result in
9 (b)(5) they have directed a balancing consideration.

10 So if Decade is relying on a general argument
11 on the public needs to know about safety as being the
12 reason for disclosure, without more, it seems to us that
13 that is a challenge to the regulation. The Commission
14 has already said that there is both a public interest
15 and the right to be apprised of the basis for the effect
16 of a proposed action, and that there is a public
17 interest in the protection of a competitive position.

18 I don't see how it carries any weight on one
19 side to say that we believe that the public needs to
20 know about safety, and that that general argument gives
21 any indication of typically why the right of the public
22 to be fully apprised in this particular case outweighs
23 the demonstrated concerns for protection of a
24 competitive position.

25 CHAIRMAN BLOCH: Is that all of your

1 presentation, Mr. Cowan?

2 MR. COWAN: As I said, in this area, Mr.
3 Chairman, there is one other area that I will eventually
4 want to reach, but in the area of the dialogue with the
5 staff, yes.

6 CHAIRMAN BLOCH: Could you tell me what are
7 the other areas that you want to reach later?

8 MR. COWAN: Yes, Mr. Chairman.

9 In the last session of this conference call,
10 there was some discussion concerning the right to
11 withdraw, and the question of whether we would need to
12 brief that as part of the briefing that is going to be
13 done, or as part of the presentations that are going to
14 be made. I would like to discuss that when the time
15 comes.

16 CHAIRMAN BLOCH: Mr. Cowan, I have
17 reconsidered my remarks on that subject, and I would
18 like to reassure you that should that become an issue, I
19 think it would only become an issue at such a time as
20 Westinghouse were to request return of the information.

21 So as far as I am concerned, there is no need
22 to brief that at this time. Does that satisfy you?

23 MR. COWAN: Yes, sir, it does.

24 CHAIRMAN BLOCH: Then you have concluded?

25 MR. COWAN: Yes, unless something somebody

1 else says leads to the need of saying something more.

2 CHAIRMAN BLOCH: Mr. Churchill.

3 MR. CHURCHILL: Yes, sir, I just have a few
4 brief comments about what I have heard so far.

5 I would like to start with my answer to your
6 very first question about the Board's authority because
7 of the fact that 2.790 appears in Part 2.

8 Part 2, all of the sections of Part 2 do not
9 deal with the hearing process. For example, there is a
10 subpart entitled "Procedures for Issuance, Amendment,
11 Transfer, or Renewal of a License." Section 2.101,
12 Filing of Application; Section 2.102, Administrative
13 Review of Application; Section 2.103, Action on
14 Applications for Licenses, none of those involve the
15 hearing process or the Board.

16 Similar, when we go to Section 2.790, it is in
17 a subpart all by itself, entitled, Availability of
18 Official Record. It is not under a broader heading
19 entitled, Hearing Decisions of Atomic Safety and
20 Licensing Boards, or anything like that.

21 CHAIRMAN BLOCH: Mr. Churchill, I think this
22 is productive, but could you tell me what you think the
23 purpose of Section 2.790(e) was?

24 MR. CHURCHILL: Yes. Could you give me the
25 citation again?

1 CHAIRMAN BLOCH: Yes, 2.790(e), the part that
2 authorizes the Board to act as the Commission could.

3 MR. CHURCHILL: I believe, Your Honor, that
4 merely says that if an issue is raised, the Board has
5 the authority to get involved.

6 The reason I say this is because it is very
7 tightly locked into Commission practice that 2.790 is
8 implemented almost daily in virtually every licensing
9 application there is, whether it is a construction
10 permit or an operating license, without the Board being
11 involved.

12 In fact, once an operating license is issued,
13 there is constant information still coming in, and the
14 staff always makes the determinations under 2.790, and
15 the Board virtually never gets involved. Indeed, in
16 many of these cases, there is no board.

17 Now, when we have a proceeding and there is a
18 Board constituted, the Board usually, probably in 99
19 percent of the cases, still does not get involved. If
20 that were the case, that means that most of the
21 construction permits proceedings and most of the
22 operating license proceedings would then have been
23 improperly done, because the board has never gotten
24 involved on issues of proprietary information, unless it
25 is adequately and appropriately raised by the party.

1 CHAIRMAN BLOCH: Mr. Churchill, just one other
2 question.

3 Under that interpretation, you have been
4 arguing consistently that we could raise this issue only
5 if it were a sua sponte matter. I am curious to know
6 whether we could also raise it under the authority of
7 the presiding officer if we thought that it was
8 important for full adjudication that we be able to
9 publish the standards for our decision, so that other
10 potential applicants will be able to know the standards
11 you have to meet in order to be licensed to do an
12 amendment of this kind.

13 MR. CHURCHILL: No, sir, I do not believe that
14 is appropriate for the simple reason that Mr. Cowan
15 stated at the conclusion of his remarks, 2.790 was
16 carefully considered by the Commission and put into the
17 regulations under the recognition that there were and
18 are safety matters and safety information upon which
19 both the staff and the Board can rely upon in arriving
20 at a decision, even though that information is not made
21 publicly available.

22 Therefore, that is why the Board is empowered
23 to go into in camera sessions, and that is why the
24 parties are allowed to have some information withheld
25 from public disclosure, even though the decision-making

1 bodies, whether it be the staff or the Board, are
2 relying upon that information for their decision.

3 CHAIRMAN BLOCH: Mr. Churchill, I understand
4 that argument best when it comes to the actual mechanics
5 of a reactor or a sleeving project. It seems to me that
6 there the proprietary interest is heightened, and the
7 interest in disclosing the standards of decision is
8 reduced. But do you really think it also applies to the
9 tests that were reviewed in the licensing process, so
10 that others might know what tests must be completed in
11 order to fulfill the licensing requirements.

12 Isn't there some general principle of law that
13 people ought to know how you go about getting a license,
14 and isn't there some difference there between the
15 proprietary process underlying the application?

16 MR. CHURCHILL: No, sir, I do not believe that
17 we are faced with that situation because there is no
18 specific requirement that tests A, B, C, and D should be
19 conducted. You will not find that in a NUREG or a
20 regulatory guide, or the regulations themselves.

21 I do think, however, that, yes, in making its
22 decision, it is conceivable, I suppose, that the Board
23 might say, there is no way that I can really reasonably
24 articulate my decision without revealing the basis for
25 it.

1 However, I would guess that that would be
2 extremely rare, because I think that in most cases, if
3 information has been properly withheld under 2.790,
4 there is a way to characterize it in a non-proprietary
5 way which the Boards can do in their decision.

6 Frankly, it is a novel question to me that
7 somehow other reactor applicants should have the need to
8 know what is required in order as far as specific test
9 results go, in order to get the license.

10 I don't think that the Commission has ever, in
11 any of its licensing proceedings, been that specific
12 about what has been required. Generally they say to an
13 applicant, "What have you got to persuade us, the staff,
14 that what you are proposing is safe?"

15 There is another aspect to this as well, and
16 that is that, generally speaking, if information
17 necessary to, in this case for example, show that
18 sleeving is a safe process is, in fact, developed and
19 is, in fact, necessary, somebody else who is trying to
20 perform the same type of Westinghouse sleeving on a
21 Westinghouse steam generator would, in fact, have access
22 to that, as well as the intervenors, Your Honor.

23 That is an important part to remember that if
24 this is a part of a proceeding, and the intervenors are
25 part of the proceeding, the intervenors are allowed to

1 see that. So all parties to the proceeding, and the
2 Board, are always apprised, aware and cognizant of the
3 information. It is only a question of whether the
4 general public has a need to know it. In that respect,
5 I don't see how the situation that you have hypothesized
6 would arise.

7 MR. SCHOMAKER: Chairman Bloch, this is Ed
8 Schomaker, just one clarification, if I may, speaking
9 about what Mr. Churchill discussed.

10 We have had decisions issued by the Commission
11 and by Boards that are proprietary decisions in the
12 Irwin case and in the rulemaking on ECCS that was
13 mentioned earlier. Those are in my office, and I can
14 also supply you the cites.

15 CHAIRMAN BLOCH: I am sure of that.

16 MR. SCHOMAKER: The point is that the
17 Commission released certain information of one of the
18 parties that was claimed proprietary, and withheld the
19 information of two other parties. B&W's information in
20 that rulemaking was released. General Electric's and
21 Westinghouse's was maintained as proprietary, and it did
22 deal with test procedures.

23 So there the Commission felt that it had an
24 adequate basis to reveal its rulemaking proceeding, and
25 it only had to disclose some proprietary information,

1 and it did withhold other information. What it withheld
2 was plant specific information.

3 CHAIRMAN BLOCH: What was released was argued
4 by the parties to that case as to be releasable, or was
5 it released sua sponte by the Commission?

6 MR. SCHOMAKER: B&W, GE and Westinghouse all
7 supplied statements that their information should not be
8 released. The Commission decided that it must release
9 the B&W information because it formed the basis of a
10 rulemaking.

11 CHAIRMAN BLOCH: Was that done with or without
12 argumentation by people that it should be released?

13 MR. SCHOMAKER: Mr. Cowan was part of that,
14 perhaps he could speak to it.

15 MR. COWAN: I believe that B&W made a
16 presentation to the appropriate people at the Commission
17 that the information should not be released. I know
18 that Westinghouse did.

19 CHAIRMAN BLOCH: But was it challenged?

20 I have been told all along that it is the rule
21 of the Commission that I only can consider
22 confidentiality issues that have been raised.

23 MR. COWAN: In the ECCS proceeding, Mr.
24 Chairman, the reason that the proprietary issue came up
25 was because what we called the National Intervenors,

1 which was the collection of intervenor groups,
2 specifically raised the appropriateness of having
3 proprietary information in that proceeding, and
4 specifically requested that it be disclosed.

5 CHAIRMAN BLOCH: They also specified in some
6 detail the sections that they wanted released and gave
7 reasons?

8 MR. COWAN: The specific documents in that
9 case, we did not have quite the same degree of detailing
10 out within documents as we do now of the specific
11 information. When we went to that detailing later on in
12 that proceeding, they specified the specific parts they
13 wanted to have disclosed is my recollection.

14 CHAIRMAN BLOCH: It does sound like an
15 important proceeding for me to be thoroughly familiar
16 with. I guess you would agree with that, Mr. Cowan?

17 MR. COWAN: I think so, Mr. Chairman,
18 although, of course, as I have indicated earlier, that
19 was a rulemaking proceeding using adjudicatory
20 procedures. It was a strict adjudicatory rulemaking
21 with all of the trappings of discovery and
22 cross-examination, and so forth.

23 CHAIRMAN BLOCH: Mr. Churchill, I believe that
24 we are still with your presentation.

25 MR. CHURCHILL: I have almost concluded, but

1 if I could digress just a moment to respond to this
2 point that you and Mr. Cowan were just talking about.

3 Section 2.760(a) is the provision that I am
4 citing that limits the Board's jurisdiction to matters
5 raised by the parties, and that is entitled, Initial
6 Decisions in Contested Proceedings on Applications for
7 Facility Operating Licenses."

8 CHAIRMAN BLOCH: Mr. Churchill, I am aware of
9 that. Since I would not be issuing an initial decision
10 on this point, you nevertheless think that it is
11 applicable?

12 MR. CHURCHILL: Yes, and I wanted to
13 distinguish from the rulemaking proceeding, which the
14 ECCS was. I think that you might have to keep that
15 distinction in mind, that we are relying here on
16 2.760(a), which by its own terms does not appear to
17 apply to rulemaking proceedings.

18 CHAIRMAN BLOCH: Section 2.760 doesn't apply
19 to rulemakings, but could you tell me why it does apply
20 to rulings on confidentiality which ordinarily I
21 wouldn't think of as being part of an initial decision
22 on the merits of the case.

23 MR. CHURCHILL: I think, Your Honor, that by
24 saying that it is part of the initial decision, that
25 defines the scope of the entire proceeding. The initial

1 decision probably would discuss and encompass any of the
2 intermediate decisions that were made along the way.

3 To read to otherwise would be to hold that,
4 even though the Board would have the jurisdiction to
5 raise certain matters during the course of the hearing,
6 it would not be able to comment finally, or determine
7 finally on them in its initial decision.

8 CHAIRMAN BLOCH: To be clear, it says that I
9 am supposed to include in an initial decision findings
10 and rulings with reasons for all material issues of fact
11 or discretion presented in the record. I guess the
12 question is material to what, and obviously you don't
13 explain every decision, including all of the procedural
14 decisions along the way, in an initial decision.

15 MR. CHURCHILL: That is true. The initial
16 decision would not necessarily do that, although it
17 often recites this. But that, taken in the context of
18 all of the Part 2 requirements governing hearings in
19 which it carefully delineates how issues are to be
20 raised, and what is necessary to support issues that are
21 raised, cannot be held to read any other way.

22 That, coupled with the Point Beach Decision,
23 which I think sets out the standards or the procedures,
24 the Appeal has there articulated how they think it would
25 be appropriate for a party to raise in a licensing

1 proceeding a question or an issue of proprietary
2 information.

3 CHAIRMAN BLOCH: Have you concluded, Mr.
4 Churchill?

5 MR. CHURCHILL: Yes, except for one thing.

6 Mr. Schomaker made a motion, and I don't know
7 if we are replying to his motion yet or not.

8 CHAIRMAN BLOCH: In terms of the wording of
9 the order?

10 MR. CHURCHILL: Perhaps I should wait until we
11 discuss the motion more specifically. I think he made a
12 motion that Decade be required to make a better prima
13 facie showing of raising the issue, including an
14 identification of the material.

15 CHAIRMAN BLOCH: I think that if you are going
16 to address that, this would be the best time.

17 MR. CHURCHILL: I am afraid, then, I might be
18 repeating myself, but I will do it very briefly.

19 In the transcript, at page 723, which is the
20 very last page of the transcript of our Fall hearing, it
21 was clear in a dialogue between you, Mr. Chairman, and
22 myself that both Decade's brief and motion were included
23 in the record as it is now, and you said, "Yes, that is
24 true." I think that was the basis for your not
25 requiring Decade to go further.

1 All I am saying is that Decade, in effect, has
2 already filed in its brief and its motion. It has
3 already had the opportunity to put forth whatever it
4 wanted to put forth, and specifically rejected an
5 opportunity to do more.

6 So that in ruling on Mr. Schomaker's motion,
7 which is that Decade be required to put forth its case
8 along the lines required by the Appeal Board, I would
9 simply state that it is clear from this record that whatever
10 Decade says has to be within the scope of the motion and
11 brief which it has already filed as of November 30,
12 1981.

13 CHAIRMAN BLOCH: Mr. Anderson.

14 MR. COWAN: Mr. Chairman, this is Mr. Cowan,
15 just for a minute. I have a couple of new points raised
16 by Mr. Churchill, and I don't know whether you want me
17 to wait until Mr. Anderson has talked about them, or
18 whether you want me to talk about them briefly now.

19 CHAIRMAN BLOCH: Mr. Anderson, what is your
20 preference?

21 MR. ANDERSON: I would like to speak because I
22 would like to reiterate my motion, which may dispense
23 with a lot of this repetitious, and redundant
24 obstructionism.

25 CHAIRMAN BLOCH: Before you speak, I would

1 like to urge you to address the arguments that have been
2 made, and also to talk about your motion. If you find
3 it possible to discuss a little bit further your reasons
4 for believing that the information should be released,
5 and which information you are particularly interested in
6 being released, it could ease the difficulty for the
7 Board of fully addressing the legal arguments that
8 have been presented.

9 Mr. Anderson, please feel free to start your
10 discussion.

11 MR. ANDERSON: I have been listening
12 patiently, although not willingly, to the statements
13 made today by Mr. Cowan, Mr. Churchill, and Mr.
14 Schomaker. I perceive there to be four distinct issues,
15 three are questions of law, and one is a question of
16 fact.

17 The three questions of law are: Who has the
18 burden in a trade secret dispute. The second question
19 of law is what notice is Westinghouse entitled to, upon
20 an objection being made to a trade secret claim. The
21 third legal issue is, what duty does the Board have in
22 the absence of a motion by a party in a trade secret
23 issue. The single issue of fact is, what was the
24 breadth or extent of the objection to the trade secret
25 claim made by the Decade at hearings in Milwaukee.

1 With respect to each of the three legal
2 questions being raised, those are basically questions
3 that should have been raised on several occasions
4 previously. They are untimely. No showing has been to
5 justify them, except to create further obstruction in
6 the due process of this hearing.

7 We would refine our objection previously made
8 to encompass those three questions of law as being
9 improperly before us, and ask those to be dispose of,
10 and leave the single issue of fact to be answered in a
11 way that we see fit.

12 I would like to, at this time, renew my
13 request for the motion, as clarified, to exclude from
14 consideration the three questions of law I just stated.

15 CHAIRMAN BLOCH: You are just renewing that
16 motion without further argument?

17 MR. ANDERSON: I would like to ask for a
18 ruling on that. If either the ruling is deferred, or if
19 we do not prevail in that ruling, we would like to go
20 forward and make further argument.

21 I would add, though, if we were to not prevail
22 on that motion, if the Board were to rule that an
23 untimely request to reopen this whole issue could be
24 made by the licensee, vendor and staff, it would
25 necessarily follow that it would be appropriate for the

1 intervenor to, on an untimely basis, raise any new
2 issues as to the extent of the challenge they are
3 making, to the extent that arguendo there was not
4 sufficient breadth in the original statements.

5 So even if we lose this motion, the applicant,
6 the licensee, and staff would lose nonetheless, and I
7 don't think there is any point in pursuing it.

8 I would like a ruling now, and if a ruling is
9 deferred, or if we do not prevail, I would like to speak
10 further.

11 MR. COWAN: Mr. Chairman, does the Board want
12 discussion on the timeliness?

13 MR. ANDERSON: I think that we have had it.

14 MR. COWAN: I don't think so.

15 MR. ANDERSON: I don't think it is appropriate
16 to go redundantly over and over the same issue each
17 time, sir.

18 CHAIRMAN BLOCH: Mr. Cowan, I did specifically
19 state when the motion was made that parties should
20 address it when it came to be their time. I guess you
21 are indicating that you did not address this.

22 MR. COWAN: I did not, because I don't think
23 there is anything to it. If it is going to be renewed,
24 then I think perhaps a comment or two on timeliness
25 might be appropriate.

1 MR. CHURCHILL: Your Honor, I also did not
2 respond to it, and I do have a response. I am sorry
3 that I misunderstood.

4 MR. ANDERSON: I think the absence of
5 responding, Mr. Chairman, must be viewed as being done
6 at their own peril. At some point, the protraction of
7 these conference calls, and the cost of that to parties
8 without unlimited resources, has to be taken into
9 account.

10 I am going to have to ask, sir, that if we
11 can't get these conference calls conducted with
12 dispatch, that the parties asking for reconsideration
13 reduce their matters to writing, and we will handle on
14 that basis, and only if the Board sees fit, at its own
15 initiation, to require further elaboration to have
16 further conference calls.

17 These interminable conference calls are simply
18 placing an undue burden on our time. We do not have the
19 resources that they do, and we do not view, and I think
20 the record shows this, that these conference are at all
21 productive. They are becoming an excuse for obstruction
22 on the part of the licensee and the vendor, and we
23 object to that.

24 CHAIRMAN BLOCH: Before I rule, there were
25 some arguments presented by Westinghouse and Applicant

1 in the course of their presentations, which I would like
2 to comment on.

3 The principal one, as I understand it, is that
4 we have established in our order on confidentiality a
5 procedure by which we would have a conference call to
6 decide what the procedure should be on determining
7 confidentiality issues, and that we have never decided
8 what those appropriate procedures should be. That is
9 really why we are having this discussion now.

10 Is your understanding different from that?

11 MR. ANDERSON: Is that question posed to me,
12 sir, Peter Anderson?

13 CHAIRMAN BLOCH: Yes.

14 MR. ANDERSON: I understood that this call was
15 initiated at the request of Mr. Cowan and Mr.
16 Churchill. They asked me if we wanted one, and I said,
17 "No, I think there is no need for it." It was at their
18 instance this this conference call was initiated, as we
19 understood. We may be in error, but that is our
20 understanding.

21 CHAIRMAN BLOCH: I guess what I am asking is,
22 have I previously ruled on what the procedures should be
23 at any hearing that we might have. If that did that,
24 then your motion would seem to me to have some serious
25 merit. If I have never ruled on who has the burden, or

1 what notice ought to be given to Westinghouse, and
2 frankly I cannot remember having ruled on those
3 questions, then it seems to me that it is a matter that
4 we must decide.

5 MR. ANDERSON: We understood that the ruling
6 that was made at the Milwaukee phase of the hearing was
7 that the requirement for motion and brief to precipitate
8 the placing in issue of the trade secret would not be
9 required. The issue would be place in issue by the
10 statements made at the hearing, and the actual
11 adjudication of any further resolution of that would be
12 postponed to a later date subsequent to the
13 demonstration sleeving portion of the proceeding. By
14 making that ruling, I think the implication is that the
15 licensee, and the Applicant, or anyone else who wants to
16 go forward has the burden of doing so at whatever
17 hearing would be going forward.

18 I think there is a proper question, Do we or
19 do we not need a hearing, as opposed to, for example,
20 any affidavits that need to be filed. I think there is
21 a proper issue as to when it should be held, and whether
22 there should be briefs afterward, but those are not the
23 issues they are raising today as I heard them.

24 CHAIRMAN BLOCH: We did rule finally at the
25 hearing about the fact that you had sufficiently stated

1 issues, and we had no motion for reconsideration of
2 that. Is that your position?

3 MR. ANDERSON: That is correct, sir. By
4 saying that there is sufficient statement of the issues,
5 it presumes, I would think, that there is sufficient
6 notification to the parties.

7 CHAIRMAN BLOCH: I would like to hear
8 Applicant and Mr. Cowan, no more than two minutes each,
9 to address that.

10 Mr. Cowan first.

11 MR. COWAN: Mr. Chairman, most of our problem
12 here revolves around the fact in the transcript, while
13 Decade has said that there is sufficient statement of
14 the issues, when one reads the transcript that is
15 foggy. But beyond that, at the last session here, when
16 we tried to get at just one specific item, namely, the
17 question of whether numbers were or were not within that
18 which Decade seeks to have publicly disclosed, we got
19 seemingly a different story on the telephone than we got
20 in the transcript.

21 One of their representatives says that the
22 numbers are not what they are trying to disclose, and on
23 the telephone they said that they might be. In light of
24 that, and similar broadscale confusion over what areas
25 of the proprietary information are being sought, we

1 think that this discussion and these considerations are
2 not untimely.

3 I should note that I would not have
4 characterized the issues here in quite the same way that
5 Mr. Anderson characterized them, as three legal and one
6 factual.

7 CHAIRMAN BLOCH: Mr. Cowan, the motion was not
8 addressed to whether you had fair notice as a result of
9 the record, but whether or not I had previously ruled
10 that the record itself was sufficient to raise questions
11 of confidentiality. Therefore, I ruled at that time,
12 and there was no timely motion at that time to
13 reconsider that, and that the time for doing that has
14 passed. You have not addressed that.

15 MR. COWAN: I am sorry, I don't understand
16 that, Mr. Chairman. I understood, based on the
17 memorandum and order that the Board issued on December
18 21, 1981, and based upon the discussion during the last
19 call, that there was going to be a conference call to
20 decide these procedures, and certainly part of the
21 procedures is who has the burden of going forward.

22 CHAIRMAN BLOCH: Possibly, unless I had
23 already ruled on that, which is what Mr. Anderson is
24 arguing.

25 MR. COWAN: I don't see any ruling with regard

1 to whether Decade has the burden of going forward, or
2 whether we have the burden of going forward. I don't
3 see any ruling that --

4 I do see a ruling that says that Decade is
5 complaining about is on the record, but when we read the
6 record and tried to give the Board our interpretation of
7 what we thought the issue was, we were quickly
8 confronted with two things -- one, that the Board was
9 interested in things beyond that which Decade is
10 interested; secondly, with regard to those things that
11 Decade is interested, they don't read the portion of the
12 record the same way that we do. So that goes to the
13 question of notice that might be involved here.

14 CHAIRMAN BLOCH: Mr. Cowan, your time as
15 expired.

16 Mr. Churchill, two minutes.

17 MR. CHURCHILL: No, Your Honor, I know of no
18 such ruling made by you on any of those issues,
19 particularly whether or not his motion has
20 satisfactorily discharged his burden of proof.

21 The only way that I can read that transcript
22 is that he, in fact, was making the motion and chose to
23 go and base it upon the brief and motion that is already
24 in the record. You accepted the motion, which you would
25 have any motion, and the parties were to respond. By

1 saying, "Okay, this is the motion," that is certainly is
2 not a ruling on the motion.

3 CHAIRMAN BLOCH: Not on the merits, but isn't
4 it the case that I was saying that he did not need to
5 file further specification in writing, that he had
6 already filed enough specification.

7 MR. CHURCHILL: No, sir, because I don't think
8 that you were making a ruling, even that it would be
9 appropriate for you to rule at the time as to whether
10 his motion as adequate. I don't think the Board ever
11 does that. The Board receives a motion from a
12 proponent, and then looks at the responses.

13 CHAIRMAN BLOCH: Were you requesting at the
14 time that he make an additional written filing, and
15 wasn't my ruling that it wasn't necessary?

16 MR. CHURCHILL: As far as I know, I made that
17 request, and Mr. Anderson said that everything he wanted
18 was on the record ad nauseam. He used that term twice.
19 Your simply saying, "Okay, that is the motion," in no
20 way implies a ruling that that motion was adequate to
21 carry the burden, or to even prevail on the merits of
22 what he was asking for in the motion.

23 I have to honestly say that if it is to be
24 construed that there was some kind of a ruling of that
25 sort, it completely escaped me. I don't know of any of

1 the parties who would have interpreted it that way.

2 CHAIRMAN BLOCH: Mr. Churchill, is part of the
3 reason for that feeling of yours that we were somewhat
4 rushed near the end of the conference. Because if that
5 is true, it might also be unfair, at the same time, to
6 hold Decade to statements that Ms. Falk made in a rather
7 rushed manner.

8 MR. CHURCHILL: No, sir, I believe just the
9 opposite. I was prepared to have that clarified right
10 then and there. If anybody was rushed, and was anxious
11 to go and to get out of there, it was Mr. Anderson. He
12 had the opportunity right then and there.

13 This conference, as I recall, was adjourned
14 very early in the day, and it was scheduled for both
15 days. There was no reason to suggest that we were being
16 held over, or that the hearing was lasting longer than
17 the parties had anticipated.

18 It was clearly Mr. Anderson's choice that he
19 did not want to do any more. He wanted to rely solely
20 and totally on his brief and motion that were already in
21 the record.

22 CHAIRMAN BLOCH: The staff, two minutes,
23 please.

24 MR. TREBY: My recollection is that at the
25 close of the hearing, things were somewhat rushed.

1 Be that as it may, the staff's point here is a
2 very simple one, that is, if we are going to have an
3 evidentiary hearing on what is to be confidential or not
4 confidential, we think the parties ought to be on notice
5 as to what is the subject of the hearing. That is why
6 the staff is requesting that Decade clarify just what it
7 is that it is claiming should be confidential.

8 We have looked through the transcript, and
9 when we looked through the transcript we found reference
10 to a single table of tests. When we inquired, at the
11 earlier conference call on this subject that we had on
12 Thursday of last week, whether that was the sole test
13 that was being the subject of this upcoming hearing, we
14 were told, no, Chapters 6, 7, and 9 also discuss tests.

15 The staff is not on notice as to what tests
16 are involved, and we think that we ought to be on
17 notice. We think that Decade should tell us.

18 If Decade wants to make an argument that it
19 was rushed, and that it wanted to have a better chance
20 to describe just what it is it wants to have the subject
21 of this forthcoming hearing be, the staff has no problem
22 with that.

23 The staff merely thinks that in order to have
24 a meaningful hearing, the parties need to be on notice
25 as to what is the subject matter of that conference.

1 CHAIRMAN BLOCH: Mr. Treby, I take it that you
2 also agree with the Applicant and Westinghouse that we
3 did not, at the hearing, rule that there had already
4 been sufficient specification of the ground for public
5 release?

6 MR. TREBY: Yes, I don't believe that you made
7 a final ruling that, in fact, the question of the public
8 interest has been resolved. Decade had made these
9 general statements that the public interest required
10 release of this proprietary information, and any
11 references made to those documents was that was the
12 argument that was being put forth by Decade. I did not
13 view it as a ruling by this Board that they had adopted
14 that argument or ruled on that argument.

15 CHAIRMAN BLOCH: Of course, we have not
16 adopted the argument. But don't you recall the way I do
17 that Mr. Churchill asked that Decade be required to make
18 a written filing, and I said, "No, that will not be
19 required. It is not required because they have already
20 told us enough in order to precipitate a hearing."

21 MR. TREBY: The transcript covering all this
22 is page 721, where there was discussion by Mr. Churchill
23 where he said, "Being on notice ad nauseam, etc., and I
24 don't know which information." Mr. Anderson said, "That
25 is not correct." You, Mr. Chairman, said, "Let me try

1 to answer first, because I have a better understanding
2 than Mr. Churchill seems to have."

3 CHAIRMAN BLOCH: I seemed to think that ther
4 was enough explanation in the record that I thought I
5 understood the basis for the claim; isn't that a fair
6 interpretation of what went on?

7 MR. CHURCHILL: If that was in fact a ruling
8 that his motion was adequate, then we did not get a
9 chance to argue it, because I did not understand that to
10 be a ruling.

11 The way I clearly understood it to be was that
12 I thought Mr. Anderson should be more specific in his
13 motion, and should file a motion. Mr. Anderson said, "I
14 have already done it. I rely on what is in the
15 record." That was his choice, his decision.

16 If I had had any inkling that what in fact you
17 were doing was making a ruling, I would have insisted
18 upon the right to argue about it.

19 CHAIRMAN BLOCH: Mr. Churchill, your time
20 expired a while ago. I am listening to Mr. Treby at
21 this time.

22 MR. TREBY: I guess my last statement would be
23 that I viewed it as the Board identifying the issue, and
24 that is something different than ruling on the issue.

25 CHAIRMAN BLOCH: Of course, we did not make

1 any ultimate ruling, but didn't we rule that no further
2 written statement was necessary?

3 MR. TREBY: You conclude by saying, "Is that a
4 full, fair statement," and you paraphrase what you
5 understand Decade to be arguing about. You say, "Is
6 that a full, fair statement of what your argument is?"

7 CHAIRMAN BLOCH: That was in response to a
8 motion that we require a written filing. We said, "We
9 don't need one. We understand it this way."

10 MR. TREBY: I understood it as identifying,
11 yes, we understand what the issue is. I guess, there
12 certainly was an implication that there need not be any
13 written filing by Mr. Anderson.

14 CHAIRMAN BLOCH: You also are unhappy that we
15 rest on that because of the rushed nature of the end of
16 the hearing?

17 MR. TREBY: Also, because having reviewed the
18 transcript, the whole basis upon which Mr. Anderson was
19 arguing that he did not have to make a written filing,
20 was that it would be clear by just reviewing the
21 transcript. Our experience is that having reviewed the
22 transcript, it is not clear. We apparently have a
23 different interpretation of what would be the matters
24 that need to be litigated than Mr. Anderson does, and it
25 may well be different than the other parties'.

1 CHAIRMAN BLOCH: Mr. Anderson, I would like
2 you to have the concluding remarks on this issue,
3 please.

4 MR. ANDERSON: I can do it in 45 seconds, Your
5 Honor.

6 As to Mr. Cowan's statement, he was simply
7 non-responsive to your question. The question is not as
8 to the factual issue, or the breadth of our objection as
9 to our motion. He said that the motion speaks to the
10 three legal issues, and his entire response to you had
11 nothing to do with the motion we are making, and I think
12 it was deliberately so. Mr. Churchill's was responsive,
13 although I think it is wrong. Mr. Treby's was not
14 either. Let me get to Mr. Churchill's response, because
15 it is the only one that attempted to at least to purport
16 to be responsive.

17 He said that he did not receive notice at the
18 hearing so that he could be in a position to know to
19 move for reconsideration. At 722 of the transcript, at
20 the close of the hearing, you stated to Mr. Churchill,
21 and I quote from the transcript, "Mr. Churchill, do you
22 want the opportunity to respond in writing to what we
23 now know is a completed motion?"

24 That was a clear statement, especially in the
25 context of the preceding statement, that the question of

1 the sufficiency of a motion made orally to challenge the
2 issue was in fact determined, and any request for
3 reconsideration was now passed.

4 Our motion as to the three legal questions,
5 not to the legal question which would still be
6 outstanding, should be granted.

7 CHAIRMAN BLOCH: Mr. Anderson, I think you
8 have stated a serious procedural point. I want an
9 opportunity to consider it and to rule possibly within
10 the next two days on it. I am not prepared to rule on
11 it at this moment, but I would like to hear you address
12 a point that we may not have to get to, which is the
13 other argument on the breadth of the claim, and what you
14 can do, perhaps as easily as you can, perhaps verbally
15 now, to specify in more detail what it is that you plan
16 to claim.

17 MR. ANDERSON: As long as I am doing so in the
18 spirit of accommodation, not because of any acceptance
19 on our part that there is any more legal need, I will be
20 more than glad to do so on that basis.

21 MR. COWAN: I don't so understand it.

22 CHAIRMAN BLOCH: What is it, Mr. Cowan?

23 MR. COWAN: I want to make sure that my
24 silence is not taken as assent to that introductory
25 comment, or any waiver.

1 CHAIRMAN BLOCH: I think we should probably
2 understand that people generally don't want to waive
3 things. If I make a ruling, and people don't object, I
4 assume that they have waived things, but other than
5 that, the comments of the parties do not need to be
6 objected to preserve waiver.

7 Mr. Anderson, I understand what you just said,
8 and I appreciate anything you can do to assist us in
9 understanding somewhat more fully your claim.

10 MR. ANDERSON: At page 721 of the transcript
11 of the Milwaukee set of hearings, you state, "I
12 understand that Decade argues particularly that any test
13 that was conducted for safety purposes must be disclosed
14 because it is essential to the record of the proceeding,
15 and because tests are different from proprietary
16 processes themselves." You asked if that was a fair
17 statement, and I indicated it was, and it continues to
18 be.

19 So basically what we are talking about, to
20 reiterate one more time in the spirit of accommodation,
21 any test conducted to determine the safety of the
22 sleeving process, and that includes the entirety of the
23 tests as indicated with respect to the sleeve report,
24 within the chapters we denominated on Thursday of last
25 week.

1 We believe that those specific tests in their
2 entirety, and the conclusion, and the numbers, and
3 everything else that surrounds them, must be part of the
4 open record. The reason for that is that we believe
5 that the public is directly affected if the safety tests
6 are not adequate to guarantee their well-being, and they
7 are entitled to know that because their safety is at
8 issue, their livelihood is at issue, and their
9 well-being is at issue.

10 We believe that sufficient questions have been
11 raised by reputable Presidential Commissions about the
12 adequacy of the protection of the public that they need
13 to be able to understand that themselves, so that they
14 are not dependent upon an agency whose credibility has
15 been severely challenged by many reputable sources.

16 CHAIRMAN BLOCH: The best you can do easily,
17 is to state that you are interested in all tests?

18 MR. ANDERSON: We responded, in the spirit of
19 accommodation last Thursday, to be several chapters.
20 Let me put that out and put it in front of me. Those
21 chapters with respect to the sleeving report were
22 Chapters 6, 7, and 9, if I recall my statement
23 correctly.

24 So I that I finish the other statement
25 completely. We also feel that we have an obligation to

1 inform our members, on whose behalf we are pursuing this
2 intervention, as to the full adequacy of the safety
3 tests that are being run, that impact on their
4 well-being as well as the broad population of the people
5 of Wisconsin.

6 Would that be responsive to you?

7 CHAIRMAN BLOCH: Yes, it would be.

8 Have the parties any further comments that
9 they wish to make at this time, and I would ask that
10 they try to limit their further comments to two minutes
11 each.

12 MR. CHURCHILL: Yes, sir, I can limit that to
13 less than that.

14 Mr. Anderson cannot have it both ways. If he
15 is insisting that he has already supplied the motion,
16 and it is complete, then he must be bound by what is in
17 the transcript, including at page 632, where Decade
18 stated that they did not want the numbers, and also at
19 the bottom of 722, where he makes it very clear in
20 response to the Chairman, that it is not the proprietary
21 nature that he is questioning, it is only the balancing
22 act.

23 Further, I must object if the Board determines
24 in any way, I am not sure whether this is where the
25 Board is going, that in fact the Board has already ruled

1 that Mr. Anderson's motion, as set forth in the record,
2 satisfies the requirements set down by the Appeal
3 Board. There was no argument on that, and the Applicant
4 never understood that that was your ruling, nor did the
5 Applicant argue it.

6 MR. COWAN: Mr. Chairman, in the dialogue with
7 Mr. Schomaker, you asked him the question of whether
8 there is some general principle of law that people are
9 entitled to know all about the licensing process and,
10 therefore, that material must be on the public record.

11 If I understand Mr. Anderson's statement, his
12 statement is that the public is so entitled to know,
13 apparently because there is some type of general
14 principle of law, and that the matter cannot be left to
15 the NRC as a suspect agency.

16 We would suggest that Mr. Anderson really is
17 challenging the Commission's resolution of the competing
18 considerations of the right to have the public apprised
19 as to the basis for a decision, and the considerations
20 that go into keeping information confidential and
21 concern for the protection of the competitive position.

22 His statement does not add, in our judgment,
23 anything beyond a reiteration, and does not specifically
24 say why the public is directly affect, except insofar as
25 his statement says that the NRC is a suspect agency. We

1 don't think that that is an appropriate basis on which
2 to predicate any disclosure of proprietary information.

3 CHAIRMAN BLOCH: The staff.

4 MR. COWAN: One further point, Mr. Chairman,
5 just so there is no question about it.

6 We previously submitted to the Board our brief
7 on the question of the Board's jurisdiction in this area
8 and, of course, by our participation in these conference
9 calls and in the procedures that the Board has outlined,
10 we did not waive any of our objections to the
11 jurisdictional point.

12 CHAIRMAN BLOCH: Surely.

13 Two minutes for the staff.

14 MR. SCHOMAKER: The staff comments are very
15 short.

16 We appreciate what Mr. Anderson was trying to
17 do on the record. We still feel that that is not
18 sufficient statement of the relevancy and need for
19 identified portions of the underlying test report to be
20 release. We feel that he has not met what we consider
21 to be the valid burden of proof here.

22 CHAIRMAN BLOCH: You think that he needs to
23 show relevancy to this case?

24 MR. SCHOMAKER: Yes.

25 CHAIRMAN BLOCH: Mr. Anderson, two more

1 minutes?

2 MR. ANDERSON: Is it my understanding that you
3 are asking for a conclusion as to the whole discussion,
4 and not just to my motion?

5 CHAIRMAN BLOCH: You have the last two minutes
6 of the entire conference call, except that I am going to
7 ask for a very narrow scheduling matter after we are
8 done with you.

9 MR. ANDERSON: I am going to have one other
10 extraneous matter to raise very briefly as well. Apart
11 from that, I must confess that I loathe to allow
12 legalistic semantics to disguise the substance of what
13 is going on.

14 I think that when you actually strip aside the
15 hair-splitting that has been discussed ad nauseam today,
16 the effect, if they were to be successful in what they
17 are attempting to get, which we would have to go piece
18 by piece, which could be hundreds or thousands of
19 different pieces, would be a Mickey Mouse procedure
20 which would not add one iota to a legally distinguishing
21 feature of whether the proprietary claim has been found
22 for tests as opposed to processes.

23 Let's say, if they were entirely successful in
24 their claim, they would not get anything more useful to
25 this proceeding. We view what they are doing as naked

1 obstructionism which should not be condoned.

2 CHAIRMAN BLOCH: Mr. Anderson, to be clear, I
3 infer from the remarks you made before about the reason
4 you want the information, that in each instance you are
5 alleging that there is a public right to know, which you
6 described in detail, overrides the Westinghouse
7 proprietary interest. Is that a correct inference?

8 MR. ANDERSON: At this point in time, but we
9 have not, for example, seen Weissman affidavit in
10 complete form as yet, and we may at some point, although
11 the probabilities of it are low, wish to challenge the
12 proprietary nature of it as well.

13 At this point in time, from what we know at
14 this point in the record that we have available to us
15 now, the basic thrust is that the public has a right to
16 know about whether the tests are adequate to guarantee
17 their safety.

18 CHAIRMAN BLOCH: I would like to know from any
19 of the parties whether there is any difficulty in terms
20 of the schedule that we have already adopted, if I rule
21 on this question by tomorrow afternoon at 4:00 o'clock?

22 MR. ANDERSON: No.

23 MR. COWAN: There is no difficulty. It may be
24 necessary, if there is a hearing called on the 10th of
25 March, to begin the hearing at noon rather than at 9:00

1 or 10 o'clock because of some travel difficulties that
2 we may have the night before. We have a conflict. Some
3 of our people will be coming from another place.

4 CHAIRMAN BLOCH: What day of the week are we
5 talking about?

6 MR. COWAN: We are talking about a hearing on
7 a Wednesday, I believe it is March 10. When we talked
8 last Thursday, I thought I had cleared sufficiently that
9 day, as indeed I had, with all of our people who might
10 be affected. However, it turns out that some of those
11 people may not be able to get into Milwaukee the night
12 before, that is the night of the 9th.

13 CHAIRMAN BLOCH: Will this affect the ability
14 to present the case, or just the order of the
15 witnesses?

16 MR. COWAN: Just the order of the witnesses,
17 or perhaps a couple of hours delay in starting time on
18 the 10th. It will not affect the ability of our being
19 able to put the case together by then.

20 CHAIRMAN BLOCH: I see, because you need to
21 talk with these people in person, and not on the
22 telephone.

23 MR. COWAN: No, because these people, Mr.
24 Chairman, if we put them on as witnesses, at least one
25 of these people has a conflict, or maybe more than one

1 has a conflict the night before, and they would have to
2 fly into Milwaukee on the morning of the 10th, rather
3 than, as I had previously assumed, the night of the
4 9th.

5 CHAIRMAN BLOCH: I still don't understand the
6 extent of the difficulty. That means he, personally,
7 could not testify until afternoon.

8 MR. COWAN: That is right.

9 CHAIRMAN BLOCH: But given that you have many
10 witnesses, I don't understand why that means we have to
11 start later.

12 MR. COWAN: I am not sure we will have many
13 witnesses, Mr. Chairman. We may have a single panel of
14 witnesses as opposed to multiple witnesses.

15 CHAIRMAN BLOCH: If you have a single panel,
16 there would be a serious problem in starting the panel,
17 and then having him join the panel at noon?

18 MR. COWAN: This is a key member of our panel,
19 Mr. Chairman.

20 CHAIRMAN BLOCH: I will take that under
21 advisement as well.

22 MR. COWAN: It is a timing factor on the
23 commencement of the hearing, the hour at which the
24 hearing is called on the 10th Milwaukee, rather than the
25 date.

1 CHAIRMAN BLOCH: I think we can leave that to
2 be resolved at the time of our last telephone conference
3 call prior to the tentatively scheduled date, because at
4 that time we should know whether the request for a delay
5 until noon would require us to have a second day of
6 hearing.

7 MR. COWAN: At that time, we will also know,
8 and perhaps this conflict will disappear, too.

9 CHAIRMAN BLOCH: All right, that is helpful.

10 In that case, we will take these matters under
11 advisement, and try our best to decide the issues by
12 tomorrow at 4:00 o'clock, with a written order to
13 follow. We will notify the parties as soon as we have
14 ruled.

15 MR. ANDERSON: Mr. Chairman.

16 CHAIRMAN BLOCH: Mr. Anderson.

17 MR. ANDERSON: I had one last matter on a
18 separate issue at this point, very quickly.

19 CHAIRMAN BLOCH: Pleas.

20 MR. ANDERSON: Unlike some other parties, we
21 like to give as much advance notice of new things that
22 we intend to precipitate as possible.

23 In that regard, we have two new facts before
24 us at this point in time. One is the January 15 letter
25 from the Applicant, which changes the time frame

1 substantially for the need for license amendment
2 approval to sometime in 1983, apparently. We have asked
3 for further clarification on that. Secondly, we have
4 the action at the Ginna plant on Monday of last week.

5 We believe that those impact on the
6 desirability and need for the merits of this case to go
7 forward as previously had been scheduled for discovery,
8 and we intend to file a motion essentially asking for a
9 continuance of this proceeding until a later date
10 because of those two new facts.

11 CHAIRMAN BLOCH: In your motion, will you
12 please specify the way in which these new facts require
13 more time, and what would probably be done with that
14 time?

15 MR. ANDERSON: I will be glad to, sir. We
16 will have having that off in the mail today.

17 CHAIRMAN BLOCH: All right.

18 I should report before we close that Judge
19 Jerry Klein, and I believe Judge Hugh Paxton have been
20 with us today.

21 Is that correct, Hugh?

22 (No response.)

23 CHAIRMAN BLOCH: I guess Hugh Paxton has not
24 been with us. Judge Klein has been in my office.

25 There being no further business, this hearing

1 is adjourned.

2 (Whereupon, at 12:55 p.m., the telephone
3 conference was adjourned.)

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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 Co. (Point Beach Nuclear Plant
Units 1 & 2)

Date of Proceeding: February 1, 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.

Patricia A. Minson

Official Reporter (Typed)

Patricia A. Minson

Official Reporter (Signature)