

December 11, 1981

DOCKETED
USNRC

'81 DEC 14 P4:27

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
MEETING & SERVICE
BRANCH

Before the Atomic Safety and Licensing Board

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

LICENSEE'S REPLY BRIEF TO NRC STAFF BRIEF ON
JURISDICTION OF LICENSING BOARD TO MAKE
DETERMINATIONS ON WITHHOLDING OF INFORMATION
FROM PUBLIC DISCLOSURE

In a brief filed on December 7, 1981, the NRC Staff stated that it "believes that the Board has the authority to make withholding determinations pursuant to 10 C.F.R. § 2.790(b) of the Commission's regulations." For the reasons set forth below, Licensee agrees with the Staff that the Board has authority to make withholding determinations pursuant to 10 C.F.R. § 2.790(b). However, the Board's authority can only be exercised where there is an issue in controversy raised by a party to a proceeding regarding the public disclosure of information claimed to be exempt from disclosure.

8112170041 811211
PDR ADOCK 05000266
G PDR

*D503
50/1*



There are no cases directly on point.¹ NRC Staff relies on Kansas Gas and Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 NRC 408 (1976). Wolf Creek stands for the proposition that a licensing board has jurisdiction over disputes between parties in a proceeding over proprietary claims regarding information obtained by a party through discovery. The Appeal Board specifically held there that Section 2.790 of the Commission's rules did not apply. ALAB-327, supra, 3 NRC at 415. Thus Wolf Creek does not directly speak to the authority of a licensing board to make any determination under Section 2.790(b).

1 Judge Bloch referred the parties to two cases decided by the DOE Office of Hearings and Appeals -- Re Collier, Shannon, Rill & Scott, 8 DOE paragraph 80,129, CCH Federal Energy Guidelines (May 20, 1981), and Re Exxon Company, U.S.A. and Miller & Chevalier, 8 DOE paragraph 80,162, CCH Federal Energy Guidelines (April 1, 1981) -- which Judge Bloch suggested "stand broadly for the proposition 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 would be granted because of a claim of confidentiality...." Tr. 777-78. Both appeals were from decisions of the Assistant Administrator of the Economic Regulatory Administration of DOE denying in part requests for information pursuant to the Freedom of Information Act. The controversy raised in both appeals was whether the information withheld was properly exempted by the Assistant Administrator from disclosure by finding that certain documents fell within the exempted categories. Thus, there, the judge certainly had authority to decide the matter in controversy. In the instant case, the Board has authority to decide the issue raised by Decade regarding disclosure of certain proprietary test results. Neither of the above cases support the jurisdiction of the Board to review, on its own, decisions of the Staff regarding the disclosure of trade secret material where the issue is not being litigated by a party to the proceeding.

As pointed out by Westinghouse Electric Corporation's brief of December 7, 1981, on the instant issue of the Board's jurisdiction, the Commission's rules carefully distinguish between the determinations to be made by "the Commission" in § 2.790(b)(3), (4), (5) and (6) and the protective order to be issued by the "presiding officer in a proceeding" in § 2.790(b)(6)(ii). It is also clear that the Commission has delegated the authority for making the determinations in § 2.790(b), in the first instance, to the NRR Staff. See Tr. 97; 791; Letter from Robert A. Clark, NRR Staff, to Robert A. Wiesemann, Westinghouse, dated November 20, 1981, (holding the information for which a proprietary claim was made by Westinghouse is properly classified as trade secret and should be withheld from public disclosure.)

Licensing boards are "delegates of the Commission and exercise only those powers which the Commission has given [them]." Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2) ALAB-316, 3 NRC 167, 170 (1976); see also, Union Electric Company (Callaway Plant, Units 1 and 2) ALAB-527, 9 NRC 126, 144 (1979). The licensing boards are empowered to consider matters in controversy among the parties within the scope of the notice of hearing. See 10 C.F.R. § 2.104(c). While a licensing board may, on its own motion, explore issues which the parties themselves have not placed in controversy, such issues raised sua sponte are specifically limited only to matters involving a serious

"safety, environmental, or common defense and security" question. 10 C.F.R. § 2.760(a). The decision on all other matters, even prior to issuance of an operating license, is the responsibility of the NRC Staff alone. Consolidated Edison Co. of N.Y. (Indian Point Nuclear Generating Station, Units 1, 2 and 3), ALAB-319, 3 NRC 188, 190 (1976). Where the NRC Staff and applicant have presented uncontested evidence on an issue, the licensing board is not required to conduct a de novo review, but rather should rely on the NRC Staff's and applicant's uncontroverted evidence. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 334-35 (1973); Boston Edison Co., (Pilgrim Nuclear Power Station) ALAB-83, 5 AEC 354 (1972), affirmed UCS v. AEC, 499 F.2d 1069 (D.C. Cir. 1974).

What we can infer from the Commission's rules and cases is that, indeed, the Board has authority and jurisdiction to determine whether information, claimed by a party to be exempt from disclosure, should be disclosed to the public, but only if it is an issue in controversy raised by a party to a proceeding. Clearly it is not a matter for sua sponte review. A license amendment proceeding, like an operating license proceeding, need only be held if there is an issue in controversy, and thus the discretion of the licensing board to explore issues which the parties themselves have not placed in controversy "should be exercised sparingly and only in extraordinary circumstances where the Board concludes that a serious

safety or environmental issue remains." Consolidated Edison Co. of N.Y. (Indian Point Nuclear Generating Station, Unit 3), CLI-74-28, 8 AEC 7 (1974)(incorporated into the Commission's rules at 10 C.F.R. § 2.760(a).)

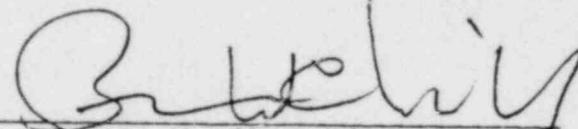
The only issue in controversy before this Board is whether certain test data regarding sleeving should be disclosed to the public. Tr. 721-22; 804-05; See "Decade's Reply in Opposition to Westinghouse's Brief to Bar it Access to Allegedly Proprietary Data" (December 7, 1981) at 3.

Wisconsin Electric submits that the Board has jurisdiction to decide the issue in controversy as stated by Decade's oral motion. Wisconsin Electric's position on the merits of that motion are stated in "Licensee's Response to Oral Motion of Wisconsin's Environmental Decade for Disclosure of Proprietary Information" (November 12, 1981).

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By



Bruce W. Churchill
Delissa A. Ridgway

Counsel for Licensee

1800 M Street, N.W.
Washington, D.C. 20036
(202) 822-1000

December 11, 1981

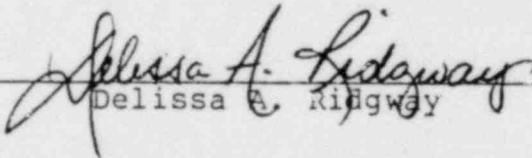
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Licensee's Reply Brief to NRC Staff on Jurisdiction of Licensing Board to Make Determination on Withholding of Information from Public Disclosure" were served, by deposit in the U.S. Mail, first class, postage prepaid, to all those on the attached service list, this 11th day of December, 1981.


Delissa A. Ridgway

Dated: December 11, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

SERVICE LIST

Peter B. Bloch, Chairman
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. Hugh C. Paxton
1229 - 41st Street
Los Alamos, New Mexico 87544

Dr. Jerry R. Kline
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Charles A. Barth, Esquire
Office of the Executive
Legal Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Kathleen M. Falk, Esquire
Wisconsin's Environmental
Decade
114 North Carroll Street
Suite 208
Madison, Wisconsin 53703

Stuart A. Treby, Esquire
Office of the Executive
Legal Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Francis X. Davis, Esq.
Westinghouse Electric Corporation
Nuclear Energy Systems Division
P. O. Box 355
Pittsburgh, Pennsylvania 15230