UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Peter B. Bloch, Chairman
Jerry R. Kline
Hugh C. Paxton



WISCONSIN ELECTRIC POWER COMPANY

Docket Nos. 50-266-OLA
50-301-OLA

(Point Beach Nuclear Plant, Units 1 and 2)

February 2, 1982

MEMORANDUM AND ORDER
(Concerning the Burden of Going Forward on Confidentiality Issues)

On January 28, 1982, in the course of an on-the-record telephone conference, Westinghouse Electric Corporation (Westinghouse), insisted that it be given greater notice concerning the specific sections of the Westinghouse Sleeving Report that Wisconsin's Environmental Decade (Decade) would like to be released to the public. Tr. 970-973. Westinghouse is supported by Wisconsin Electric Power Company (applicant) and by the staff of the Commission (staff). It is opposed by Decade, which argues that the Board already ruled on this same issue, that the present argument contributes to unnecessary delay in the proceeding and expense to Decade, and that Westinghouse has been sufficiently informed of Decade's claim.

Because of the importance which Westinghouse attaches to retaining the confidentiality of this information and because the staff attempted to buttress the Westinghouse claim by citing a string of Commission decisions to us, we continued the January 28 telephone conference and reconvened for two full hours on February 1, 1982. After consideration of this record, including those precedents which the staff argued were most relevant, we have determined that Westinghouse's motion for elaboration of confidential-

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ity claims should be denied. In the course of this opinion, we also attempt to clarify the scope of the Board's concern about confidentiality.

## I EFFECT OF OUR PREVIOUS RULING

At the conclusion of the October 29-30, 1981, hearing in Wisconsin applicant argued that if a party wants allegedly proprietary information disclosed to the public that it should come forward with a motion stating reasons why information should not be held proprietary and defining or identifying the material to which its reasons apply. Tr. 718. Applicant argued that failure to follow this procedure could result in a protracted hearing in which the proprietary nature of each page of the Westinghouse Sleeving Report would be litigated separately. Tr. 719.

At that time, Decade responded that it had already made its arguments sufficiently clear. Tr. 720. A point of disagreement about the degree of specificity of Decade's request for public disclosure then arose. Tr. 721. Judge Bloch attempted to resolve the dispute by stating his understanding of Decade's argument. Tr. 721-722. Mr. Anderson then summarized the Decade argument himself:

> [T]he countervailing interest of the public relating to the safety aspect of [the sleeving project] . . . exceeds any proprietary interest that the vendor may have when it comes to the safety test as opposed to the design parameters.

Tr. 722. Applicant then stated its understanding that Decade's motion had been filed and that it was up to it to respond, and the Board concurred in that interpretation. Tr. 723. The hearing was adjourned. Ibid.

Our review of this record persuades us that the Board did rule on the issue of whether Decade had to come forward with further arguments or further specificity. Applicant, which at that time represented Westinghouse's interests concerning confidentiality, was permitted to make whatever argu-

ments it pleased. There was no request for further argument or for permission to file briefs; and there was no timely motion for reconsideration. Hence, that decision of the Board should stand as final.

On the other hand, we are aware that events at the close of a hectic two day hearing schedule are not always conducive to careful, measured decision making. Consequently, we listened to the untimely argments of Westinghouse, applicant and staff. Had we been persuaded that we had made an egregious error, we might have acknowledged error and have rescinded our ruling. Since these arguments were presented by distinguished counsel with long experience in Commission proceedings, we considered it possible that we had made such an error and listened patiently. However, after reviewing the key authorities cited to us, we find no such egregious error and we therefore decline to exercise the discretion to review the procedural ruling we made on October 31, 1981.

The remainder of this decision presents the analysis which led us to conclude that we had not been in error and it attempts to suggest efficient paths which Westinghouse may choose in order to expedite this phase of the proceeding.

## II BURDEN OF GOING FORWARD

Westinghouse and applicant based their arguments about the need for increased specificity from Decade largely on general principles on law. Staff bore the principal burden of suggesting applicable precedent. Initially, staff provided us with three case citations. Tr. 1000. Then, by telephone call on January 29, 1982, it provided us with a list of 13 additional citations to authority. In response, the Board telephoned staff and requested to know: (1) the effective date of 10 CFR §2.790, (2) whether any

of the authorities brought to our attention has cited §2.790, and (3) the relevance of these authorities. See Tr. 1007.

In oral argument on February 1, staff relied on Commanche Peak, CLI-81-24 (December 21, 1981)(limiting sua sponte authority), on Wisconsin Electric Power Company, et al., (Point Beach Nuclear Plant, Unit 2), ALAB-137, 6 AEC (1973) 491, 513 and 514; on Wisconsin Electric Power Company, et al., (Point Beach Nuclear Plant, Unit 2), LBP-73-9, 6 AEC (1973) 152, 155, 164 and 167; on Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB- 600, 12 NRC (1980) 3, 10; and on in the Matter of Northern States Power Company (Monticello Nuclear Generating Plant Unit 1), ALAB-16, 4 AEC (1970) 435, 439 (footnote 1). Westinghouse cited Selected Issuances of the Atomic Energy Commission . . . in the Rulemaking Proceeding on . . . Emergency Core Cooling Systems . . ., TID-26713 (March 1975, USERDA)(herinafter "ECCS Proceeding") and "basically agreed with the staff's interpretation of the cases they have cited." Tr. 1037.

We have reviewed each of the cases cited with respect to the issue before us: the extent of the obligation of an intervenor to specify portions of a document which should be released to the public. We shall discuss our review in the ensuing portion of this memorandum. However, we must comment at the outset that these cases do not appear to require any greater specificity from an intervenor than the specification of a document which should be released. None of these cases appears to have required that portions of a document be pointed out or that specific arguments concerning release be addressed to portions of documents.

Before we begin our review, we note that §2.790 was amended in 1976 to require that a proposal to withhold documents as proprietary be accompanied by an affidavit stating "the full reasons on the basis of which it is

claimed that the information should be withheld from public disclosure"(10 CFR §2.790(b)(1)(ii)). The affidavit requirement should be interpreted in light of the succeeding section which places the submitter on notice of the Commission's policy to balance the interests of protection and disclosure against one another. 10 CFR §2.790(b)(2). The effect of this amendment of the regulations on procedures concerning proprietary information has not been addressed in any of the cited cases.

The Board concludes that these provisions were designed to permit a decision on a proprietary claim entirely based on the affidavit and the filed document. See also Tr. 1008 (staff agrees with this basic proposition). Hence, we also conclude that applicant must carry the full burden of persuasion in the affidavit or risk disclosure of all or part of the document. Additional procedures, such as we have authorized, are discretionary and not a matter of right. In this case, we believe additional procedures to be appropriate because of the importance of the material to Westinghouse, but this discretionary determination does not disturb the basic principle that the submitter has the burden to come forward with reasons for non-disclosure and to carry the burden of persuasion for non-disclosure.

We find the Point Beach (ALAB-137) decision relevant to burden-of-going-forward questions, but it does not reach so far as staff would have it. In that case, there were voluminous discovery materials produced through discovery requests, but many of the documents were not material and would never become part of the record. Point Beach at 513. Consequently, the Board, with the Appeal Board's approval, requested that intervenors identify particular, relevant documents which ought to be disclosed to the public. Id. at 513. Furthermore, despite the refusal to specify documents, the Board (apparently on its own motion) gave intervenors the opportunity to have a hearing on one allegedly proprietary document that had been intro

duced as an exhibit. Id. at 514. There does not appear to have been any prior requirement that intervenors provide reasons why the exhibit be disclosed or specify portions of the exhibit in which it was interested. Ibid.

The ECCS Proceeding also is instructive. The Commission's decision, at 27-28, makes no mention of any burden of going forward or burden of proof imposed on intervenors. It approves of Board requirements imposed on submitters. Id. at 26. It also states:

> The Commission is mindful . . . of the strong public interest in conducting a rule making proceeding which is as open as possible to full public scrutiny. Open consideration of the technical issues involved in this rule making matter was a motivating factor for the Commission in its experimental use here of a public rule making hearing. However, as our prior resume of the Board's rulings should make clear, the ground rules are rigorous for information's qualifying as proprietary and their purport is to hold to an essential minimum that data which will not be considered in open hearing session.
>
> In the latter connection, we would underscore that our present holding is confined to treatment of proprietary information during the hearing phase of this proceeding. Should such information form part of the basis for the ultimate rule making decision, the Commission will again--and in that context--address the question of that information's public disclosure.

[Emphasis added.]

Although the ECCS Proceeding was a rulemaking, its determinations are relevant in adjudicatory proceedings. Kansas Gas and Electric Company et al., (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-327, 3 NRC (1976) 408, 417. Wolf Creek established, in the context of discovery, that applicant must show a substantive, rational basis for withholding relevant information from the public as proprietary. Id. It also placed the burden of going forward and the burden of proof squarely on the possessor of the information that was sought. Id. at 418.

We also find Monticello (ALAB-16) instructive. That was a discovery case, not a public disclosure case. In considering the disclosure of documents grouped by the Licensing Board in Category 2 (apparently on the Board's own motion), the appeal board reviewed individual references made within that document and made determinations as to each such reference, resulting in some releases. Id. at 437. The Appeal Board then cautioned the licensing board to take great care to avoid permitting the inclusion in the record of references of questionable relevance. Id. at 438. However, this citation does not support placing the burden of showing relevance on an intervenor, as the Appeal Board appears to have been addressing the Licensing Board directly and not to have been requiring any showing by the intervenor. (We fail to understand the relevance of footnote 1, page 439, which was cited by staff. We also consider Diablo Canyon irrelevant because the case dealt with disclosure of a security plan, a very special category of proprietary information.)

In this case, there is no question of the relevance of the information whose public disclosure is sought. All of the information was filed by applicant in support of the safety of tube sleeving, which is the subject of this proceeding. Furthermore, the material most hotly contested is the safety tests that were conducted. By definition, these tests are relevant to this proceeding.

Furthermore, there is no question of the sufficiency of Decade's request. Under the Freedom of Information Act, all that is necessary to request a document is that the document be sufficiently well specified so that the agency will know what document is requested. No reason for disclosure need be supplied. The shoe is on the other foot. Everything is disclosed unless the submitter or the agency has a reason for its non-disclosure. In addition, each reasonably segregable part of a document

must be treated separately, so that a submitter must provide reasons for the withholding of each part of a document--unless privileged matter is so heavily intertwined with nonprivileged matter that "segregation" of these separate matters is not practicable. See, e.g., Collier, Shannon, Rill & Scott, 8 DOE ¶80,129 (1981) and Exxon Company, U.S.A., BFA-0609, Decision and Order of the Department of Energy, slip op., February 18, 1981 (interpreting the Freedom of Information Act and citing a long history of court and DOE decisions).

Although the Freedom of Information Act (FOIA) is not directly applicable in our proceeding, 10 CFR §2.790 is similar in its intent. Furthermore, it is appropriate to interpret that section in parallel to the FOIA, which is another avenue by which citizens may obtain the public release of information. There is no reason to believe that information should be less readily available in these proceedings, which bear directly on important issues of public welfare and safety, than in the regular course of FOIA requests, which are appropriate for information of far less public interest and concern.

We note that in one portion of the record Decade appears to have limited its concern about public disclosure to exclude "numbers". However, we consider this solitary statement to have been an example of overcooperativeness that was inconsistent with the otherwise consistent position of Decade that it is interested in the disclosure of safety tests. In particular, we note that many of the test results would be meaningless if the results were disclosed but the numbers were not.

We also note that Decade has restricted its interest to the disclosure of chapters 6, 7 and 9 of the Sleeving report. For the most part, our interests coincide with Decade's. However, we are also concerned about the appendices to the Sleeving Report and about marked portions (if any) of the

answers to Board questions and Decade interrogatories--to the extent that these materials deal with safety tests. Also, we reserve the right to become concerned about any portion of the San Onofre Sleeving Report, submitted as part of our record, which might be directly relevant to the initial decision in this case. That concern need not, however, be addressed in briefs and hearings that have already been scheduled.

We reject again applicant's argument that we may not consider confidentiality issues sua sponte. We are responsible for conducting this proceeding fairly and responsibly. The issuance of a reasoned opinion is part of our responsibility, and we bear the corrolary responsibility for developing a record which, consistent with other Commission policies, is open to public scrutiny. 10 CFR §2.718. The limitation on our sua sponte authority affects our pursuit of substantive issues but does not limit our exercise of our procedural discretion. Furthermore, even if the sua sponte rule applied, it would not prohibit a Board from inquiring further into an issue already raised.

It would not always be appropriate for the Board to take up proprietary matters on its own. As applicant clearly has pointed out, that responsibility lies in the first instance with staff. Tr. 1043-1045. To the extent that we have previously said otherwise, we stand corrected. However, the proprietary issue has been raised in this case and is ripe for our determination. Furthermore, we find that the staff's review of this document was inadequate because it made no attempt to segregate releasable information from non-releasable information and it did not separately address the possible releasability of the results of safety tests. Consequently, we consider our review of these determinations to be necessary.

## III PROCEEDING EFFICIENTLY

Since Westinghouse has the burden of going forward, it also has an

important obligation to go forward in a way that will economize on time. Any rational system of organization for its presentation likely will be accepted by us. One way to proceed would be for Westinghouse to demonstrate which of its safety tests have special proprietary value, indicating in each instance the nature of that value. Then the Board could review the testimony in light of the Safety Evaluation Report and weigh the demonstrated proprietary value against the nature of the information that would be withheld from the public if the nature of the test or the results of the test were withheld. However, we encourage Westinghouse to think through its method of presentation and to adopt whatever method seems most suitable for the conduct of an efficient proceeding.

## O R D E R

For all the foregoing reasons and based on consideration of the entire record in this matter, it is this 2nd day of February, 1982,

ORDERED

(1) Wisconsin's Environmental Decade need not file any further specification of its claim that documents of Westinghouse Electric Corporation should be released to the public.

(2) This is an interlocutory order that is not subject to appeal.

Confidentiality Burden: 11

FOR THE
ATOMIC SAFETY AND LICENSING BOARD

Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland