

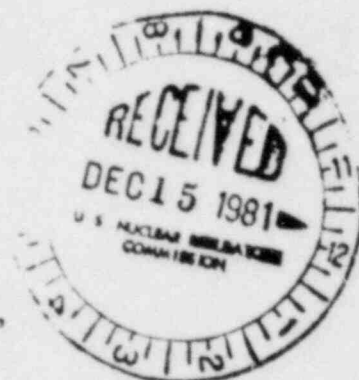
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of
WISCONSIN ELECTRIC POWER COMPANY
(Point Beach Nuclear Plant,
Units 1 and 2)

)
) Docket Nos. 50-266
) 50-301
) (OL Amendment)
)
)



BRIEF OF WESTINGHOUSE ELECTRIC CORPORATION,
APPEARING SPECIALLY, ON ISSUE OF LICENSING
BOARD'S JURISDICTION TO DECLINE
TO AFFORD PROPRIETARY INFORMATION
PROTECTION FROM PUBLIC DISCLOSURE

I. Introduction

The question addressed by this brief is whether the Atomic Safety and Licensing Board assigned to this proceeding has the jurisdiction to make a determination regarding the proprietary nature of information submitted pursuant to 10 CFR §2.790 (1981) or refuse to afford that information protection from public disclosure should it be determined to be proprietary as provided in the same regulation.

In connection with the underlying issue of tube sleeving of steam generators, Wisconsin Electric Power Company ("WEPCO") has submitted

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certain proprietary information owned by Westinghouse Electric Corporation ("Westinghouse"). WEPCO has applied for withholding from public disclosure, and affidavits from Westinghouse explaining the reasons that the documents should be so withheld were provided in compliance with §2.790(b). The Regulatory Staff of the Commission has concluded that the information is proprietary and has afforded it such protection.^{1/}

The Chairman of the Licensing Board has stated an apparent intention independently to determine the questions of the proprietary nature of the information, and, if that test is met, whether public disclosure nevertheless is called for.

Tr. 775, 778-781, 780. In pertinent part, he has stated that:

when questions are raised about the public release of information, the appeal authority - or possibly it is suggested in this case, the Board - should make its own decision about whether the exception to the release of public information should be granted because of a claim of confidentiality....

^{1/}The letter was from R. A. Clark to R. A. Wiesemann, and was dated November 20, 1981.

. . .

I do think that the Board has jurisdiction over this issue and I would like to state why.

It seems to me the jurisdiction is based partly on the rules, and partly on the nature of the adjudicatory process of which we are a part. It really stems from the general principle that in a democracy the actions of government are available to be examined by the people, and that it does not help to just give it to a party in a proceeding; and it is a legitimate issue concerning the integrity of the entire hearing process to consider whether or not a document should be accorded confidential treatment.

. . .

I also would state that part of the problem facing the Board is that none of the parties have as yet informed us in an organized way what it is that the public can learn about sleeving from the public records.

Now, we would review the record ourselves and determine that, but it does seem to me that the burden ought to be on one of the parties - and I am not sure which at this point - to tell us what the public can know, and to tell us in fact whether the public need to know can be satisfied by some kind of summary document, or deleted document that is not yet in our record. That is the concern that I have, that the public know enough from our record so that if there are one or two informed scientists somewhere who want to look at what we have done, that there will be a public record available that means something in terms of the responsibility of the government to the people.

The Board has invited briefs from the parties on its independent authority to determine the proprietary nature of information and to withhold such information from public disclosure. Tr. 822-25.

II. THE LICENSING BOARD'S JURISDICTION

Westinghouse asserts that the Licensing Board does not have authority to make such an independent determination under either the Commission's Rules or the nature of the adjudicatory process.

The Commission's rules vest Licensing Boards and presiding officers with some authority in this area. They may properly examine proprietary information and fashion appropriate protective orders and hold in camera sessions of hearings to preserve the confidential nature of the information.

Section 2.740(c)(6) of the Commission's Rules of Practice gives the presiding officer authority to:

make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:that, subject to the provisions of §§2.744 and 2.790, a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way....

Further, Section 2.790(b)(6) provides in part that:

Withholding from public inspection shall not affect the right, if any, of persons properly and directly concerned to inspect the document. The Commission may require information claimed to be a trade secret or privileged or confidential commercial or financial information to be subject to inspection....(ii) by the presiding officer in a proceeding; and (iii) under protective order, by parties to a proceeding, pending a decision of the Commission on the matter of whether the information should be made publicly available or when a decision has been made that the information should be withheld from public disclosure. In camera sessions of hearings may be held when the information sought to be withheld is produced or offered in evidence. (Emphasis added.)

Westinghouse believes that this limited authority is clear and has been properly exercised to date in the proceeding. It would exceed the Board's authority granted by the Commission's Rules to attempt to enlarge this authority to make the determination reserved to "the Commission" of whether proprietary information should be afforded protection from public disclosure. Seemingly, the Commission could have vested such authority in a presiding officer by wording §2.790(b)(6)(iii) in such a manner as to give the presiding officer, rather than "the Commission" the authority to make the determination. The absence of such wording should be interpreted to mean that no such authority exists. This absence of an express delegation to Licensing Boards from the

Commission in an area where the Regulatory Staff has exercised jurisdiction demands an interpretation that the Board has no jurisdiction for the purpose of assuring a consistent interpretation of the regulations.

The nature of the adjudicatory process also fails to vest any authority in the Licensing Board in excess of that granted by the Commission's Rules enumerated above. The fact that a Licensing Board has been appointed to preside over an adjudicatory proceeding gives no special right of the public to know information which would otherwise be withheld from disclosure. The Nuclear Regulatory Commission has been entrusted with the responsibility of regulating commercial production and utilization facilities by the Atomic Energy Act^{2/} and the Energy Reorganization Act of 1974.^{3/} The "public" or "one or two informed scientists somewhere" have no authority to reanalyze every bit of information which the Regulatory Staff

^{2/} 42 USC 2011 et seq.

^{3/} 42 USC 5801 et seq.

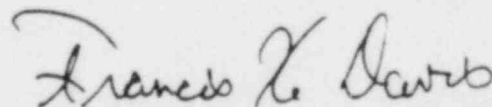
has examined during its deliberations on this matter, or, in the end, substitute their judgment for that of the Staff. To purport to give the public or one or two informed scientists this right obscures the Commission's plenary authority and fails to recognize the regulatory framework adopted by the Congress.

There may be a generalized right of the affected public to know the basis for decision-making. However, that general right has been tempered by the right of an owner of a trade secret or privileged or confidential commercial or financial information to have the information protected from public disclosure granted by the Freedom of Information Act, (FOIA), 5 USC 552. Owners of trade secrets and commercial or financial information obtained from a person and privileged or confidential have the right to have that information withheld from public disclosure, under exemption four of the FOIA. The Commission has implemented this exemption in its regulations, and has thereby recognized the legitimate public interests to be attained by protecting private property from public disclosure. The Board may not alter the nature of the processes provided in the Rules

for application for protection from public disclosure and the weighing provided in §2.790(b).

The Regulatory Staff is in a position to render the most reasoned decisions on applications for withholding. Its staff includes those who know the history of other applications and the determinations and rationale used in deciding them. On the other hand, Licensing Boards do not necessarily have this expertise in this somewhat specialized area. In the event that they assert this authority and begin exercising it, inconsistent and unjust decisions may follow and, in the long run, the licensing program may suffer.

For the foregoing reasons, Westinghouse urges the Board to recognize the validity of the Regulatory Staff's determination that the relevant Westinghouse information should be protected from public disclosure, and to continue in effect the protective order heretofore entered.



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Dated: December 7th, 1981

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

DEPT. OF SECRETARY
NAVY & SERVICE
BRANCH

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(Point Beach Nuclear Plant,) 50-301
Units 1 and 2) (OL Amendment)

CERTIFICATE OF SERVICE

I hereby certify that copies of the BRIEF OF WESTINGHOUSE ELECTRIC CORPORATION, APPEARING SPECIALLY, ON ISSU OF LICENSING BOARD'S JURISDICTION TO DECLINE TO AFFORD PROPRIETARY INFORMATION PROTECTION FROM PUBLIC DISCLOSURE in the above-captioned proceeding have been served on those shown on the Service List by deposit in the United States mail, first class, postage prepaid, this 7th day of December 1981.

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Counsel for Westinghouse Electric
Corporation, Appearing Specially

Dated: December 7th, 1981

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