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)

March 31, 1982

MEMORANDUM AND ORDER
(Concerning Reconsideration of Our Denial
Of a Motion to Certify a Sua Sponte Question)

On March 9, 1982, Westinghouse Electric Corporation (Westinghouse) moved for reconsideration of our Memorandum and Order of February 26, 1982, in which we denied its motion to certify a sua sponte question to the Commission. Wisconsin Electric Power Company (applicant) supported this motion in a filing of March 24, 1982. Staff has not filed. Wisconsin's Environmental Decade (Decade) commented in a March 12, 1982 letter:

> In addition to the legal arguments against the substance of Westinghouse's claims, the issue is now completely moot in light of our having challenged the confidentiality of the matters previously only challenged by the Board.

We agree with Decade that the motion deserves to be summarily denied, for reasons previously stated. We also find that the issue is moot and that there are no remaining sua sponte issues because Decade has expressed its interest in each issue in which the Board is interested.

However, we find that applicant's filing managed to raise a few issues in a manner that has not been addressed directly to this time and that a few more explanatory words may be appropriate. In particular, we will clarify the extent of our interest in the confidentiality issue, along lines suggested by applicant, which stated that if "the Board's actual inquiry is limited to the issue raised by the Intervenor, [its] concerns regarding the adverse impact on its interests will be substantially assuaged." Answer at 3. We also will comment on the validity of our observation that the sua sponte rule affects the substantive inquiries of the Board but does not restrict its procedural authority.

I SCOPE OF THE BOARD'S INTEREST

The Board has already issued a decision concerning the confidentiality of an affidavit that we previously styled the Wiesemann affidavit. Westinghouse considers that this action was sua sponte; however, that action is completed, is subject to appeal, and has no further effect on this proceeding.

The principal issue Decade has raised is whether or not a portion of our record dealing with safety tests performed by Westinghouse should be released to the public. The Board's present interest is limited to that issue, although our concern may extend beyond the initial periphery of that issue as defined by Decade. At first, Decade limited its interest to certain sections of the Westinghouse Sleeving report. We stated, however, that our interest might include related materials in the appendices. Decade has subsequently extended its interests to parallel ours. We believe that this slight extension of Decade's initial interests is clearly within the Board's prerogatives, whether or not Decade agreed to take up the issues in

its own right. However, Decade's interest makes it moot as to whether this was initially a sua sponte issue.

II PROCEDURAL VERSUS SUBSTANTIVE

Applicant challenges the Board's assertion that the sua sponte rule affects its authority to pursue substantive issues but not its authority to issue necessary procedural determinations. Applicant argues that we have not adequately explained our use of the term "procedural" and that the Supreme Court has defined a substantive rule as one "affecting individual rights and obligations." Morton v. Ruiz, 441 U.S. 199, 232 (1974).

We find applicant's effort to define "procedural" to be wholly without merit, but we are grateful to it for providing us with this opportunity to more fully expound our views on why a confidentiality issue is procedural rather than substantive. The issue is among the thorniest in law. Indeed, in some law schools it is the first and often the most confusing issue taught to first year law school students, who must study Sibbach v. Wilson & Co., 1941, 62 S.Ct. 422, 312 U.S. 1, 85 L.Ed. 479. See also Charles Alan Wright, Federal Courts, 1963 at 225, footnote 20.

In Sibbach the court upheld the federal rules of civil procedure against a challenge that a particular rule was substantive and not procedural and that the rule was therefore barred by the terms of the enabling act pursuant to which the rules had been issued. The particular rule whose validity was challenged had been interpreted by the lower courts to require that plaintiff be jailed for contempt for failing to take a physical examination pursuant to court order. In its discussion, the majority concluded that the rule involved was procedural and that it was valid even if it had such an important effect as requiring incarceration. However, the majority

also found that the proper result (which also was procedural) was the dismissal of plaintiff's action if she would not be examined, rather than the extreme penalty of imprisoning the plaintiff. Hence, we find that an issue can be procedural even if its effect is to dismiss the entire action and determine its result.

The core of Sibbach is instructive here:

> If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded. The test must be whether a rule really regulates procedure, --the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.

Id. 312 U.S. at 14, 85 L.Ed. at 485. At first blush, the rule appears to be somewhat circular, testimony to the difficulty of this definitional problem. However, the circularity is not complete. Application of this rule to Commission cases suggests that if an issue relates to a safety, environmental or common defense matter then it is substantive. Such issues are the meat and potatoes of our proceedings. They are the underlying issues which have a direct effect on whether a license should be issued.

When an issue does not relate to safety, the environment or common defense, it is unlikely to be substantive. If it relates to the methods by which such substantive issues are determined, it is procedural. Hence, rulings on scheduling matters, discoverability, the order of presentations, sanctions for violation of Board rulings and the like are all procedural. Included in this procedural category, because it relates to the fairness of the way in which substantive issues are decided, are issues related to the completeness and public availability of the record of this proceeding. We come to such issues because of our responsibility to govern the proceeding

fairly. Though such issues may be crucial to the parties, they are nevertheless procedural.[1]

III STANDING TO DEMAND COMPLIANCE WITH SUA SPONTE MEMORANDUM

In conclusion, we call into question whether the memorandum of June 30, 1981, from Samuel J. Chilk to the Chairman of the Atomic Safety and Licensing Board Panel and to others creates any rights whatsoever for private parties. The memorandum directs licensing boards to follow certain procedures when they have raised an issue sua sponte. The memorandum states that:

> The Commission made clear that in so requesting, it was not altering in any way the provisions of the Commission's rules regarding the raising and consideration of issues sua sponte. Accordingly, the Boards shall continue to make the initial determination of whether a Board question is an exercise of sua sponte authority. . . .

We think it clear that the Commission intended that Boards would have the discretion to determine whether to treat an issue as sua sponte. It did not anticipate that this very issue would become a source of complication and delay in Commission proceedings. Since all of our decisions on this issue have been delivered to the commissioners, and read by the Appeal Board

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1. We find Morton v. Ruiz at 232, as cited by applicant, to be entirely inapposite. It holds that a legislative rule promulgated by an agency must be published in the Federal Register in order to comply with procedural requirements of the Administrative Procedure Act.

Chrysler v. Brown, 1979, 441 U.S. 281, 310-11 is somewhat more relevant. That case deals with the ability of an agency to use its housekeeping authority (5 U.S.C. §301) to enact regulations that are contrary to a criminal statute. It concludes that agencies lack such authority absent express statutory authorization. In that setting, the court ruled that 5 U.S.C. §301 authorized only "procedural rules" which cannot abridge protections of confidentiality included in the criminal code. However, we do not have a similar problem in this proceeding and do not find the court's interpretation of "procedure" in this very specialized context to be helpful to us in this proceeding.

We note that no party has suggested that Chrysler invalidates the Commission's rules governing the release of confidential information in the public interest, presumably because the Commission's regulations on the release of confidential information in the public interest are grounded in the Atomic Energy Act and are valid.

Board as well, there is an adequate opportunity for higher authorities to express dissatisfaction with our reasoning. But we do not think the parties have any further right to pursue this matter.

O R D E R

For all the foregoing reasons and based on consideration of the entire record in this matter, it is this 31st day of March, 1982,

ORDERED

Westinghouse Electric Corporation's March 9, 1982, Motion for Reconsideration of our February 26, 1982, order is denied.

FOR THE
ATOMIC SAFETY AND LICENSING BOARD

Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland