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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Appeal Board

SECRETARY
OF DEFENSE
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| In the Matter of |) | |
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| WISCONSIN ELECTRIC POWER COMPANY |) | Docket Nos. 50-266 (OLA-1) |
| |) | 50-301 (OLA-1) |
| (Point Beach Nuclear Plant, |) | |
| Units 1 and 2) |) | |

LICENSEE'S BRIEF IN OPPOSITION
TO INTERVENOR'S EXCEPTIONS TO
INITIAL DECISION AUTHORIZING
FULL-SCALE SLEEVING

SHAW, PITTMAN, POTTS AND TROWBRIDGE

Bruce W. Churchill
Delissa A. Ridgeway

Counsel for Licensee

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

8305020438 830427
PDR ADOCK 05000266
G PDR

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LICENSEE'S BRIEF IN OPPOSITION
TO INTERVENOR'S EXCEPTIONS TO INITIAL
DECISION AUTHORIZING FULL-SCALE SLEEVING

Wisconsin Electric Power Company ("Licensee") submits this brief in opposition to the exceptions and supporting brief of Wisconsin's Environmental Decade, Inc. ("Decade") to the Memorandum and Order (Initial Decision) issued by the Atomic Safety and Licensing Board in this proceeding on February 4, 1983.

I. INTRODUCTION

This appeal arises from Licensee's application to amend the operating licenses for Point Beach Nuclear Plant, Units 1 and 2, to permit repair of corroded steam generator tubes by

inserting within them "sleeves" that span the corroded areas and reinforce the tubes. The Technical Specifications for the Point Beach licenses required that steam generator tubes with degradation exceeding 40% of the nominal tube wall thickness be removed from service by "plugging." By letter dated July 2, 1981, Licensee filed a Technical Specification Change Request to allow repair of such tubes by sleeving, thus leaving the tubes in service.

The Commission published a notice of opportunity for hearing, 46 Fed. Reg. 40,359 (Aug. 7, 1981), after receiving Decade's July 20, 1981 request for a hearing. No other petitions for leave to intervene were filed, and Decade was admitted as the sole intervenor in the proceeding.

Early in the proceeding, Licensee requested, as an interim measure, authorization for operation of Point Beach Unit 1 with six degraded tubes sleeved, rather than plugged, to enable completion of a preliminary sleeving demonstration program during the fall 1981 refueling outage. Subsequent to an October 29-30, 1981 hearing, the Licensing Board authorized such operation, pending the issuance of its Initial Decision on Licensee's application for full-scale sleeving. See LBP-81-55, 14 N.R.C. 1017 (1981), aff'd, ALAB-696 (Oct. 1, 1982).

The Licensing Board initially admitted a single broad contention in this proceeding. See LBP-81-45, 14 N.R.C. 853, 854 (1981). Following completion of discovery, the Licensing

Board directed Decade to file a "Motion Concerning Litigable Issues," in which Decade was to identify its specific contentions and show that the contentions satisfied applicable requirements for adjudication. Both Licensee and the Staff filed extensive procedural and substantive responses to Decade's motion, including motions for summary disposition supported by detailed affidavits. Following oral argument in an on-the-record telephone conference,^{1/} and applying summary disposition standards to Decade's motion, the responses of the Staff and Licensee, and Decade's replies, the Licensing Board concluded that summary disposition should be granted with respect to all issues raised by Decade, except for a portion of one issue. The Licensing Board framed the sole genuine issue remaining for litigation:

That the license amendment should be denied or conditioned because applicant has not demonstrated that eddy current testing is adequate to detect serious stress corrosion cracking or intergranular attack, in excess of the technical specification prohibiting more than 40 percent degradation of the sleeve wall, in sleeves that would be inserted within steam generator tubes.

See generally "Memorandum and Order (Concerning Summary Disposition Issues)," LBP-82-88 (Oct. 1, 1982).

^{1/} See transcript of September 9, 1982 conference call.

An evidentiary hearing was held on November 17 and 18, 1982 in Milwaukee, Wisconsin. After the hearing, Licensee and the NRC Staff filed detailed proposed findings of fact and conclusions of law^{2/}; Decade filed none.^{3/} On February 4, 1983, the Licensing Board issued its Initial Decision, from which Decade now appeals.

II. SCOPE OF APPEAL

A. Most of Decade's Exceptions Have Not Been Briefed and Are Therefore Waived

On February 14, 1983, Decade filed its exceptions to the Initial Decision, and included several exceptions to certain intermediate orders issued by the Licensing Board during the course of the proceeding. However, "Decade's Brief in Support of Its Exceptions to Board's Initial Decision," March 16, 1983 ("Brief"), failed to address most of its exceptions.

The Appeal Board has consistently and repeatedly held that exceptions not briefed, or not adequately briefed, are considered waived and should be disregarded. See, e.g., Public Service Electric & Gas Co. (Salem Nuclear Generating Station,

^{2/} See Licensee's Proposed Findings of Fact and Conclusions of Law in the Form of a Proposed Initial Decision, December 20, 1982, and NRC Staff's Proposed Initial Decision on Eddy Current Testing Issue, January 10, 1983.

^{3/} Decade instead filed a "Statement of Inadequate Record" of less than five pages, December 30, 1982.

Unit 1), ALAB-650, 14 N.R.C. 43, 49-50 (1981), aff'd sub nom. Township of Lower Alloways Creek v. Public Service Electric & Gas Co., 687 F.2d 732 (3rd Cir. 1982); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 N.R.C. 313, 315 (1978); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-367, 5 N.R.C. 92, 104 n.59 (1977); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 N.R.C. 397, 413-14 (1976). Accordingly, Licensee does not herein respond to any of Decade's unbriefed exceptions. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-409, 5 N.R.C. 1391, 1395 (1977) (appellee obligated to respond only to appellant's brief, not to his exceptions).

Decade has announced that it is not waiving its unbriefed exceptions.^{4/} Brief at 1. However, a mere declaration by an appellant that he is not subject to the rules governing all other parties does not suffice to excuse him from his

^{4/} Decade asserts that its failure to brief its exceptions is "due to limited time and resources." Brief at 1. However, the Commission has stated that "the fact that a party may have . . . fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations." Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 N.R.C. 452, 454 (1981). In any event, Decade did not request an extension of time to file its brief. And, as the Appeal Board has previously observed, Decade is not an insubstantial organization. Its staff includes a General Counsel who has appeared in this proceeding. See Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-719, slip opinion at 15 n.28 (March 22, 1983).

responsibilities. The statement is nothing more than an admission by Decade that it is well aware that unbriefed exceptions are waived. And Decade is so aware. In this very proceeding, the Appeal Board rejected a number of Decade's exceptions to the Licensing Board's earlier decision authorizing the sleeving demonstration program on the ground that they had not been briefed. See ALAB-696, slip opinion at 13-14. See also ALAB-719, slip opinion at 17-19.

B. Decade's Brief Addresses Only Exception D.1
and a Part of Exception C.1

Because Decade has made no reference in its brief to any of its specific exceptions, an examination of its brief, in conjunction with its filed exceptions, is necessary to determine the precise issue left before the Appeal Board. Decade characterizes its brief as "[focusing] on the refusal of the [Licensing Board] to first establish the degree of assurance necessary to protect the public safety before it found that the level of assurance proffered was adequate. . . ." Brief at 1. This statement apparently refers to Exception D.1 which contains similar language.

However, the only reference in Exception D.1 to the Initial Decision, required by 10 C.F.R. § 2.762(a), is a reference to note 8 at page 5. In that note, the Licensing Board observed that "[t]he record therefore does reflect thorough consideration of both the likelihood of not finding

flaws and the consequences of not finding them" (emphasis supplied). Decade's reliance on the referenced note is puzzling, for the note itself appears to controvert Decade's assertion of error. Thus, Decade's specific allegation of error in the Initial Decision is unclear, and Decade presents no further explanatory discussion or citations to the record. Neither the reference to note 8 of the Licensing Board's Initial Decision, nor any other reference to the Initial Decision, appears in Decade's brief.

Decade also makes several references to "evidence" purportedly "proffered" but not received. Brief at 3-6. Setting aside for the moment the fact that Decade offered no evidence whatsoever by affidavit or otherwise during or preceding the hearing, Decade's only citation in its brief to a Licensing Board decision or order is a reference to pages 7 and 8 of the October 1, 1982 Memorandum and Order in which the Licensing Board rejected certain of Decade's contentions on the ground of relevancy. LBP-82-88, supra. Reference to Decade's July 21, 1982 Motion Concerning Litigable Issues at pages 1 through 3 indicates that the "proffered evidence" cited by Decade at pages 4 and 5 of its brief is in fact a verbatim reiteration of a series of quotations from documents used by Decade as its basis for seeking to have the following contention (Contention 1) litigated at the hearing:

Degradation of as few as one to ten steam generator tubes in a pressurized water reactor such as at [Point Beach] could induce essentially uncoolable conditions in the course of a loss-of-coolant-accident ("LOCA").

The brief therefore takes issue with the Licensing Board's rejection of Contention 1. This matter would appear to be included in Decade's Exception C.1, in which Decade asserts that the Licensing Board erroneously excluded several contentions on relevancy grounds. However, none of the other contentions to which Decade alludes in Exception C.1 have been touched upon in Decade's brief.^{5/}

Thus, the only issue remaining before the Appeal Board, as addressed in Decade's brief with some degree of confusion, is that presented by Exception D.1, read in conjunction with a portion of Exception C.1. The issue can be stated as follows:

Whether the Licensing Board erred by not "first [establishing] the degree of assurance necessary to protect the public safety before it found that the level of assurance proffered was adequate," Brief at 1, in that the Licensing Board rejected on the ground of relevancy Decade's proposed Contention 1 relating to the consequences of tube failures under LOCA conditions.

^{5/} The portion of LBP-82-88 referenced by Decade also rejected Decade's Contention 2 (tube failures under normal operation conditions) and 4 (sources of leakage from failing explosive plugs), and its "alternative litigable issue" (interrelationship with thermal shock). See Decade's July 21, 1982 Motion Concerning Litigable Issues.

The remaining exceptions (Exceptions A.1, B.1, C.2, D.2 through D.4, and most of Exception C.1) have not been briefed and are thus waived.

C. Decade Has Failed to Explain How
the Asserted Error Might Affect
the Outcome of the Proceeding

The issue raised in Decade's brief provides no basis for reversal of the Initial Decision below. Decade has not identified any specific Licensing Board finding which it alleges to be erroneous, and has provided no explanation of how the allegations in Exceptions C.1 and D.1 would undermine or in any way affect any of the specific findings made by the Licensing Board.

The findings and determinations made by the Licensing Board, first in the comprehensive summary disposition procedure and later in its Initial Decision, relate to the adequacy of sleeved tubes for the protection of the health and safety. As discussed below in Section III.B.2, the Licensing Board's findings were based on detailed, comprehensive consideration of all aspects of safety related to sleeving. In addition to positive findings on the adequacy of eddy current testing, see generally, Initial Decision at 13-17, the Licensing Board found that "sleeved tubes will be subject to an extremely low probability of abnormal leakage, of rapidly propagating failure and of gross rupture," id. at 22, lower in fact than the

probabilities for unsleeved tubes, id. at 34. The Licensing Board also found that "sleeved tubes are safer than unsleeved tubes already present in the Point Beach steam generator," id. at 22, and that "the uncontradicted evidence shows that sleeving enhances safety, both from the point-of-view of increased integrity of the primary pressure boundary and decreased consequences of a breach in the pressure boundary," id. at 33-34.

These findings led to Licensing Board approval of the amendment request. An appeal from the Initial Decision must necessarily identify which of these or other Licensing Board's findings are in error, explain why the findings are in error (with appropriate citations to the record, 10 C.F.R. § 2.762(a)), and explain why such erroneous findings should preclude authorization of sleeving or should warrant other appropriate remedy.

Decade has done none of this.^{6/} What Decade has done, in effect, is to grandly assert, without elaboration, that unspecified Licensing Board findings are in error because the Licensing Board allegedly did not first inquire into the consequences of tube failure. Reference to Decade's brief shows that its sole specific complaint in this regard is that

^{6/} Specific allegations of erroneous Licensing Board findings were made in Decade's exceptions, but were not briefed.

the Licensing Board did not admit Contention 1 which alleges that failure of ten or fewer tubes could precipitate uncoolable conditions in the core during a LOCA. Assuming, arguendo, that the allegation were true,^{7/} where is the Licensing Board error? Decade has identified no Licensing Board finding which would be affected, has identified no "level of assurance" which it alleges to be inadequate, and has provided no explanation of how the rejection of Contention 1 could conceivably have had an effect on any of the Licensing Board's findings. By failing to do so, Decade has failed to present the Appeal Board with an issue which, when resolved, would affect the Licensing Board's Initial Decision. For this reason alone, Decade's appeal must necessarily be dismissed.

^{7/} The record shows otherwise for sleeved tubes, as is discussed in Section III.B.2 below.

III. DECADE'S EXCEPTIONS

- A. The Licensing Board Properly Excluded Decade's
Contention 1 as a Matter in Controversy in
This Proceeding on the Ground of
Relevancy (Exception C.1)

The Licensing Board determined the matters that were to be litigated below by an unconventional procedural mechanism which afforded Decade relief from procedural requirements attendant to intervention under the Commission's Rules of Practice. Decade was not required to frame its contentions until after it had completed discovery on Licensee's application; thus, the scope of discovery was essentially unconstrained by the predefinition of issues contemplated by the Commission's regulations.^{8/} See 10 C.F.R. § 2.740(b)(1) (discovery to relate only to matters which have been placed in controversy). See also Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 A.E.C. 188, 192, reconsid. denied, ALAB-110, 6 A.E.C. 247, aff'd, CLI-73-12, 6 A.E.C. 241 (1973) (petitioner not entitled to discovery to assist in framing contentions).

Following discovery, Decade was directed to present its proposed contentions in a Motion Concerning Litigable Issues,^{9/}

^{8/} Nor was Decade required to demonstrate bases for its contentions -- a precondition to admission under the Commission's Rules of Practice. Compare 10 C.F.R. § 2.714(b) with LBP-82-88, slip opinion at 4-5.

^{9/} Decade's Motion Concerning Litigable Issues, July 21, 1982, and Decade's Amendment to Motion Concerning Litigable Issues, August 20, 1982.

in which it was required to present all of its arguments in support of the contentions, including demonstrations of relevancy and the existence of any genuine issues as to material facts necessitating an evidentiary hearing. Tr. 890-92, 902. Licensee and the Staff responded, each including in its response a motion for summary disposition of Decade's contentions pursuant to 10 C.F.R. § 2.749, complete with supporting affidavits, as appropriate.^{10/} Decade responded to Licensee's and the Staff's filings, but failed to include affidavits in answer to the motions for summary disposition.^{11/} Moreover, even given its essentially unrestricted scope of discovery, Decade was unable to provide any nexus between sleeving and the consequences of tube failure alleged in Contention 1, i.e., "essentially uncoolable conditions in the course of a [LOCA]," either in its original motion or in its reply to the relevancy arguments advanced by Licensee and the Staff.

^{10/} Licensee's Response to Decade's Motion Concerning Litigable Issues, August 9, 1982; Licensee's Response to Decade's Amendment to Motion Concerning Litigable Issues, August 24, 1982; NRC Staff Response to Decade's Motion Concerning Litigable Issues, August 16, 1982; and NRC Staff Response to Decade's Amendment to Motion Concerning Litigable Issues, September 3, 1982.

^{11/} Decade's Reply Brief in Support of Its Motion Concerning Litigable Issues, August 31, 1982.

The Licensing Board, consistent with the positions taken by both Licensee and the Staff, rejected Contention 1 as an issue for litigation at the hearing on the ground that it "did not relate to the safety of tube sleeving and [is] irrelevant to an application for a license amendment concerning steam generator tube sleeving." LBP-82-88, slip opinion at 7-8. The Licensing Board was clearly correct in its exclusionary ruling on Contention 1.^{12/}

It is beyond cavil that an admitted contention must be relevant to the subject matter of the hearing. A Licensing Board is authorized by 42 U.S.C. § 2241, and its jurisdiction is established by the Commission's rules and regulations (10 C.F.R. Part 2) and by the Commission's Notice. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-235, 8 A.E.C. 645, 646-47 (1974); see 10 C.F.R. § 2.717(a). A Licensing Board has only the jurisdiction and power which the Commission delegates

^{12/} The Licensing Board did more than simply exclude as irrelevant a contention on the alleged consequences of tube failure during a LOCA. In focusing its Exception C.1 and supporting brief on the Licensing Board's exclusion of Contention 1 on that ground, Decade has ignored the fact that Contention 1 was also excluded after detailed factual consideration resulting from the summary disposition motions by Licensee and the NRC Staff. This will be discussed in Section III.B.2 below. Also, as will be discussed in that section, the Licensing Board put all parties on notice that, while the issue to be litigated had been narrowed through summary disposition to the question of the adequacy of eddy current testing, the parties were expected to address the consequences of a failure to detect and repair tube degradation.

to it. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 N.R.C. 167, 170 (1976); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-577, 11 N.R.C. 18, 25, rev'd on other grounds in part, CLI-80-12, 11 N.R.C. 514 (1980); New England Power Co. (NEP, Units 1 & 2), LBP-78-9, 7 N.R.C. 271, 279 (1978). To determine what the jurisdiction of the licensing board is to be, the Appeal Board has stated that one must look to the notice of hearing in the particular case. Houston Lighting & Power Co. (South Texas Project, Unit Nos. 1 and 2), ALAB-381, 5 N.R.C. 582, 592 (1977). See Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 N.R.C. 381, 385 (1978); Midland, ALAB-235, supra.

The Notice issued by the Commission in this proceeding states:

The Amendments would revise the provisions in the Technical Specifications to permit repair of degraded or defective steam generator tubes by sleeving in accordance with the licensee's application for amendment dated July 2, 1981.

.

By September 8, 1981, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene.

46 Fed. Reg. 40,359-60 (Aug. 7, 1981) (emphasis supplied).

The Notice refers to the Licensee's July 2, 1981 application for amendment which states:

The purpose of these license amendments is to incorporate certain changes into the Point Beach Plant Technical Specification to permit repair of degraded or defective steam generator tubes by sleeving.

Thus, the subject matter of the instant proceeding must be restricted to safety or environmental issues arising as the result of the sleeving process or operation of the plant with steam generator tubes sleeved rather than plugged.

Decade's Contention 1 alleges a particular consequence of tube degradation in general. Nowhere does the contention mention or relate to sleeving. The Licensing Board, in effect, held that the contention was not relevant to the subject matter of the hearing because it did not allege that sleeving would cause or contribute to the consequences alleged in the contention. The contention is thus beyond the limited scope of Licensee's amendment request for permission to sleeve tubes, and was therefore correctly excluded by the Licensing Board.

The contention, worded as it is, attempts to raise the broader question of whether a plant which utilizes steam generator tubes should be allowed to operate at all, irrespective of whether the tubes are sleeved or not. The Point Beach plant is already authorized to operate, with specific surveillance and operating limitations which reflect consideration of the possibility of corrosive degradation of steam

generator tubes. Licensee's amendment request did not raise the generic question of the acceptability of operating a plant with steam generators, because Licensee already has authorization for such operation. Licensee sought only permission to sleeve -- rather than plug -- certain tubes. Decade was not entitled in this proceeding to challenge the overall operation of the Point Beach units as currently authorized, including the authorizations, limitations and restrictions related to steam generator tube degradation. Contention 1, because it does not relate to sleeving, but instead sought to explore the larger, generic issue of whether a plant should be allowed to operate because of the alleged consequences of steam generator tube rupture, is not relevant to the amendment request which is the subject of this proceeding.

The distinction was succinctly stated by the Licensing Board Chairman during a telephone conference on September 16, 1981, when the contention was first being argued:

But the issue that is being raised in the amendment here is not whether it is permissible to operate the steam generator as part of the reactor, but whether sleeving is permissible.

Tr. 32. This point was further elaborated by the Licensing Board in excluding Contention 1:

This is not an application to build or operate a nuclear power reactor. In an amendment proceeding, the relationship of steam generators to the remainder of the plant is not germane. In this case, applicant

already has an operating license, granted after the safety of its reactor was considered. We do not think it appropriate to permit an intervenor to question the original design of the reactor or the systems not directly involved in this application, on the unexplained premise that they are somehow related to the steam generator. LBP-81-45, 14 N.R.C. 853, 858 (1981) (rejecting a previous version of Contention 1 as irrelevant to the proceeding because it is an allegation of the consequences of tube failure which may be litigated only if a mechanism for tube failure is shown to exist). The test of relevance we have applied is to ask whether an issue is relevant to "how the sleeving program would cause problems" or whether it reflects "unfavorably on the safety of sleeving." [Emphasis in original.] See LBP-82-33, 15 N.R.C. 887 (1982) at 890-891; LBP-81-55, 14 N.R.C. 1017 (1981) at 1026 (citing Tr. 598).

LBP-82-88, slip opinion at 8.

The arguments in Decade's brief confirm that Decade advanced Contention 1 below for the purpose of widening the sleeving amendment proceeding beyond its allowable scope.^{13/} Most of Decade's brief, particularly the second half, is

^{13/} The very generic nature of Contention 1 is emphasized by Decade's attempt to advance an essentially identical contention in the proceeding involving the replacement of the Point Beach Unit 1 steam generators. See Decade's Contentions Concerning Steam Generator Replacement, November 5, 1982, in Docket No. 50-266 (OLA-2). At a minimum, Decade's attempt to raise the same contention in the steam generator replacement proceeding constitutes an admission that its concerns are unrelated to sleeving, and thus beyond the scope of the instant proceeding.

devoted to a diatribe, peppered liberally with selected extra-record quotations, against the Commission's generic policies with respect to steam generator tube behavior during a LOCA, irrespective of whether or not the tubes are sleeved. Decade's principal argument centers around the allegation that the Commission has not formally investigated the consequences of steam generator tube failure during a LOCA. Brief at 7. In Contention 1, Decade, in effect, was requesting hearings on the Commission's generic safety standards with respect to steam generator tube behavior during a LOCA, rather than specifically challenging the ability of the repaired Point Beach tubes to meet current standards. In such a case, Decade's remedy is to petition the Commission for rulemaking pursuant to 10 C.F.R. § 2.802, rather than attempt to use an individual licensing proceeding to mount its generic challenge.^{14/}

^{14/} The only conceivable way for Decade to have raised the issue in this proceeding would have been to allege that sleeving would somehow cause or contribute to tube conditions that would induce "essentially uncoolable conditions in the course of a . . . [LOCA]." Decade chose not to make such an allegation, though it was given several opportunities to do so. But even if Decade had attempted to relate sleeving to the occurrence of uncoolable conditions during a LOCA, the contention would have failed. Decade provided no nexus between sleeving and the inducement of the alleged consequences. More significantly, Decade provided no response to the detailed affidavits of Licensee and the NRC Staff which established that sleeving would not cause uncoolable conditions in the core during a LOCA and, in fact, would minimize the potential for such consequences. See generally the discussion in Section III.B.2 below.

Thus, the Licensing Board committed no error in ruling that Contention 1 was irrelevant to the subject matter of the proceeding below.^{15/}

B. The Licensing Board Was Not Required To First
 Determine the Consequences of Tube Failure
 Before Making Safety Determinations (Exception D.1)

1. The Licensing Board is Not Required -- or
 Authorized -- to Modify NRC Safety Standards
 By Investigating Accident Consequences

Decade argues that the Licensing Board was required to first establish the "degree of assurance necessary to protect the public safety" before finding that the "level of assurance proffered was adequate." Brief at 1. According to Decade, the Licensing Board should have received evidence on the consequences of tube failure in general before making its findings on the adequacy of the sleeving process. Decade's novel argument is not supported by law or by Commission policy or practice.

^{15/} As discussed in note 1, supra, the Licensing Board also excluded three other proposed contentions. LBP-82-88, slip opinion at 7-8. The subject matters of these contentions were alluded to in Decade's Exception C.1, but were not addressed in Decade's brief. Each of these contentions alleges consequences of tube failure generally, but is not related in any way to the sleeving of steam generator tubes. See Decade's Motion Concerning Litigable Issues, July 21, 1982 at 1-5, 11-13. Thus the reasoning discussed above for rejecting Contention 1 applies with equal force to the other three contentions.

The ultimate findings to be made by the Commission before issuance of an operating license or an amendment thereto include a determination that there is "reasonable assurance" that "the health and safety of the public will not be endangered." 10 C.F.R. § 50.40(a). Further, because the steam generator tubes are part of the reactor coolant pressure boundary, the Licensing Board analyzed the adequacy of the sleeved tubes against the NRC's General Design Criterion 14 ("GDC-14"):

Criterion 14 - Reactor coolant pressure boundary. The reactor coolant pressure boundary shall be designed, fabricated, erected, and tested so as to have an extremely low probability of abnormal leakage, of rapidly propagating failure, and of gross rupture.

10 C.F.R. Part 50, Appendix A. The standards, or "degree of assurance" as Decade phrases it, are clear. There is nothing in NRC regulations -- or in GDC-14 -- to suggest that the Licensing Board is permitted to apply a different standard as a result of investigating the consequences of tube failures.

Current NRC regulations do not require probabilistic risk assessment for steam generator tube failure and, accordingly, do not specify a numerical safety goal for such occurrences. When applying the standard of "reasonable assurance" of protecting the health and safety of the public, in the absence of such a numerical safety goal and in the absence of any other

specific standards, one would reasonably expect the decision maker to appreciate the seriousness of the potential risks to safety involved in the matter being considered. Safety decisions are not made in a vacuum, either by the NRC staff or by licensing boards. It is important to note, however, that in this case the Licensing Board had very little latitude in determining what constitutes "reasonable assurance" of protecting the public health and safety. That question has been largely preempted by the application of the rigorous and more specific additional standard set forth in GDC-14, i.e., that there is to be an "extremely low probability" of serious tube failure. In any event, the record below clearly illustrates that the Licensing Board was acutely aware of the safety significance of steam generator tube integrity and the exacting standards set out in GDC-14, and that it conducted its deliberations accordingly. See generally Initial Decision at 18-34.

2. The Licensing Board Gave Detailed Consideration to the Overall Safety Implications of Sleeving, Including the Consequences of Undetected Flaws

Decade has implied that the Licensing Board, by rejecting Contention 1, has put on blinders and ignored the consequences of failure of sleeved tubes. Nothing could be further from the truth. Notwithstanding the relative specificity of the eddy current testing issue litigated at the hearing, the Licensing

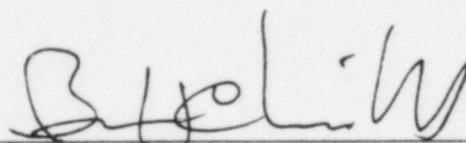
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensee's Brief in Opposition to Intervenor's Exceptions to Initial Decision Authorizing Full-Scale Sleeving" were served upon those persons on the attached Service List by deposit in the United States mail, postage prepaid, this 27th day of April, 1983.



Bruce W. Churchill

Dated: April 27, 1983

UNITED STATES OF AMERICA
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SERVICE LIST

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

Dr. W. Reed Johnson
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. Reginald L. Gotchy
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Peter B. Bloch, Chairman
Atomic Safety and Licensing
Board
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
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

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

Richard G. Bachmann, Esquire
Office of the Executive
Legal Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Myron Karman, Esquire
Office of the Executive
Legal Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Appeal Board-Service List
Page Two

Mr. Peter Anderson
Director of Public Affairs
Wisconsin's Environmental Decade, Inc.
114 North Carroll Street
Suite 208
Madison, Wisconsin 53703

Board gave extraordinarily thorough consideration to all safety aspects of sleeving, including the consequences of tube failure.

During the consideration of Decade's July 21, 1982 Motion Concerning Litigable Issues, the Licensing Board had before it motions for summary disposition by Licensee and the NRC Staff, including disposition of Contention 1 which dealt with the consequence of tube failure during a LOCA. With respect to that contention, Licensee's motion included a statement of material facts, fully supported by affidavit, which clearly demonstrated that sleeving, if anything, would mitigate the consequences alleged by Decade. Westinghouse evaluations of the loads on steam generator tubes demonstrated that the tubes would maintain their integrity for all postulated design basis accidents, including the LOCA. Maximum LOCA stresses do not occur near the tube sheet where sleeving occurs. More importantly, because of depressurization on the primary side during a LOCA, the mode of failure, if any, would be tube collapse, rather than a break or rupture. Leakage resulting from tube collapse would be significantly lower than that from a double-ended rupture. Licensee's August 9, 1982 Response at 52-53.

Sleeving would provide even greater margin against both tube rupture and tube collapse because it strengthens the tube and provides additional support. Sleeving would also impede leakage flow, and would actually mitigate the consequences

alleged in Contention 1. Analysis showed that over 100 tubes would have to fail simultaneously, with the equivalent of a double-ended tube break, to even begin to affect the ability of the ECCS to cool the core. Thus it is not considered credible to postulate '"essentially uncoolable conditions in the course of a . . . [LOCA]"' as a result of sleeving steam generator tubes at Point Beach. Id. at 54-55.

The Staff, in its August 16, 1982 response to Decade's motion, reached a similar conclusion. See NRC Staff's Statement of Material Facts as to Which There Is No Genuine Issue to be Heard at 1-3. Decade did not factually dispute the statements of either Licensee or the Staff, filed no statement of its own, and filed no affidavits.^{16/} Summary disposition was granted. LBP-82-88, slip opinion at 19.

But that was by no means the end of the story. Even though the Licensing Board's summary disposition procedure excluded all but a portion of one of Decade's contentions dealing with the adequacy of eddy current inspection,^{17/} the

^{16/} The material facts set forth in the statements of Licensee and the NRC Staff are therefore deemed to be admitted. 10 C.F.R. § 2.749(a).

^{17/} Decade briefed no exceptions to the Licensing Board's October 1, 1982 summary disposition ruling, with the possible exception of the Licensing Board's exclusion of Contention 1, and briefed no exceptions with respect to the Licensing Board's determination in its Initial Decision on the eddy current issue.

Licensing Board put the parties on notice that it also expected them to address the overall safety considerations associated with sleeving, including the consequences of undetected tube leakage. LBP-82-88, slip opinion at 2. Consequently, Licensee and the NRC Staff presented testimony on the overall safety considerations of sleeving, including the various safety considerations other than eddy current inspections for minimizing and detecting tube corrosion and failure, and including the safety significance of failing to detect a defect in a steam generator tube.^{18/}

Similarly, the Licensing Board considered in detail in its Initial Decision the overall safety implications of sleeving, well beyond the question of eddy current inspectability, and the consequences of not detecting flaws:

The Board nevertheless considered, in its Summary Disposition decision, what its course might be should eddy current testing prove to be inadequate for the detection of flaws in sleeved tubes. It therefore requested the applicant and staff to address contingently the safety implications of sleeving if that finding was made. Both did so. We consider those implications in subsequent sections of this decision even though we could rest our decision solely on the demonstrated adequacy of eddy current testing. The record therefore does reflect thorough consideration of both

^{18/} See, e.g., Licensee's Testimony of W. D. Fletcher, following Tr. 1422, at 5-12; Staff's Testimony of Ledyard B. Marsh, following Tr. 1822.

the likelihood of not finding flaws
and the consequences of not finding
them.

initial Decision at 5 n.8. See also id. at 18-34.19/

Considering the Licensing Board's detailed and wide-ranging examination of the safety issues associated with sleeving steam generator tubes, and the lack of any requirement or authority to define the "level of assurance" by entertaining specific contentions dealing with the consequences of tube failure, Decade's Exception D.1 is totally without merit and should be denied.

IV. CONCLUSION

In accordance with the foregoing, Licensee submits that each of Decade's exceptions to the Licensing Board's Initial Decision of February 4, 1983 has either been waived for failure to brief, or is without merit. Licensee further submits that Decade has failed to show how the assertions presented in its briefed exceptions would in any way affect any of the Licensing Board's findings below. Accordingly, Licensee respectfully


19/ In view of the fact that Decade did not dispute the statements of material fact filed by Licensee and the NRC Staff in their motions for summary disposition, filed no affidavits of their own, and presented no direct case at the hearing, it is misleading in the extreme for Decade to assert that it "proffered evidence" on the safety consequences of tube failure which the Licensing Board "excluded." Brief at 3, 5. It is similarly incorrect that the Licensing Board excluded "consideration of safety." Brief at 6.

requests that the Appeal Board deny Decade's exceptions and affirm the Licensing Board's Initial Decision.

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

Dated: April 27, 1983