



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of
PUBLIC SERVICE COMPANY OF OKLAHOMA,
INC.
ASSOCIATED ELECTRIC COOPERATIVE, INC.,
and
WESTERN FARMERS ELECTRIC COOPERATIVE
(Black Fox Station, Units 1 and 2)

Docket Nos. STN 50-556 CP
STN 50-557 CP

CERTIFICATION TO THE COMMISSION

Pursuant to 10 C.F.R. §§ 2.718(i) and 9.15, the Licensing Board certifies the following question to the Commission for its determination:

Should the Licensing Board now return to the General Electric Company the so-called Reed Report, and the underlying Sub-Task Force Reports, which General Electric had made available to the Board in confidence and which were subject to a Protective Order?

Factual Background

On July 24, 1978, the Licensing Board issued a Partial Initial Decision Authorizing Limited Work Authorization, which addressed only environmental and site suitability issues (LBP-78-26, 8 NRC 102). Thereafter, radiological health and safety hearings were held beginning on October 10, 1978 and were concluded on February 28, 1979. The parties have submitted proposed findings of fact and conclusions of law.

On October 18, 1978, at the health and safety hearings, Intervenor's counsel sought to cross-examine one of Applicants' witnesses from GE with

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regard to the Reed Report.^{1/} (Tr. 4700-4720). The Board directed that the parties confer, concur upon a protective agreement, and propose a protective order for the Board's signature, and that thereafter counsel for the parties could inspect the Reed Report but only as to the 27 safety issues contained therein. (Tr. 4721). The Board made it known that any Reed Report proceedings would be in camera (Tr. 4723), and directed that Intervenors' counsel would discontinue cross-examination upon the Reed Report until such time as a protective order and protective agreements might be executed. (Tr. 4724). Upon being advised by Applicants' counsel that Applicants did not have a copy of the Reed Report and that he would have to discuss the Board's ruling with the Applicants and with GE, and after a bench conference, the Board decided not to issue a subpoena and stated that it would await Applicants' counsel's report on October 16, 1978 as to the results of his discussion with GE. (Tr. 4722, 4725, 4961-2).

^{1/} Previously, on May 19, 1978, Intervenors had filed an Application To Admit Additional Contentions. Additional Contention 2 asserted that the proprietary General Electric Reed Report discussed 27 BWR safety-related items, that the Applicants and Staff had not adequately assessed the impact of these items, and that this information should be made available to the Intervenors. The Staff and Applicants opposed the granting of the Application in submissions respectively dated May 31 and June 5, 1978. During the prehearing conference on June 29, 1978, the Board refused to admit Additional Contention 2 because, contrary to § 2.714(a)(3), the Intervenors had failed to amend their petition to assert this Contention fifteen days prior to the special prehearing conference held on July 21, 1976 and, contrary to § 2.714(a)(1)(i), had not shown good cause for their failure to file on time. (Tr. 4172-3; see also Orders of July 7, 1978).

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On October 16, 1978, Applicants' counsel stated that GE proposed to prepare a report discussing all matters in the Reed Report that arguably would have anything to do with safety, to make that report available to the parties and to the Board under an appropriate protective order, and, in the event anyone questioned whether any extraction was adequate or accurate, to make the Reed Report available for in camera review by the Board which could then determine whether there had been faithful extractions. Intervenors' counsel objected to this proposal. (Tr. 5547-5572).

On October 17, 1978, the Board directed Applicants and/or GE to produce the entire Reed Report for inspection by Intervenors' counsel and their three experts, Messrs. Minor, Hubbard and Bridenbaugh for the purpose of cross-examination upon extant Board questions and contentions (Tr. 5727-5529). On October 18, 1978, the Board issued a subpoena duces tecum requiring the production by GE of the Reed Report. (Tr. 6039-6041) On October 30, 1978, GE moved to quash the subpoena. In its Memorandum In Support Of Motion To Quash, GE asserted, inter alia, that the Reed Report is "a confidential commercially sensitive generic product improvement study which was intended to improve the availability and performance of GE's BWR product." (Attachment 1). Responses were filed by the parties, and oral argument was held on December 13, 1978. (Tr. 7390-7493)

During a conference call with the Board and the parties on January 2, 1979, GE proposed a settlement with respect to the production of the Reed

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Report and advised the Board that the parties were in agreement on all aspects of the GE offer of settlement except one. The Board orally ruled on that one matter in dispute which is not material herein. In a Protective Order dated January 5, 1979, the Board approved the settlement which rendered moot GE's motion to quash the subpoena (Attachment 2), and, on that date, GE forwarded to the Board copies of the Reed Report, the Sub-Task Force Reports, and verbatim extractions therefrom. The terms of the Protective Order were as follows:

- a. GE will make the Reed Report and the related Sub-Task Force Reports available to the Board in confidence.
- b. GE will prepare a verbatim extraction of the Reed Report and the related Sub-Task Force Reports, insofar as those documents relate to the intervenor's contentions and Board questions in the Black Fox proceedings, and will make it available to counsel subject to the provisions of this Order and the protective agreement contained in Attachment A hereto
- c. GE will make the Reed Report and the related Sub-Task Force Reports available to counsel subject to the provisions of this Order and the protective agreement contained in Attachment B hereto for the purpose of evaluating the faithfulness of GE's verbatim extraction.
- d. Upon review by counsel, GE will consult with counsel for all parties in an attempt to resolve any disputes concerning the faithfulness of extraction, and failing resolution on any matter or matters, counsel will participate in oral argument in camera before the Board in order to obtain Board rulings resolving any disputed matters.
- e. In the event that the Board's review of the Reed Report and the related Sub-Task Force Reports raises any additional matters beyond the existing intervenor contentions and Board questions which the Board determines to be necessary for consideration in these proceedings,

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GE will make available to counsel, subject to the provisions of this Order and the protective agreement contained in Attachment B hereto, a verbatim extraction of those documents insofar as they relate to any such additional matters. The parties will undertake the steps identified in sub-paragraphs c. and d. above in regard to the matters identified in sub-paragraph e.

- f. GE will make portions of the verbatim extractions of the Reed Report and related Sub-Task Force Reports ultimately resulting from Board rulings or agreements of counsel in accordance with sub-paragraphs d. and e. above available to consultants for the parties subject to the provisions of this Order and the protective agreement contained in Attachment A hereto.

In an in camera Order dated January 17, 1979, the Board requested that GE and Applicants testify in response to twelve (subsequently reduced to nine) questions derived from the Reed Report. In camera evidentiary hearings concerning the Reed Report extractions were held on February 20, 27 and 28, 1979. These extractions were admitted into evidence as Intervenors' Exhibit No. 1 - in camera. (It should be noted that the Reed Report and the related Sub-Task Force Reports were not admitted into evidence and the Board has retained in confidence the copies of these documents forwarded by GE on January 5, 1979.)

In letters dated February 13 and March 7, 1979, Mr. Brian D. Hunt of Tulsa, Oklahoma and Leah Kosik, Esq., of Cincinnati, Ohio respectively requested that they be furnished with copies of the Reed Report pursuant to the Freedom of Information Act, 5 U.S.C. 552. (Attachments 3, 4). In a letter of March 15, 1979 addressed to Mr. Samuel Chilk, GE's counsel requested confirmation that the proprietary Reed Report and verbatim extractions, previously furnished in confidence and subject to a protective order and agreements in the Black Fox proceeding, are exempt from disclosure

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pursuant to 10 C.F.R. § 2.790 and Part 9 of the Commission's regulations. An affidavit of William Roth, GE's Manager of the Reliability Engineering Operation, was attached to the letter of March 15th, attesting to the proprietary nature of the Reed Report and extractions (Attachment 5).

Pursuant to 10 C.F.R. § 9.15, after consultations with the Office of the General Counsel in which representatives of the Office of Nuclear Reactor Regulation and of the Office of Executive Legal Director were requested by OGC to participate, in letters of March 23 and March 29, 1979 respectively addressed to Mr. Brian Hunt and Leah Kosik, Esquire, I, as Chairman of the Licensing Board, made the initial determinations. (Attachments 6,7). Said initial determinations read in pertinent part as follows:

These documents came into the possession of the NRC under a Protective Order issued on January 5, 1979 by the Atomic Safety and Licensing Board in the Black Fox proceedings (Docket Nos. STN 50-556, STN 50-557). Specifically, this Protective Order (copy attached) provides that "GE will make the Reed Report and the related Sub-Task Force Reports available to the Board in confidence." In maintaining this confidence, only the members of this Licensing Board have access to this copy of the Reed Report and the related Sub-Task Force Reports.

The General Electric Company asserts that the requested documents contain confidential business (proprietary) information and it has supplied a letter and affidavit in support of this claim. The NRC is now reviewing this proprietary claim. The NRC has asked GE to reconsider its assertion. Pending completion of the NRC's review, the requested documents are being withheld from public disclosure pursuant to exemption (4) of the Freedom of Information Act (5 U.S.C. 552(b)(4)) and 10 C.F.R. 9.5(a)(4) of the Commission's regulations. The person responsible for this denial is the undersigned. As soon as the proprietary review is completed, the NRC will make available to you any additional material which can be released to the public.

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This denial may be appealed to the Commission within 30 days from the receipt of this letter. As provided in 10 C.F.R. 9.15, any such appeal must be in writing, addressed to the Secretary of the Commission, U. S. Nuclear Regulatory Commission, Washington, D.C. 20555, and should clearly state on the envelope and in the letter that it is an "Appeal from an Initial FOIA Decision."

In a letter dated March 28, 1979, counsel for GE requested that the Board return the copy of the Reed Report and related Sub-Task Force Reports which had been transmitted to the Board under cover of a letter dated January 5, 1979. (Attachment 8). Treating GE's letter as a motion, the Board denied the motion in an Order dated April 12, 1979 (Attachment 9).

On April 13, 1979, the Director, Division of Rules and Records, requested that by April 30th, GE furnish additional, more specific information in support of its claim for withholding under Exemption 4 of FOIA and 10 C.F.R. 9.5(a)(4). (Attachment 10). Thereafter, GE's counsel responded in a letter dated May 4, 1979, to which was attached an affidavit. (Attachment 11).

Discussion

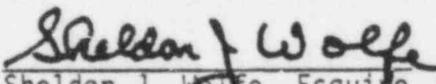
As stated above, in letters dated March 23 and March 29, 1979, I denied the two FOIA requests for the production of the Reed Report. Neither of the FOIA requesters has timely appealed to the Commission from my initial determinations and, accordingly, I believe that the Board should return to GE the Reed Report and the underlying Sub-Task Force Reports which had been made available to the Board in confidence and

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were subject to a Protective Order. In a letter dated April 13, 1979, GE has advised that, if for some reason, either the Licensing Board or the Appeals Board desires to review the Reed Report in the future, said documents will be made available (Attachment 12).

However, in view of the April 13th letter of the Director of Rules and Records to GE and GE's response of May 4th (Attachments 10 and 11), the Commission may wish to seek the Staff's advice with regard to the certified question. I take no position on whether or not the advice of the two requesters should be sought in view of their failure to appeal from my initial determinations.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD


Sheldon J. Wolfe, Esquire
Chairman

Dated at Bethesda, Maryland
this 30th day of May, 1979.

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