UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

Wisconsin Electric Power Company
POINT BEACH NUCLEAR PLANT UNITS 1 & 2
DOCKET NOS. 50-266 AND 50-301
Operating License Amendment
(Steam Generator Tube Sleeving Program)

DECADE'S BRIEF ON THE CONFIDENTIALITY ISSUE

I N T R O D U C T I O N

One issue in this proceeding is the question of whether certain information submitted by the Licensee in conjunction with its application for a license amendment should be accorded trade secret protection pursuant to 10 C.F.R. 2.790.

Specifically, the information in question concerns details of the "sleeving" process developed by Westinghouse Electric Corporation("Westinghouse") in an attempt to counteract the effects of steam generator tube degradation at many of the pressurized water reactors built by it, including Point Beach.

The Intervenor, Wisconsin's Environmental Decade. Inc.("Decade") chose to not contest confidentiality for that part of the sleeving reports containing details of the process itself, but rather to confine its challenge to the remaining part

consisting of tests and test results that bear on whether the plant can be operated safely with degraded tubes sleeved instead of plugged.*

In related matters, the Decade has contended that, even if trade secret protection is ultimately accorded for the test results, then it is absolutely essential that the Licensee be barred under the terms of such an order from selectively releasing parts of the test results. Also, the Decade has objected to Westinghouse offering information to the Atomic Safety and Licensing Board("Board") relating to the alleged amount of money spent of developing its sleeving program, unless it is provided with a copy.

See, generally, Transcript pp. 134 to 137 and 717 to 723; Decade Objection, dated February 27, 1982.

This brief is respectfully submitted by the Decade, first, in vigorous opposition to trade secret protection for any safety tests; second, alternatively in support of measures to insure against selective release by the Licensee; and third, in opposition to receipt into evidence of any information withheld from opposing parties.

* This disinclination to argue the confidentiality of the sleeving process here may not be construed as in any other way withdrawing our blanket objection to any trade secret, or as conceding the confidentiality of the sleeving process. Decade Objection, dated February 28, 1982.

A R G U M E N T

I

TRADE SECRET PROTECTION SHOULD BE DENIED

A. The Real Issue is Political and Not Legal

At the outset we would state our unalterable view that the licensee's and vendor's claims of confidentiality have very little to do with any legitimate business interest.

Rather the real issue that underlies these disputes is the nuclear industry's attempt to keep the great "unwashed" public ignorant of the facts that undermine their position in the political arena.

The claims of "commercial" trade secrets grow out of the same soil as the abused claims of "national security" top secrets that have been used to coverup the arrogance and the impotence of power in the debate over foreign policy.

Knowledge is, truly, power. So long as the industry can keep its critics unarmed by a maze of protective orders that prevents important safety controversies from being fully aired, the longer it can keep at bay the inevitable public backlash that would ensue from full disclosure.

To that end, the industry has done everything in its power to draw an "Atom Curtain" across the public debate over nuclear safety--the chief arrow in its quiver being the over-exercised claim of trade secrets.

Nowhere is that more evident that in the case at bar.

For it is virtually uncontroverted that the same licensee previously made equally energetic proprietary claims in another proceeding, only to glibly release the allegedly confidential material to the newspapers as soon as it became politically advantagous to do so.

Specifically, that other proceeding was before the Public Service Commission of Wisconsin in which Wisconsin Electric was required to produce a Settlement Agreement between it and Westinghouse concerning the disposition of a potential liability claim for defective steam generators at Point Beach.

The utility vigorously contended to the state Commission that the release of the terms of the Settlement Agreement would prevent it from receiving favorable terms from its suppliers in the future. Affidavit of Peter Anderson Concerning the Confidentiality Issue, dated February 23, 1982("Anderson Affidavit"). at ¶2a, ¶2b and ¶2c.

Based upon these utility representations that their business position would be gravely compromised if the Settlement Agreement were made public, the state Commission granted trade secret protection. Anderson Affidavit, at ¶2d.

Not more than one month later when the utility was challenged by elected officials for failing to protect the interests of the ratepayers, a Wisconsin Electric spokesperson released to the press those parts of the Settlement that were favorable to the company--while continuing to withhold other parts disadvantagous to the utility and its customers. Anderson Affidavit, at ¶2e.

It must be concluded that, in this instance, the Licensee's

proprietary claims were not honestly made and that its real motivation was to keep damaging information out of the public dialogue.

Can the Board really find any basis for distinguishing from that instance the Licensee's representations in the case at bar. Recognizing that the controverted information in this case has nothing to do with the particular vendor's proprietary installation process, but rather only with more generic test results, it is exceedingly difficult to assume that the Licensee is being more forthcoming with the Board than it was with the Wisconsin commission.

B. The Public Interest in Disclosure Outweighs Any Conceivable Commercial Interest in Confidentiality

The Commission's rules provide that the general rule is for full disclosure of all documents unless a "compelling" reason to the contrary is demonstrated:

> "* * * [F]inal NRC record and documents, including but not limited to correspondence to and from the NRC regarding the issuance, denial, amendment, transfer, renewal, modification, suspension, revocation, or violation of a license, permit, or order, or regarding a rule making proceeding subject to this part shall not, in the absense of a compelling reason for nondisclosure after a balancing of the interests of the person or agency urging nondisclosure and the public interest in disclosure, be exempt from disclosure and will be made available for inspection * * *."

10 C.F.R. §2.790(a). Accord, Westinghouse v. N.R.C.(3rd Cir. 1977), 555 F. 2d 82, 91. [Emphasis added.]

There are nine subject areas in which the Commission has indicated it may make an exception to the general rule in favor of disclosure, including subjects which are trade secrets. 10 C.F.R. §2.790(a)(4). The rules governing the exercise of the

trade secret exception state that when a person has made an affidavit asserting confidentiality and the document is found to be commercial information, the Commission shall then consider, among other things, the following two factors:

> "Whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money, if any expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others."

10 C.F.R. §2.790(a)(4)(v). [Emphasis added.]

> "If the Commission determines, pursuant to paragraph (b)(4) of this section, that the record or document contains trade secrets or privileged or confidential commercial or financial information, the Commission will then determine (i) whether the right of the public to be fully apprised as to the basis for and effects of the proposed action outweighs the demonstrated concern for protection of a competitive position and (ii) whether the information should be withheld from public disclosure pursuant to this paragraph. * * *"

10 C.F.R. §2.790(a)(5).

Thus, most particularly relevant to this case, the Board must determine:

(1) Whether the alleged harm to Westinghouse is "substantial", 10 C.F.R. §2.790(a)(4)(v); and

(2) Whether the "right of the public to be fully apprised * * * outweighs the demonstrated concern for protection of a competitive position", 10 C.F.R. §2.790(a)(5).

It is important to reemphasize the fundamental principle that the mere fact of a document being a trade secret does not, by itself justify overcoming the general rule against secrecy. Challenges to the Commission's rules that are consistent with

this general precept have been squarely rejected. Westinghouse, supra, at p. 92.*

In interpreting this rule. the Commission has previously recognized the importance of the public being provided with the information supporting critical safety standards in a rule-making proceeding. Re Generic Emergency Core Cooling Systems(1973), 6 A.E.C. 1085, 1088.

This case presents even more compelling reasons for disclosure in view of the importance of the issue to the public in Wisconsin.

For one thing, since the ECCS case. there has been a major accident at the Three Mile Island nuclear power plant that the Commission had previously assured the public "would not occur" and that came within 30 to 60 minutes of a catastrophe. Special Inquiry Group, Three Mile Island(1980), at p. 90 to 91.

Two independent and reputible investigations of the Commission in the aftermath of TMI have concluded that the agency is "incapable" and "unable" of protecting the public from the safety hazards at existing nuclear power plants. Id., at p. 90; President's Commission on the Accident at Three Mile Island, The Need for Change(1979), at p. 56.

For another, the problems with degrading steam generator tubes such as at Point Beach have been identified by every

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* It is unnecessary to decide whether the Freedom of Information Act, 5 U.S.C. 552, and the Commission rules thereunder, 10 C.F R ch. 9, are more restrictive as to disclosure than the foregoing Commission rules because the FOIA has been held to not repeal by implication statutes which make disclosure a matter of agency discretion, F.A.A. v. Robertson(1975), 422 U.S. 255, 262, which the Commission's statutes, 42 U.S.C. §§2133(b)(3), have been held to permit, Westinghouse, supra, at p. 92.

evaluation as a serious safety problem that could lead to "essentially uncoolable conditions in the course of a loss-of-coolant-accident". Report to the American Physical Society by the Study Group on Light Water Reactor Safety, 47 Review of Modern Physics(Supp. 1), Summer 1975), at p. S-91; Risk Assessment Review Group, Report to the Nuclear Regulatory Commission(1978), NUREG/CR-0400, at p. 48; Reactor Safety Research Review Group, Report to the President's Nuclear Safety Oversight Committee, Sept. 1981, at I-2.

Even the Commission staff has finally been forced to recognize that steam generator "tube failures [during LOCA] would create a secondary to primary leak path which aggravates the steam binding effect and could lead to ineffective reflooding of the core." Nuclear Reactor Research. "Steam Generator Status Report," Feb. 1982, at p. 3. [Emphasis added.]

The particular aspect of the steam generator tube problem in this case referred to as "sleeving" directly implicates these safety concerns. The tubes are only 7/8 inch in diameter with a wall thickness less than five hundreths of an inch. Transient workers who have been known to take drugs, dressed in uncomfortable protective rubber coverings and cramped in the narrow confines of the steam generator's highly radioactive channel head, have to insert the sleeves inside the tubes above their heads and then bond both ends of the sleeve to the tube--all without compromising the integrity of the thin tube walls which is the primary-to-secondary barrier in the nuclear plant. Office of Nuclear Reactor Regulation, Safety Evaluation Report to Facility Operating License No. DPR-24. undated, at p. 2.

The portions of the documents for which trade secret protection is disputed involve the tests to determine whether the sleeves have been properly installed such that they will not be a contributory source for the cause of safety concerns, secondary-to-primary in-leakage during LOCA.

With the regulatory agency's credibility for insuring adequate safequards so shattered, with the problem of safely installing sleeves so difficult and with the consequences of a worst case accident so severe, the public has an overriding interest in being fully informed in the details of those tests.

Against this, little or no weight can be given to the assertions of commercial value because there is no controversy over disclosing the installation process itself but rather only over the safety tests to insure the installation has been properly performed. And most of those safety tests, according to the Commission staff, would be routinely performed by any vendor in the normal course of affairs. Affidavit of Emmett L Murphy. dated March 23, 1982, at pp. 2 to 4. Whatever value that may attach to the few test results peculiar to Westinghouse's installation process can only be described as marginal and not "substantial" within the meaning of 10 C.F.R. §2.790(a)(4)(v).

If a protective order is issued, the industry's position will obviously prevail and there will be no lawful ability to inform the effected public of the facts that undermine the Commission's decision so that they can demand fundamental reforms of the present unacceptable process.

Too often, just like the militarists' belief that a nuclear war with 500 million dead is winnable, we have heard in the

corridors of the Commission staff and industry officials quietly concede the inevitability of a nuclear accident, followed by their belief that then the public will become inured to nuclear accidents. In our view, this "Dr. Strangelovian" attitude is far unacceptable to the mainstream of society's values.

Maintaining an Atom Curtain over full and knowledgable debate will result in the inability of democracy to work its will. Such a course must be rejected.

II

IF PROTECTION IS ACCORDED, IT MUST APPLY EQUALLY

In the alternative, in the event a protective order is entered, the Decade avers that it must be binding on all parties to prevent further abuse of the protection that would otherwise permit deceptively selective release by the utility.

This is not an idle concern. During the confidentiality dispute before the Wisconsin commission, Wisconsin Electric violated the terms of the order and released parts of the alleged trade secret when it was politically advantagous to do so. Moreover, it released only selective parts of the document which showed terms favorable to it and withheld other parts showing it in a less favorable light. Anderson Affidavit, at ¶2.

Any initial decision to grant trade secret protection by itself creates an enormous disadvantage to the effected public. To compound that disadvantage by permitting just the utility to selectively release protected portions would be unconscienable.

Therefore, it is imperative that, should a protective order be entered, it also specifically (as well as implicitly) bind all parties, and that it provide as an enforcement tool the right of

opposing parties to release any other part of the protected documents should the utility or vendor selectively release another part.

III

THE BOARD MAY NOT USE WITHHELD INFORMATION IN ITS DECISION

The Decade's copy of the Affidavit of R. A. Wiesmann, dated November 13, 1981, setting forth the alleged investment by Westinghouse in sleeving technology, has had the amount deleted. Id., at p. 5.

It is a violation of due process of law to have the decision maker render a judgment based upon evidence relevant to the decision that opposing parties do not have an opportunity to rebut. 5 U.S.C. §554.

Indeed, if the Board rendered a decision without appraising Decade of the facts of the amounts of money at issue, that would be error and grounds for reversal on judicial review. Ohio Bell Tel. Co. v. P.U.C., 301 U.S. 292 (1936). Marathon Oil Co. v. EPA, 12 ERC 1098 (9th Cir.1977); International Harvester Co. v. Ruckelhaus, 478 F. 2d 615, 652 (1973).

One of the criteria which the Board must find is met before trade secret protection can be accorded is "the amount of effort or money, if any expended by the owner in developing the information". 10 C.F R. §2.790(a)(4)(v).

Thus, until the Decade has been provided with the missing number and given an opportunity to rebut, the Board may not go forward with a decision on confidentiality.

C O N C L U S I O N

For the foregoing reasons, trade secret protection for sleeve safety tests should be denied.

DATED at Madison, Wisconsin. this 20th day of April, 1982.

WISCONSIN'S ENVIRONMENTAL DECADE, INC.

by

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POINT BEACH NUCLEAR PLANT UNITS 1 & 2
Docket Nos. 50-266 and 50-301
CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing document will be served this day by depositing copies of the same in the first class mails, postage pre-paid and correctly addressed, to the following:

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