



**HITACHI**

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**Proprietary Notice**

This letter forwards proprietary information in accordance with 10 CFR 2.390. Upon the removal of Enclosure 1, the balance of this letter may be considered non-proprietary.

MFN 08-269

Docket No. 52-010

July 10, 2008

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

Subject: **Submission of ESBWR Licensing Topical Report NEDE-33226P, ESBWR - Software Management Program Manual (SMPM), Revision 3 – GEH Proprietary Information**

The purpose of this letter is to submit Licensing Topical Report (LTR) NEDE-33226P, *ESBWR- Software Management Program Manual*, Revision 3 for your review and use. This letter is to support the NRC review of the GEH application for final design approval and standard design certification of the ESBWR standard plant design pursuant to 10 CFR Part 52, Reference 1.

Enclosure 1 contains GE Hitachi Nuclear Energy (GEH) proprietary information as defined by 10 CFR 2.390. GEH customarily maintains this information in confidence and withholds it from public disclosure. A non-proprietary version of Enclosure 1 is provided in Enclosure 2.

The affidavit contained in Enclosure 3 identifies that the information contained in Enclosure 1 has been handled and classified as proprietary to GEH. GEH hereby requests that the information of Enclosure 1 be withheld from public disclosure in accordance with the provisions of 10 CFR 2.390 and 9.17.

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

Sincerely,

Richard E. Kingston  
Vice President, ESBWR Licensing

DOGB  
NRO

Reference:

1. MFN 05-084 - Letter from Steven A. Hucik, GE, to William D. Beckner, NRC, *General Electric Company Application for Final Design Approval and Design Certification of ESBWR Standard Plant Design*, dated August 24, 2005

Enclosures:

1. MFN 08-269 – ESBWR Licensing Topical Report – ESBWR Software Management Program Manual - NEDE 33226P, Revision 3 – GEH Proprietary Information
2. MFN 08-269 – ESBWR Licensing Topical Report – ESBWR Software Management Program Manual - NEDO 33226, Revision 3 – Non-Proprietary Version
3. MFN 08-269 - Affidavit

cc: AE Cabbage                      USNRC (with enclosures)  
RE Brown                            GEH/Wilmington (with enclosures)  
DH Hinds                             GEH/Wilmington (with enclosures)  
GB Stramback                        GEH/San Jose (with enclosures)  
eDRF                                    0000-0051-3897

**MFN 08-269**

**Enclosure 3**

**Affidavit**

# GE-Hitachi Nuclear Energy LLC

## AFFIDAVIT

I, **David H. Hinds**, state as follows:

- (1) I am the General Manager, New Units Engineering, GE-Hitachi Nuclear Energy LLC (GEH) 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 Enclosure 1 of GEH letter MFN 08-269, Mr. Richard E. Kingston to U.S. Nuclear Regulatory Commission, entitled *Submittal of ESBWR Licensing Topical Report – ESBWR Software Management Program Manual*, Revision 3 (NEDE-33226P) – GEH Proprietary Information, dated July 10, 2008 is delineated by a [[dashed underline inside double square brackets<sup>(3)</sup>]]. Figures and large equation objects are identified with double square brackets before and after the object. In each case, the superscript notation <sup>(3)</sup> refers to Paragraph (3) of this affidavit, which provides the basis for the proprietary determination.
- (3) In making this application for withholding of proprietary information, of which it is the owner, 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 qualifies 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 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. 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, by the manager of the cognizant marketing function (or his delegate), and by the Legal Operation, 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 identifies details of GEH ESBWR methods, techniques, information, procedures, and assumptions related to the application of the software plans to the GEH ESBWR.

The development of the evaluation process along with the interpretation and application of the regulatory guidance 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.

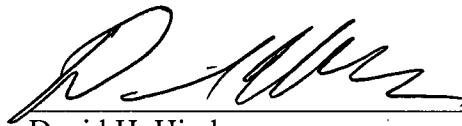
The precise value of the expertise to devise an evaluation process and apply the correct analytical methodology is difficult to quantify, but it clearly is substantial.

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 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 10<sup>th</sup> day of July 2008.

A handwritten signature in black ink, appearing to read 'D. Hinds', written over a horizontal line.

David H. Hinds  
GE Hitachi Nuclear Energy