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Proprietary Notice

This letter forwards proprietary information in accordance with 10CFR2.390. Upon the removal of Enclosures 1 through 5, the balance of this letter may be considered non-proprietary.

MFN 08-110

Docket No. 52-010

February 29, 2008

U.S. Nuclear Regulatory Commission
Document Control Desk
Washington, D.C. 20555-0001

Subject: Identification of Proprietary Information in Safety Evaluation Reports and Associated Technical Evaluation Reports for ESBWR DCD Chapters 4 and 21

By letter dated January 11, 2008 (Reference 1), the U.S. Nuclear Regulatory Commission (NRC) provided GE Hitachi Nuclear Energy (GEH) with Safety Evaluation Reports (SERs) with Open Items for Chapters 4, 6, 15, 21, and Topical Reports NEDE-33083P, NEDE-33083P (Supplement 2), Addendum to NEDE-33083P-A, and Addendum to NEDE-33083P (Supplement 1) regarding the ESBWR Design Certification Review. The NRC provided these documents to GEH to review for proprietary information and factual accuracy.

GEH has completed its review of the above documents and has determined that a portion of them contain GEH proprietary information. This letter transmits NRC SERs and associated Technical Evaluation Reports for ESBWR Design Control Document Chapters 4 and 21 (Enclosures 1 through 5) in which GEH has identified Proprietary Information. GEH has also confirmed that the remaining documents transmitted via Reference 1 (those not included in Enclosures 1 through 5 of this letter) do not contain proprietary information and may be placed in the public document room.

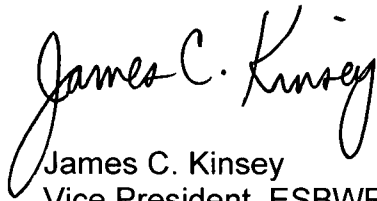
Enclosures 1 through 5 contain GEH proprietary information as defined by 10 CFR 2.390. GEH customarily maintains this information in confidence and withholds it from public disclosure.

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NRC

The affidavit contained in Enclosure 6 identifies that the information contained in Enclosures 1 through 5 has been handled and classified as proprietary to GEH. GEH hereby requests that the information in Enclosures 1 through 5 be withheld from public disclosure in accordance with the provisions of 10 CFR 2.390 and 9.17. Non-proprietary versions of the documents are not provided because the documents are SERs with Open Items that will be issued by the NRC.

If you have any questions or require additional information, please contact me.

Sincerely,



James C. Kinsey
Vice President, ESBWR Licensing

Reference:

1. MFN 08-105, Letter from U.S. Nuclear Regulatory Commission to Robert E. Brown, GEH, "Safety Evaluation Reports (SERs) with Open Items (OIs) for Chapters 4, 6, 15, 21, and Topical Reports NEDE-33083P, NEDE-33083P (Supplement 2), Addendum to NEDC-33083P-A, and Addendum to NEDE-33083P (Supplement 1) Regarding the ESBWR Design Certification Review," dated January 11, 2008

Enclosures:

1. Safety Evaluation Report for ESBWR DCD Chapter 4, Reactor – GEH Proprietary Information
2. Safety Evaluation with Open Items for Application of the TRACG Computer Code to the Transient Analysis for the ESBWR Design – GEH Proprietary Information
3. Safety Evaluation with Open Items by the Office of New Reactors, Application of the TRACG Computer Code to Anticipated Transients Without Scram for the ESBWR Design, NEDE-33083P, Supplement 2 – GEH Proprietary Information
4. ISL-NSAD-TR-06-16, Technical Evaluation Review of TRACG Applications to ESBWR Anticipated Operational Occurrences (AOOs), January 2007– GEH Proprietary Information

5. ISL-NSAD-TR-07-02, "Technical Evaluation Review of TRACG Applications to ESBWR ATWS," January 2007 – GEH Proprietary Information
6. Affidavit – James C. Kinsey – February 29, 2007

cc: AE Cubbage USNRC (with enclosures)
GB Stramback GEH/San Jose (with enclosures)
RE Brown GEH/Wilmington (with enclosures)
DH Hinds GEH/Wilmington (with enclosures)

MFN 08-110

Enclosure 3

Affidavit

GE Hitachi Nuclear Energy

AFFIDAVIT

I, **James C. Kinsey**, state as follows:

- (1) I am Vice President, ESBWR Licensing, GE Hitachi Nuclear Energy (“GEH”), and have been delegated the function of reviewing the information described in paragraph (2) which is sought to be withheld, and have been authorized to apply for its withholding.
- (2) The information sought to be withheld is contained in enclosures 1 through 5 of GEH’s letter, MFN 08-110, Mr. James C. Kinsey to U.S. Nuclear Energy Commission, entitled “*Identification of Proprietary Information in Safety Evaluation Reports and Associated Technical Evaluation Reports for ESBWR DCD Chapters 4 and 21*,” dated February 29, 2008. The proprietary information in enclosures 1 through 5 is identified by yellow highlighting with a red border. This sentence is an example. Proprietary figures are identified by red borders, but without the yellow highlighting. In each case, Paragraph (3) of the enclosed affidavit documents the basis for the proprietary determination. Specific information that is not so marked is not GEH proprietary. Note that the NRC-identified GEH proprietary information is identified by a single underline inside double square brackets with red font. [[This sentence is an example.]]
- (3) In making this application for withholding of proprietary information of which it is the owner or licensee, GEH relies upon the exemption from disclosure set forth in the Freedom of Information Act (“FOIA”), 5 USC Sec. 552(b)(4), and the Trade Secrets Act, 18 USC Sec. 1905, and NRC regulations 10 CFR 9.17(a)(4), and 2.390(a)(4) for “trade secrets” (Exemption 4). The material for which exemption from disclosure is here sought also qualify under the narrower definition of “trade secret”, within the meanings assigned to those terms for purposes of FOIA Exemption 4 in, respectively, Critical Mass Energy Project v. Nuclear Regulatory Commission, 975F2d871 (DC Cir. 1992), and Public Citizen Health Research Group v. FDA, 704F2d1280 (DC Cir. 1983).
- (4) Some examples of categories of information which fit into the definition of proprietary information are:
 - a. Information that discloses a process, method, or apparatus, including supporting data and analyses, where prevention of its use by GEH’s competitors without license from GEH constitutes a competitive economic advantage over other companies;
 - b. Information which, if used by a competitor, would reduce his expenditure of resources or improve his competitive position in the design, manufacture, shipment, installation, assurance of quality, or licensing of a similar product;
 - c. Information which reveals aspects of past, present, or future GEH customer-funded development plans and programs, resulting in potential products to GEH;

- d. Information which discloses patentable subject matter for which it may be desirable to obtain patent protection.

The information sought to be withheld is considered to be proprietary for the reasons set forth in paragraphs (4)a. and (4)b. above.

- (5) To address 10 CFR 2.390(b)(4), the information sought to be withheld is being submitted to NRC in confidence. The information is of a sort customarily held in confidence by GEH, and is in fact so held. The information sought to be withheld has, to the best of my knowledge and belief, consistently been held in confidence by GEH, no public disclosure has been made, and it is not available in public sources. All disclosures to third parties, including any required transmittals to NRC, have been made, or must be made, pursuant to regulatory provisions or proprietary agreements which provide for maintenance of the information in confidence. Its initial designation as proprietary information, and the subsequent steps taken to prevent its unauthorized disclosure, are as set forth in paragraphs (6) and (7) following.
- (6) Initial approval of proprietary treatment of a document is made by the manager of the originating component, the person most likely to be acquainted with the value and sensitivity of the information in relation to industry knowledge, or subject to the terms under which it was licensed to GEH. Access to such documents within GEH is limited on a "need to know" basis.
- (7) The procedure for approval of external release of such a document typically requires review by the staff manager, project manager, principal scientist, or other equivalent authority for technical content, competitive effect, and determination of the accuracy of the proprietary designation. Disclosures outside GEH are limited to regulatory bodies, customers, and potential customers, and their agents, suppliers, and licensees, and others with a legitimate need for the information, and then only in accordance with appropriate regulatory provisions or proprietary agreements.
- (8) The information identified in paragraph (2) above is classified as proprietary because it contains details of GEH's evaluation methodology.

The development of the evaluation process along with the interpretation and application of the analytical results is derived from the extensive experience database that constitutes a major GEH asset.

- (9) Public disclosure of the information sought to be withheld is likely to cause substantial harm to GEH's competitive position and foreclose or reduce the availability of profit-making opportunities. The information is part of GEH's comprehensive BWR safety and technology base, and its commercial value extends beyond the original development cost. The value of the technology base goes beyond the extensive physical database and analytical methodology and includes development of the expertise to determine and apply the appropriate evaluation process. In addition, the technology base includes the value derived from providing analyses done with NRC-approved methods.

The research, development, engineering, analytical and NRC review costs comprise a substantial investment of time and money by GEH.

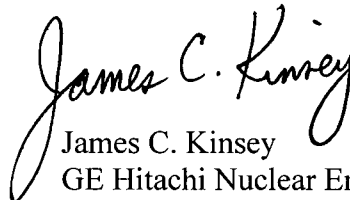
The precise value of the expertise to devise an evaluation process and apply the correct analytical methodology is difficult to quantify, but it clearly is substantial.

GEH's competitive advantage will be lost if its competitors are able to use the results of the GEH experience to normalize or verify their own process or if they are able to claim an equivalent understanding by demonstrating that they can arrive at the same or similar conclusions.

The value of this information to GEH would be lost if the information were disclosed to the public. Making such information available to competitors without their having been required to undertake a similar expenditure of resources would unfairly provide competitors with a windfall, and deprive GEH of the opportunity to exercise its competitive advantage to seek an adequate return on its large investment in developing and obtaining these very valuable analytical tools.

I declare under penalty of perjury that the foregoing affidavit and the matters stated therein are true and correct to the best of my knowledge, information, and belief.

Executed on this 29th day of February 2008.


James C. Kinsey
GE Hitachi Nuclear Energy