

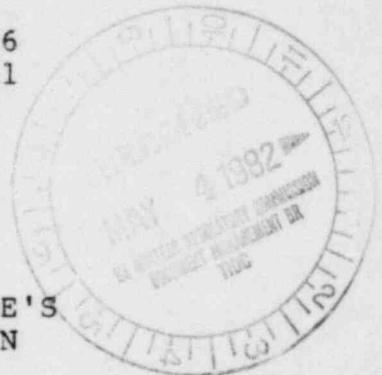
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
WISCONSIN ELECTRIC POWER	)	Docket Nos. 50-266
COMPANY	)	50-301
	)	(OL Amendment)
(Point Beach Nuclear Plant,	)	
Units 1 and 2)	)	



LICENSEE'S REPLY BRIEF IN OPPOSITION TO DECADE'S  
ORAL MOTION FOR PUBLIC DISCLOSURE OF CERTAIN  
PROPRIETARY INFORMATION

This is in reply to "Decade's Brief on the Confidentiality Issue," served on April 21, 1982 ("Decade's Brief").

The parties (Licensee, Westinghouse Electric Corporation, and the NRC Staff) have struggled over the past six months to determine (i) precisely what information Decade seeks to have released, (ii) whether Decade is contesting the Commission's determination pursuant to 10 C.F.R. §2.790(b)(4) that the subject information (whatever it may be) is proprietary, or whether Decade is contesting the Commission's determination pursuant to 10 C.F.R. §2.790(b)(5) that the information, having been found to be proprietary, should be withheld from the

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public, or both, and (iii) what Decade's reasons are in support of its allegation that the Commission's determinations should be overturned. Decade's Brief does nothing to alleviate the confusion.

Citations to the long history of uncertainty over the subject matter of Decade's oral motion were presented in "Licensee's Brief in Opposition to Decade's Oral Motion for Public Disclosure of Certain Proprietary Information," April 21, 1981 ("Licensee's Brief"), n. 6, p. 5. Decade now states that it is interested only in public disclosure of the tests performed at Point Beach to assure that the sleeves have been properly installed:

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.

. . . [T]here is no controversy over disclosing the installation process itself but rather only over the safety tests to insure the installation has been properly performed.

Decade's Brief at 9 (emphases added). But Decade has still not identified the specific information it wishes released. How are the parties to respond to Decade's arguments on why information should be released when the parties do not know which information Decade seeks to have released? Indeed, how is Decade itself to argue for the release of material which it has not identified? The answer is that Decade cannot, and has

not. If we assume that Decade is challenging the Commission's section 2.790(b)(4) determination that the information is proprietary, it is instructive to see what Decade has said about each specific test in its various briefs, affidavits, letters, and oral arguments:

§2.790(b)(4)(i): "Whether the information has been held in confidence by its owner." Decade has said nothing.

§2.790(b)(4)(ii): "Whether the information is of a type customarily held in confidence by its owner and whether there is a rational basis therefor." Decade has said nothing.

§2.790(b)(4)(iii): "Whether the information was transmitted to and received by the Commission in confidence." Decade has said nothing.

§2.790(b)(4)(iv): "Whether the information is available in public sources." Decade has said nothing.

§2.790(b)(4)(v): "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." Decade has raised the question of whether the harm to Westinghouse's competitive position is "substantial", Decade's Brief at 6, but then gives only an unsupported conclusion that "[w]hatever 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) (sic), Decade's Brief at 9.

Apparently, by this last statement, Decade is seeking release of only a "few test results" to assure that the installation of sleeves at Point Beach has been properly performed. All of the proprietary information in this sleeving docket has been clearly identified by brackets, and Decade has been provided with the specific proprietary information within the brackets. Decade cannot possibly put forth reasons (and, indeed, has not) why the disclosure of certain information will cause substantial harm to Westinghouse without identifying the information it claims can be disclosed without harm. Moreover, how can the Board grant Decade's motion, when it cannot identify the information Decade seeks to have released to the public? In contrast to Decade's total failure to provide any evidence or rationale on why any particular portion of the sleeving information should not have been held to be proprietary, the Board has before it affidavits, briefs, and determinations from both Westinghouse and the NRC Staff in support of the Commission's section 2.790(b)(4) determination that all of proprietary information was correctly classified.

As to Decade's arguments that the proprietary information should not have been withheld from public disclosure pursuant to section 2.790(b)(5), Decade has clearly confirmed that its

motion constitutes an impermissible challenge to the Commission's regulations under 10 C.F.R. §2.758. See Licensee's Brief at 13. Decade does not address any specific proprietary information or type of proprietary information in its section 2.790(b)(5) arguments. Instead, Decade flails out at the concept of withholding proprietary information in general, claiming that the real issue is political and not legal, and that "industry" is using claims of trade secret to "keep the great 'unwashed' public ignorant of the facts that undermine [industry's] position in the political arena," Decade's Brief at 3. Decade goes on to say that, if it loses on its motion, "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," Decade's Brief at 9 (emphasis added). Decade in no way attempts to explain how public disclosure of "the few tests results" on the installed sleeves is necessary to effect "fundamental reforms of the present unacceptable process" when Decade itself, as a member of the public, is a full participating party, privy to the proprietary information, in a proceeding which allows Decade to challenge the adequacy of the sleeving process. Nor has Decade attempted to explain how the failure to disclose a "few test results" equates to "[m]aintaining an Atom Curtain over full and knowledgable debate [which] will result in the inability of democracy to

work its will," Decade's Brief at 10. The only specific argument Decade makes for public disclosure of the "few test results" is that they are important to safety as, one would suppose, all proprietary information necessary to support an application before the NRC would be. Decade is clearly engaging in an assault against the Commission's regulations in §2.790 which permit "industry" to protect its proprietary information.

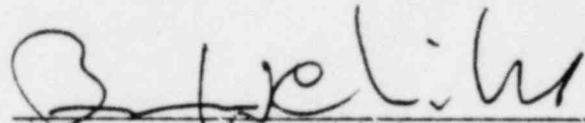
Decade also reiterates its novel but by now repetitive demand that, if the disputed proprietary information is not to be publicly released, the subsequent release of any part of it by its owner will give Decade the right to release any other part of the protected documents. Such a sanction would be contrary to both law and public policy. The criteria for affording protection to sensitive information is stated in section 2.790. Nowhere does it state that a determination to withhold one item of proprietary information is dependent upon the release or non-release of another item of proprietary information. Moreover, Decade's proposal would inhibit the flow of safety information to the NRC and would guarantee that the owner of proprietary information already in an NRC docket would never, under any circumstances, downgrade any item of proprietary information from the classification of trade secret for the purpose of publicly releasing it. In any event, the Board has previously rejected Decade's position on this matter, Tr. 134-43.

Because Decade's motion is an impermissible challenge to the Commission's regulations, and because Decade has presented no evidence or cognizable argument as to why the Commission's determinations under 10 C.F.R. §2.790(b)(4) and (5) should be overturned, in the face of considerable evidence to the contrary, Licensee respectfully submits that Decade's motion should be denied.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By



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Dated: April 30, 1982

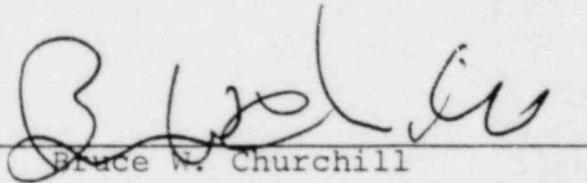
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CERTIFICATE OF SERVICE

This is to certify that copies of "Licensee's Reply Brief in Opposition to Decade's Oral Motion For Public Disclosure of Certain Proprietary Information" are being served to all those on the attached Service List by deposit in the U.S. Mail, first class, postage prepaid, this 30th day of April, 1982.

  
Bruce W. Churchill

Dated: April 30, 1982

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