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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

SERVED MAR 1 1982

WISCONSIN ELECTRIC POWER COMPANY

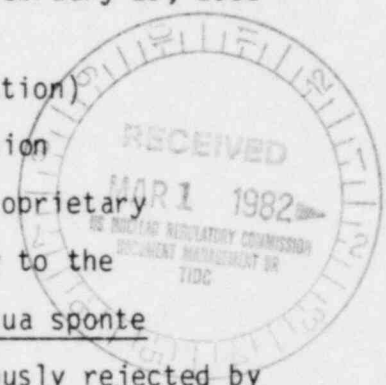
Docket Nos. 50-266-OLA
50-301-OLA

(Point Beach Nuclear Plant, Units 1 and 2)

February 26, 1982

MEMORANDUM AND ORDER
(Concerning a Motion to Certify a Sua Sponte Question)

On February 23, 1982, Westinghouse Electric Corporation (Westinghouse), appearing specially to protect allegedly proprietary information from disclosure, requested the Board to certify to the Commission its determination with respect to an allegedly sua sponte matter. This motion is a reincarnation of arguments previously rejected by us. LBP-81-62, December 21, 1981 and LBP-82-5A (reconsideration), January 28, 1982.



Although our grounds for decision in these earlier rulings were somewhat attenuated by LBP-82-6, February 2, 1982, slip op. at 9, we continue to believe that confidentiality issues do not fall within the scope of the sua sponte limitation found in 10 CFR §2.760a. That section discusses the kinds of substantive issues properly considered by a Licensing Board in its initial decision, which has the principal purpose of deciding the substantive issues in a case and generally does not restate every procedural ruling made along the way.

Section 2.760a should be interpreted together with §2.718, which provides the authority to regulate the hearing in a "fair and impartial"

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manner. Furthermore, that authority should be interpreted in light of the Commission's policy to withhold information from the public only after balancing "legitimate concerns for the protection of competitive positions" against "the right of the public to be fully apprised." 10 CFR §2.790(b)(2). In addition, §2.790(e) gives licensing Boards the authority to rule on "proposals" of Confidentiality. It would appear that the submitter is the moving party and the Board rules on the proposal. Section 2.790 can be interpreted to make the Board responsible for ruling on "proposals" although this responsibility is not clearly imposed.

Texas Utilities Generating Company, et al. (Commanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445, 50-446, December 29, 1981, cited to us by Westinghouse, is not apposite. In that case, a Licensing Board sought to retain jurisdiction over contentions submitted to it by a party that had withdrawn from the case. It adopted that course without justifying its exercise of sua sponte authority. A consequence of its action was a continuing role in supervising staff action with respect to those issues even though the issues had not been determined to be important substantive issues.

In this case, our use of procedural authority has been limited to an order that one passage of one document should be released to the public. The passage will not be released until after Westinghouse has an opportunity to appeal our order. Furthermore, our determination with respect to this issue is over and done with. To certify the issue to the Commission would not conserve Westinghouse's resources. No further effort by Westinghouse with respect to our ruling is called for. The issue can be fully raised on appeal.

To bother the Commission with this matter now is far from the intent embodied in the sua sponte rule. That rule is designed to prevent Boards

from pursuing "important" safety or environmental issues which the Commission might later decide were not so important. The rule did not intend to affect the Board's authority to conduct a fair and impartial hearing, open to public scrutiny. (We note, as well, that our decisions on this matter have been published and could have been reviewed by the Appeals Board sua sponte if it chose.)

To be sure, our interest in the public's right to know is a continuing interest and goes beyond the single passage of the Wiesemann Affidavit on which we have already ruled. We have announced that our inquiries in the hearing scheduled for March 10, 1982, could extend beyond the specific matters raised by intervenor. LBP-82-6, February 2, 1982 at 8-9.

Following our previously explained logic, we consider ourselves authorized to explore confidentiality issues even beyond those raised by an intervenor. We also believe that even were our concern substantive rather than procedural, Board inquiries within the general scope of matters already raised by an intervenor are wholly appropriate and are not affected by the sua sponte restriction. That rule is intended to preclude major, substantive inquiries not related to the subject matter already before a Board. If the subject matter is already before the Board, a Board is not expected to adjourn a hearing before asking questions that extend somewhat beyond the strict limits of an intervenor's inquiries. When, as in this case, a Board can anticipate the likelihood that some such inquiries may be made, it is to the party's advantage that the Board has chosen to indicate the extent to which its questions may go beyond those of the intervenor. Advance notification of an authorized practice does not convert that practice into a sua sponte consideration, particularly since the actual exercise of such authority is entirely speculative and will depend on the course of the hearing.

One purpose of the sua sponte rule is to avoid unnecessary delay. Obviously, our ruling has imposed some additional burden on Westinghouse (and, to a lesser extent, on Wisconsin Electric Company). However, this proceeding has not been delayed by our interest in the procedural question of the public's right to know. Like most procedural questions (even those requiring evidentiary determinations), our inquiry is less complex than if we had taken up a potentially serious safety matter. Furthermore, we have managed to consider these questions without any delay in the underlying case. Consequently, application of the sua sponte rule to this case would not serve the Commission's principal purpose in adopting the rule: avoiding unnecessary delay.

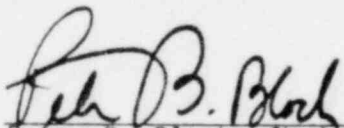
O R D E R

For all the foregoing reasons and based on consideration of the entire record in this matter, it is this 26th day of February, 1982,

ORDERED

- (1) Westinghouse Electric Corporation's Motion to Certify Sua Sponte Question to Commission is denied.
- (2) This is an interlocutory order that is not subject to appeal.

FOR THE
ATOMIC SAFETY AND LICENSING BOARD


Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland