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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

IN THE MATTER)

)
) PUBLIC SERVICE COMPANY OF
) OKLAHOMA, ASSOCIATED ELECTRIC
) COOPERATIVE, INC., and
) WESTERN FARMERS ELECTRIC
) COOPERATIVE, INC.
)

Docket Nos.
STN 50-556
STN 50-557

(Black Fox Stations,
Units 1 and 2)

MEMORANDUM IN SUPPORT OF
GENERAL ELECTRIC MOTION TO QUASH



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Dated: October 30, 1978

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ABSTRACT OF FACTS

During evidentiary hearings on October 12, 1978, the Interveners entered a motion for production of the "Reed Report," a proprietary 1975 GE product improvement study, which was not a safety review, and according to confidential reviews by the NRC and Congressional Committee Staff, did not consider matters related to safety which were not otherwise previously known to the NRC Staff. On October 18, 1978, the Board granted the Interveners' motion and issued a subpoena for the entire Report, in spite of the facts that: 1) as recently as June 29, 1978, it denied, on grounds of inexcusable untimeliness, an additional Intervenor contention which sought the production of the Reed Report; 2) the Interveners' October 12 motion only sought the Reed Report as it related to their existing contentions; 3) the record is devoid of any showing of relevance, good cause for untimely filing, and necessity for a sound decision; 4) production, even under a protective order, would raise a substantial likelihood of competitive harm to GE; and 5) the Board's June 29 ruling found that permitting production of the Reed Report at that time would certainly delay the proceedings.

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General Electric (GE) hereby files its Memorandum in Support of its Motion to Quash dated October 30, 1978 in the above-captioned proceeding. GE's Motion to Quash is addressed to a subpoena, issued in response to the Intervenor's motion on October 18, 1978, which subpoena seeks the production of GE's "Reed Report," and inspection of that Report by the Intervenor's counsel and consultants. GE submits that the subpoena should be quashed since, in its present form, it: 1) contravenes the recent ruling by the Board in these proceedings, the NRC's Rules of Practice, and well-settled case law relating to relevance and timeliness, 2) seeks information which is not necessary to a sound decision in these proceedings, and 3) fails to give any consideration to

the adverse impacts which the subpoena would impose upon GE, the Applicant, and the public interest. In what follows, GE will show that, in view of the foregoing considerations, the subject subpoena must be quashed.

I. Statement of Facts

Upon review of the record as it pertains to the subject subpoena, GE believes that the facts applicable to the Reed Report and the instant controversy have not been comprehensively, and in certain instances, accurately developed for the benefit of the Board. Consequently, before proceeding to consideration of the procedural history of the controversy and analysis of those factors which are dispositive of that controversy, the facts in the public record pertaining to the Reed Report's: 1) purpose and objectives, 2) structure, and 3) regulatory significance will be addressed.

A. Purpose and Objectives of the Reed Report

In hearings before the Joint Committee on Atomic Energy of the Congress of the United States, which were held on February 18, 23, and 24 and March 2 and 4, 1976, the purpose and objectives of the Reed Report were the subject of testimony by Dr. Charles E. Reed, Senior Vice President for Corporate Strategic Planning and Studies, General Electric Company, and Chairman of the Task Force which authored the report. In response to testimony from Messrs. Bridenbaugh,

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Minor and Hubbard, which implied that the Reed Report contained undisclosed safety issues, Dr. Reed described the purpose and objectives of the Reed Report by quoting the opening paragraph of that report:

Objective of Study. The Nuclear Reactor Study was a highly technical study with the objectives of determining the basic requirements for implementing the Nuclear Energy Division's (NED) quality strategy through continuing improvement in the availability and capability of Boiling Water Reactor Nuclear Plants (BWR's). This strategy is predicated on the view that leadership of the BWR in these characteristics represents the greatest opportunity for reducing the Utility customer's power generation cost, with resulting lower power cost for industry and for the ultimate consuming public. The study included review of the broad range of opportunities for development of BWR leadership in all aspects of availability and capability across the entire range of design, development, manufacturing, construction and operation. 1/

Dr. Reed elaborated on the purpose and objectives as follows:

1/ Investigation of Charges Relating to Nuclear Reactor Safety, Hearings Before the Joint Committee on Atomic Energy, 94th Cong., 2d Sess., February 18, 23, and 24, and March 2 and 4, 1976, Volume 1 [hereinafter, "JCAE Hearings"], at 187.

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The principal purpose of the study was to provide a basis for assessing the level of corporate resources -- including engineering and development facilities, technical personnel and financial support -- required to enable our boiling water reactor product line to achieve the same technical and competitive success as our turbine generators enjoy. General Electric has grown into a highly diversified company operating in many different fields of technology. While each of our businesses is managed with a great deal of decentralized authority we use a process of study and review through which the top management can obtain objective appraisals of our major business ventures by persons who are not involved in the day-to-day management of the individual business.

* * * *

The task force made numerous recommendations intended to improve the availability level of the BWR. These recommendations dealt with overall reactor design considerations, as well as with specific plant components and services. We also made recommendations concerning development and test facilities, and concerning questions of management and organization. The report is, of course a document of considerable sensitivity from a competitive standpoint. It candidly discusses opportunities for improvement in our product line and our organization and recommends steps to strengthen our competitive position. 2/

In response to allegations advanced in prior hearing sessions by Messrs. Minor, Bridenbaugh, and Hubbard, Dr. Reed

2/ JCAE Hearings at 187.

explained that the Reed Report was not a safety review. In this regard, Dr. Reed again quoted from the Reed Report:

Safety Aspects. The Nuclear Reactor Study Group concentrated on reviewing opportunities for improvement in the availability and capability factors of the BWR plants. Although in the course of the Study Group's review, nuclear safety aspects were considered, this study was not a safety review. However, the Study Group found no reason to believe that applicable safety requirements are not being met for operating BWR plants or will not be met for future BWR plants. 3/

In response to a question by Congressman McCormick concerning the manner in which the Reed Report addressed safety considerations Dr. Reed responded as follows:

. . . [i]n going over all the safety aspects the task force found no reason to believe that there were any aspects of safety that had not been completely covered with the Nuclear Regulatory Commission. When you talk about performance, maybe I can put it in a little more perspective by recalling some reports I think that have recently been made comparing the availability of nuclear plants with fossil plants on the Commonwealth Edison system. They pointed out that the availability of nuclear plants of the larger size is about the same as the fossil plants. As I recall it for the period they talked about, it was 72 percent or something like that. Now if we can only find out how to improve this performance all the way along the line so that we could get that availability up to 85 percent, for

3/ JCAE Hearings at 187 - 188.

example, it would be extremely valuable to any utility system. Our turbine generators have an availability of something like 98.5 percent. They are so good that we have been able to have that superior availability recognized when our customers evaluate the lifetime cost of the whole unit.

We feel one of our objectives is to try to get similar high performance levels on the part of nuclear reactors. We considered all factors affecting performance and, quite obviously, we can improve the performance. 4/

On February 22 - 24, 1976, a review was made by the NRC Staff of the Reed Report at the General Electric offices in Washington, D.C. 5/ As a result of that review, the NRC Staff acknowledged the stated purpose of the Reed Report, and its incidental consideration of safety matters as follows:

In our review of the GE nuclear reactor study it was apparent that the study was mainly directed at marketing rather than safety per se. The report does contain items which had implications on the safe construction and operation of BWR's;

4/ JCAE Hearings at 195.

5/ As more fully discussed below, the NRC Staff review of this report was made for two specific purposes: 1) to determine if any information in the report expressing safety concerns by GE had not previously been known to the Nuclear Regulatory Commission (NRC); and 2) to determine if Section 206 of the Energy Reorganization Act of 1974 had been met by the reporting of significant safety items. Upon review, the NRC Staff found that:

In our review of the report we did not identify any instances of new areas of safety concerns; nor were any instances identified where significant safety concerns were not previously reported to the NRC. JCAE Hearings at 883.

however, the examples were used to illustrate the point that identified problems (some of which had safety significance) do have an effect on the availability of BWR plants and hence the cost and marketing potential of that plant. In those instances where problems having safety significance were cited there was no analysis in the GE report of the significance from a safety standpoint of the particular phenomena. 6/

B. Structure of the Reed Report

The structure of the report and the manner of its preparation were likewise the subject of testimony in the aforementioned JCAE hearings. In this regard Dr. Reed testified as follows:

. . . I undertook the study in the fall of 1974 at the request of our chairman, Reginald H. Jones. The general purpose of the study was to chart the technical course whereby GE's boiling water reactor could improve its competitive position by achieving a superior availability factor.

We organized a task force which included nine of our most experienced scientists and engineers. Two were from our Nuclear Division and the remaining seven were from other parts of General Electric. The task force held 11 meetings, each of 2 or 3-days duration. It utilized 10 subtask forces, which made indepth studies of specific areas such as nuclear fuel;

6/ JCAE Hearings at 883.

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mechanical systems; materials, processes and chemistry. Members of the task force and of the subtask forces met with scores of engineers and scientists involved in our nuclear operations. 7/

In response to a question from the Board, the Applicant's counsel advised, upon information from GE, that the Reed Report itself was a 1,000 page document. Unfortunately, the information furnished the Applicant's counsel was not entirely accurate. The Reed Report itself consists of a 21 page executive summary, and a main Report of some 140 pages, which was endorsed by all members of the Task Force. 8/ This main Report is organized into 10 sub-task subjects addressing the following issues: a) nuclear systems, b) fuel, c) electrical control and instrumentation, d) mechanical systems and equipment, e) materials, processes and chemistry, f) production, procurement and construction, g) quality control systems overview, h) management/information systems, i) regulatory consideration, j) scope and standardization. 9/

7/ JCAE Hearings at 186.

8/ JCAE Hearings at 315.

9/ JCAE Hearings at 883. In the course of preparing the Reed Report, each member of the Task Force chaired a sub-task review, which resulted in the preparation of a sub-task report. The ten sub-task reports comprise 713 pages, and were input documents for consideration by the Reed Task Force in preparing their findings and conclusions, which are found in the main Report. The sub-task reports did not have the endorsement of and did not represent the findings and conclusions of the Reed Task Force. The "five foot" shelf referred to by

C. Regulatory History/Significance of the Reed Report

The matters raised as implicit in the Intervenor's motion have been previously reviewed by the NRC Staff and three Congressional Committee Staffs. Those reviewers have recognized: 1) the commercial sensitivity of and need for confidential treatment of the Reed Report; 2) that the Reed Report was not a safety review; and 3) to the extent that the Report addressed matters with possible safety implications, those matters were previously and otherwise known to the NRC.

The Reed Report is not an isolated instance of critical self-analysis by GE. Indeed, since the inception of GE's involvement in the nuclear industry, it has conducted critical internal reviews, including safety reviews, as a matter of prudent management. ^{10/}

In this spirit, upon completion of the Reed Report in the summer of 1975, GE undertook a review of the report to determine whether the report contained information which constituted a potentially reportable deficiency within the meaning

9/ cont.

GE's chairman (see Tr. 5553, 5558) was simply an overstatement. Beyond the Reed Report itself and the 713 page sub-task reports, each sub-task force assembled technical papers, reviewed existing reports, and heard oral presentations. This source data was never assembled for retention and was never intended to be part of the Reed Report. Consequently, it does not now exist in any assembled or retained form.

of Section 206 of the Energy Reorganization Act of 1974. ^{11/}
Dr. Reed's testimony before the JCAE noted that "the work
of the task force was carefully reviewed by the Safety and
Licensing staff of our Nuclear Division in San Jose to deter-
mine whether anything reportable had been discovered which had
not been previously disclosed to the NRC." ^{12/} This screening
review by GE yielded a preliminary list of 27 issues which, if
not otherwise reported, might give rise to a potential obliga-
tion to report those issues to the NRC in accordance with
Section 206 of the Energy Reorganization Act. GE's further
review concluded that NRC had been aware of each of the 27 issues
which had safety significance, and that there was no obligation
to report pursuant to Section 206. ^{13/}

11/ JCAE Hearings at 188. Section 206 of the Energy Reorgan-
ization Act of 1974 and 10 CFR Part 21, the NRC Regulations
implementing that statute, obligate directors or responsible
officers of firms engaged in supplying nuclear equip-
ment to report any defects or items of noncompliance
which relate to a substantial safety hazard. This "section
206 review" did not attempt to define every matter dis-
cussed in the Reed Report which might arguably relate to
safety. The standards contained in 10 CFR Part 21 and
Section 206 contemplate a higher threshold to trigger a
reporting obligation than a mere relationship to safety.
Thus, the 27 issues which were preliminarily identified
by GE pursuant to this review were reviewed against the
more stringent standards arising from Section 206, and did
not necessarily include all matters discussed in the Reed
Report which might arguably relate to safety.

12/ JCAE Hearings at 188.

13/ JCAE Hearings at 188.

Although the testimony of Messrs. Minor, Hubbard, and Bridengaugh may have implied that NRC had not been aware of the Reed Report until the JCAE Hearings, this was not the case. During the latter stages of the Task Force review, GE advised two of the Commissioners of the nature and purpose of the review. Subsequently, when the misplaced allegations concerning the safety significance of the Reed Report were made, the NRC accepted GE's invitation to review the Reed Report,^{14/} and thus satisfy itself that the Report did not include any otherwise undisclosed safety information, and that GE had met its obligations pursuant to Section 206. On February 22, 23, and 24, 1976, in response to GE's invitation, the NRC Staff met in the GE Washington, D.C. offices to review the Reed Report.^{15/} During the latter two days two senior members of the NRC technical staff reviewed the entire report in detail.^{16/} The NRC Staff reported the results of that review to the Joint Committee on Atomic Energy on

14/ JCAE Hearings at 188.

15/ JCAE Hearings at 315. NRC's General Counsel recognized the commercial sensitivity of the Reed Report, and in view of the potential for leaks inherent in any government agency organization, agreed that it was appropriate to conduct the review at GE's offices, and that it was unnecessary to retain a copy of the Report. JCAE Hearings at 254-5.

16/ Id.

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February 25, 1976. ^{17/} In that regard, the NRC Staff reviewers concluded that they "did not identify any instances of new areas of safety concern; nor, were any instances identified where significant safety concerns were not previously reported to the NRC." ^{18/} The Staff also indicated their view that the Reed Report "was mainly directed at marketing rather than safety per se," ^{19/} and noted that "in those instances where problems having safety significance were cited, there was no analysis in the GE report of the significance from a safety standpoint of the particular phenomena." ^{20/} Based upon GE's testimony, the NRC Staff review, and its own confidential Staff review of the Reed Report, the Joint Committee on Atomic Energy took no further action.

In the fall of 1977, at the behest of Congressman Moss, Chairman of the House Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, Subcommittee staff members undertook a review of the Reed Report subject to safeguards designed to protect the commercial sensitivity of the Report. After an additional February 22, 1977, meeting with the Subcommittee

^{17/} JCAE Hearings at 883-4.

^{18/} JCAE Hearings at 883; see also Attachment A hereto.

^{19/} Id.

^{20/} Id.

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Staff to review GE's response to the Reed Report, the Subcommittee Staff did not pursue the matter further. ^{21/}

On December 15, 1977 Congressman Dingell, Chairman of the Subcommittee on Energy and Power of the House Interstate and Foreign Commerce Committee, requested that the NRC Staff provide the subcommittee with a list of safety related items discussed in the Reed Report, and an explanation of what actions have been taken by either GE or the NRC to correct each problem. In a letter of March 6, 1978, the NRC Staff requested that GE provide it with a copy of the study or a list of the safety issues identified in the study and further requested that GE meet with the Staff to confirm their understanding of each issue, and status of actions taken by GE to resolve them. ^{22/} By a letter of March 22, 1978, GE provided the NRC Staff with a list of 27 issues identified in its prior review pursuant to Section 206 of the Energy Reorganization Act of 1974. ^{23/}

On April 11, 1978, GE met with the NRC Staff and a member of Congressman Dingell's staff in Washington to review

21/ See Attachment B hereto.

22/ See Attachment C hereto.

23/ See Attachment D hereto. This list was accompanied by appropriate affidavits supporting GE's request that the information submitted be withheld from public disclosure pursuant to 10 CFR § 2.790.

those issues. The Reed Report was made available for a confidential review by the NRC and Congressional Staff member at that time. As a result of this meeting the Staff apprised GE that it was satisfied with the status of the issues as either having been resolved or having been identified as an integral part of current NRC programs to resolve generic issues. The NRC Staff further requested that GE provide a written status report on each issue reviewed in the April 11 meeting.

By letter dated May 26, 1978, GE provided the status report requested by the NRC, and further requested that the report be withheld from public disclosure pursuant to 10 CFR § 2.790. ^{24/} By letter dated July 10, 1978, the NRC Staff responded to the request contained in GE's letters dated March 22, 1978 and May 26, 1978, in which it requested that the list and status report, respectively, be withheld from public disclosure pursuant to 10 CFR § 2.790. Upon review of the supporting affidavits contained in both submittals, the NRC Staff concluded that

In essence your claim is that public disclosure of the list of safety related items in the Summary Status Report is likely to cause substantial harm to the competitive position of GE. We agree that if the Reed Report in its entirety were submitted, it should be afforded the protection of proprietary information under the

24/ See Attachment E hereto.

Commission's regulations because it is a product improvement study of important competitive value and because disclosure of this sort of study would act to inhibit thoughtful self-criticism by nuclear equipment vendors since it would enable competitors to obtain a better understanding of a manufacturer's product concerns and programs.

The aggregate list in the Summary Status Report of the 27 safety related items is derived from the report and therefore can be afforded the same protection of proprietary information. Because of the historical context of a product improvements study, we agree that the public disclosure of the aggregate list of the 27 issues could cause substantial harm to the competitive position of GE. 25/

Based upon the foregoing, the purpose, structure, and regulatory significance of the Reed Report can be briefly summarized as follows:

a) It is a confidential commercially sensitive generic product improvement study which was intended to improve the availability and performance of GE's BWR product. In recognition of the commercial sensitivity and non-safety purpose of the Report, respectively, the NRC and Congressional Staffs reviewing the Report have found it appropriate to employ safeguards against disclosure, and unnecessary to retain a copy of the Report.

b) The report was not focused upon safety considerations and did not attempt to determine the safety significance of matters addressed in that study.

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25/ See Attachment F hereto.

c) Reviews of the Reed Report and the 27 issues identified in GE's Section 206 review by the NRC Staff and by congressional committee Staff concluded that the Reed Report was commercially sensitive, was not a safety study, and did not disclose any safety matters that were not otherwise known to the NRC. Further, the NRC Staff has expressly determined that the Reed Report and the list and Status Report produced by GE pursuant to its Section 206 review were entitled to confidential treatment pursuant to 10 CFR § 2.790, and that those issues addressed in the Section 206 review were either insignificant, resolved, or were being addressed in current NRC licensing programs.

II. Procedural Background of the Subject Subpoena

In a motion dated May 19, 1978, the Intervenors requested that two additional contentions be admitted in the above-captioned proceeding. The second of these two additional contentions involved the Reed Report. The gravamen of this contention was that the Applicant and NRC Staff had not adequately assessed the impact of numerous unresolved safety items in evaluating and reviewing the Black Fox Nuclear Plant and that the unresolved BWR safety issues were discussed by GE in the Reed Report. Further, the contention asserted that information concerning the NRC review of the Reed Report and specific information concerning safety related items within the report should be made available to Intervenors to permit a complete and thorough review of the plant. Upon review of the Intervenors' motion and

the Applicant's and NRC Staff's response, the Board denied the admission of additional Contention No. 2 on the grounds of untimeliness and Intervenor's failure to make a showing on the remaining four criteria enunciated in the West Valley proceeding. ^{26/} In so ruling, the Board stated that:

This extremely belated application to admit contention number 2 is inexcusable. This is so because, first, Mr. Hubbard, one of the Intervenor's consultants, in testimony before the Joint Committee on Atomic Energy on February 18, 1976 averred to, and thus was aware of the Reed Report.

Secondly, in a letter dated April 1, 1976, Mrs. Younghein filed a copy of that testimony as part of the amended petition to intervenor. ^{27/}

In light of these and other considerations, the Board concluded:

- . . . Had the Intervenor's timely moved to amend their petition to plead additional contention number 2, in at least generalized form, in a timely manner prior to July 21, 1976, and had we admitted it, the Intervenor's could move for discovery. If there were objections to the production of the Reed Report, said report might have been subject to inspection in this proceeding and admission under 10 CFR § 2.790(b)(6), Proper Safeguards. Obviously, at this late date, to begin that procedure could broaden the issues and most certainly will delay this proceeding. Thus, criterion IV in 10 CFR § 2.714(a)(1)
- does not justify the admission of additional contention number 2. ^{28/}

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26/ Tr. 4172-73.

27/ Tr. 4172.

28/ Tr. at 4173

On October 11, 1978, during Intervenors' cross-examination of a GE expert witness on the subject of intergranular stress corrosion cracking, the Intervenors made a motion for production of the Reed Report insofar as it related to the Intervenors' contentions. ^{29/} Intervenors indicated that they wished to use the Reed Report to cross-examine GE witnesses in relation to their contentions. ^{30/} Counsel did not offer any excuse for the untimeliness of the motion, nor was any showing made in relation to the four factors enunciated in the West Valley decision. After hearing argument, the Board ordered the parties to negotiate a protective agreement and the Applicant to produce the Reed Report insofar as it relates the "27 safety issues." ^{31/}

Counsel for the Applicant advised the Board that it did not own and did not have possession of the Report and that it would contact GE to determine whether the report would be produced pursuant to the Board's order. ^{32/} The Board subsequently advised Counsel for the Applicant that it would issue a subpoena in blank to the Intervenors for production of the Report, and that it did not wish to hear from GE. ^{33/}

^{29/} Tr. 4708-09.

^{30/} Id.

^{31/} Tr. 4721.

^{33/} Tr. 4721; 4725-26.

^{33/} Tr. 4961-2.

Upon reconsideration, the Board deferred ruling on the production of the Reed Report until October 16, 1978 in order to provide the Applicant with an opportunity to reach some accommodation with the General Electric Company regarding production of the Reed Report. ^{34/}

On October 15, 1978 Counsel for General Electric, the Applicant, the NRC Staff, and the Intervenors met in Tulsa to discuss production of the Reed Report. At that time, GE made an offer of settlement in an effort to avoid prostrate litigation concerning production of the Reed Report. GE's offer of settlement consisted of two basic elements. It would prepare a report, which would extract and discuss, on an issue-by-issue basis, all matters addressed in the Reed Report which relate to safety. This report would also include a discussion of the current status of the issue from an NRC licensing standpoint. In recognition of the fact that a party might raise a question as to the faithfulness of the extraction, GE offered to provide the Board with a copy of the Reed Report for in camera inspection to determine if the extraction was faithful to the Reed Report.

Having made that offer, GE did not, as a matter of law or fact, admit that the Reed Report was relevant to any matter in issue, contained information which would lead to relevant information, or that any party was entitled to obtain

access to the Reed Report. ^{35/} Upon consideration of GE's offer, the Intervenors were unwilling to accept the Board's review for faithfulness of extraction and no accommodation was reached.

On October 16, 1978 Counsel for the Applicant reported GE's offer of settlement to the Board and urged the Board to adopt that offer as the basis for compliance with the Board's order. ^{36/} Upon consideration of arguments presented by all parties of record in the Black Fox proceeding, the Board took the matter under advisement. ^{37/}

On October 17, 1978, the Board ruled that the Applicant and/or GE must produce the entire Reed Report for inspection by Intervenors' counsel and by Intervenors' three experts, Messrs. Minor, Hubbard, and Bridenbaugh. ^{38/}

^{35/} It has long been settled that an offer of stipulation or compromise by a litigant cannot be deemed to constitute, or even infer, an admission on the part of that litigant as to liability, the existence of certain underlying facts, or the relevance of any information. West v. Smith, 101 U.S. 263, 273 (1879); Hawthorne v. Eckerson Co., 77 F.2d 844 (2d Cir. 1935); Lewis v. Dixie - Portland Flour Mills, Inc., 356 F.2d 54 (6th Cir. 1966); McCormick on Evidence, Section 274 (2d Ed. 1972).

^{36/} Tr. 5547-53.

^{37/} Tr. 5572.

^{38/} Tr. 5722.

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The bases for the Board's decision were as follows:

a) The [verbatim] extraction from the Reed Report of the 27 safety related items would be difficult, if not impossible.

b) A summary would not serve the purpose of allowing the Intervenors to cross-examine fully and intelligently.

c) It would not be appropriate for the Board to make a comparison between the Reed Report and any summary or extraction without the benefit of input and argument of the Intervenors' counsel in an adversary setting.

d) The inspection will not be a detriment to General Electric's competitive position because inspection will be conducted under the aegis of a protective order.

e) Intervenors' experts would be more competent to spearhead the inspection of the Reed Report than would Intervenors' attorneys who admittedly are not nuclear experts. ^{39/}

GE submits that the foregoing bases are legally and factually erroneous in the following respects:

a) The verbatim extraction from the Reed Report of the "27 safety related" items would be difficult, but not impossible; ^{40/} whether or not the Board's misunderstanding

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^{39/} Tr. 5728-29.

^{40/} Tr. 5549-5550.

resulted from the Board's reluctance to hear directly from GE, the representations were advanced in furtherance of GE's sincere belief that a verbatim extraction would not provide a form which approaches the substantive value of an issue-by-issue extraction in terms of clarity, ^{41/} conciseness, ^{42/} comprehensiveness, ^{43/} comprehensibility, ^{44/} and (particularly in view of the age of the material) usefulness. ^{45/}

(See Affidavit, Attachment G hereto).

b) There is no basis in the record for the finding that either the Reed Report, an issue-by-issue extraction, or a verbatim extraction is necessary for the Intervenors to cross-examine fully and intelligently (see Section III. B. below).

c) To the extent that the Board would have access to the entire Reed Report, GE's offer of settlement was predicated upon satisfying the Board's unexpressed desires to independently inquire, and well-settled judicial and quasi-judicial practice by which it is appropriate for the trier of fact to review the proprietary Report in camera.

^{41/} Id.

^{42/} Id.

^{43/} Tr. 555⁸.

^{44/} Tr. 5549-50.

^{45/} Id.

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without regard for the more topical adversary interests of the Intervenor^{46/}.

d) The inspection of the entire Reed Report, irrespective of whether it is pursuant to a protective order, would result in the disclosure of information without a showing of relevance, necessity, or good cause, and would expose GE to a risk of disclosure for which the NRC's Rules of Practice do not clearly contain commensurate enforcement authority (see Sections III. A., III. B., and III. C.1., below).

e) Neither Intervenor's attorneys nor their consultants are entitled to inspect the Reed Report (see Section III. below).

III. Since The Information Sought By The Subpoena Is Neither Relevant Nor Necessary To A Decision, And Issuance of The Subpoena Will Result In Substantial Adverse Impacts Upon GE, The Applicant, And the Public Interest, The Discovery Should Not Be Had

GE submits that the Board's order directing production of the Reed Report pursuant to the subject subpoena is predicated upon substantial errors of law and fact. In what follows GE will demonstrate that: 1) the scope and timing of the subpoena are improper, 2) the information sought by the subpoena is not necessary to a sound decision in these proceedings, and 3) severe adverse impacts upon GE, the applicant, and the

46/ See Section III.B., below.

public interest would inevitably result from its issuance and enforcement.

A. The Scope and Timing of the Subpoena are Improper

In granting the Intervenors' motion for production of the Reed Report, and issuing the subject subpoena to the Intervenors, the Board erred in two fundamental respects: 1) the information encompassed by the subpoena goes well beyond the parameters of the Intervenor's motion and applicable law governing discovery in NRC proceedings; and 2) the Intervenor's motion was inexcusably untimely and in direct conflict with the Board's June 29, 1978 ruling denying admission of an additional, late-filed contention concerning the Reed Report.

1. A Showing Of Relevance Sufficient To Support Issuance Of A Subpoena Is Absent From The Record

The instant subpoena resulted from an Intervenor motion requesting production of the Reed Report only insofar as it related to the Intervenors' contentions in the Black Fox proceeding. In ultimately granting the Intervenors' motion, the Board ordered production of the Reed Report insofar as it relates to the "27 safety-related items", the Board's questions, and, in effect, all matters covered in the Reed Report, whether or not related to safety. The Intervenors, however, have made no showing that the information

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sought is at least reasonably calculated to lead to information relevant to any matter in issue. In apparent recognition of this fundamental deficiency in the record, on the day after its ruling the Board made reference to the fact that GE's offer of settlement should, in the Board's view, operate as a generalized showing of relevance which it believed to be sufficient to support issuance of the subpoena. ^{47/}

In issuing the subpoena in spite of these facts and circumstances, the Board erred in three fundamental respects. First, GE's offer of settlement is inadmissible as a matter of law in these proceedings, and the Board's reliance upon that offer as a generalized showing of relevance was improper. GE's offer was designed to settle and thus avoid protracted litigation, and it cannot operate as a concession of even the generalized relevance of the subject matter of the Reed Report. ^{48/} Therefore, the record does not contain any showing of the generalized relevance of the Reed Report.

Second, the Board erred in finding that only a generalized showing of relevance was sufficient to justify issuance of the subpoena. At the very least, the Intervenor

^{47/} Tr. 6042-43.

^{48/} See n. 35 and accompanying text, supra.

must show that the information sought is reasonably calculated to lead to information relevant to their contentions. 49/

The record is barren of any evidence to suggest that the Reed Report as it relates to the "27 safety-related items", much less the entire Reed Report, constitutes information which could lead to information relevant to any of the Intervenor's contentions. In short, the scope of the subpoena patently exceeds the scope of the Intervenor's contentions and, absent any basis in the record to support a subpoena of such scope, it must be considered excessive and improper. 50/

49/ Section 2.740(b)(1) of the Commission's Rules of Practice only permits discovery of information and documents, not privileged, which are "relevant to the subject matter of the proceeding" and then further qualifies and limits the term "subject matter" to the contentions admitted by the presiding officer in the proceeding. 10 CFR § 2.740(b)(1). This provision has invariably been interpreted as requiring that the information sought must be reasonably calculated to lead to the discovery of admissible evidence related to such contentions. See e.g., Allied-General Nuclear Services et. al. (Barnwell), LBP-77-13, 5 NRC 489, 492 (1977); Boston Edison Co. (Pilgrim 2), LBP-75-30, 1 NRC 579, 581 (1975). The scope of discovery permissible against third parties is in no event more extensive than that permitted against actual parties to the proceeding pursuant to this provision, (see e.g., Toledo Edison Co. (Davis-Besse 1-3), CCH NRR ¶ 30,089 (July 20, 1976)) and subpoenas have been quashed in the past in situations where Intervenor's have failed to establish that the information sought is relevant to one or more of their contentions. See e.g., Commonwealth Edison Co. (Zion 1 and 2), ALAB-116, 6 AEC 258, 259 (1973).

50/ As the United States Court of Appeals for the District of Columbia Circuit recently noted in SEC v. Arthur Young and Co., ___ F.2d ___, No. 76-1716 (D.C. Cir. July 24, 1978), Slip Op. at 24, citing Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208-209 (1946), the disclosure

Third, the Board gave no consideration to the additional burdens in regard to a showing of relevance which the Intervenor must assume if discovery is to be had in this case in light of the untimeliness of the Intervenors' motion. The Intervenors' motion is not only defective by reason of its inexcusable untimeliness per se, but it also failed to meet the higher threshold showing of relevance necessary to support an untimely discovery request. ^{51/} Inasmuch as the record does not contain so much as a generalized showing of relevance, a fortiori, the Intervenors did not, and cannot,

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sought under a subpoena "shall not be unreasonable" and "the requirement of reasonableness . . . comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry." (emphasis added). The NRC Rules of Practice likewise provide for the quashing of any subpoena that is "unreasonable or requires evidence not relevant to any matter in issue." 10 CFR § 2.720(f)(1). See Commonwealth Edison Co. (Zion 1 and 2), ALAB-166, 6 AEC 258, 259 (1973).

51/ See Toledo Edison Co., et. al. (Davis-Besse 1, 2, and 3), Cleveland Electric Illuminating Co., et al., (Perry 1 and 2), LBP-76-8, 3 NRC 199, 201 (1976) (higher standard of probative value beyond the relevance test set forth in 10 CFR § 2.740 is appropriate in situations where the application for the subpoena is made after the termination date for discovery established by the Licensing Board). See also Illinois Power Co. (Clinton 1 and 2), ALAB-340, 4 NRC 27, 32-33 (1976) (affirming Licensing Board order denying request for subpoena for production of documents made at the time of cross examination).

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meet the higher threshold burden which must apply in the instant case. ^{52/}

In light of: a) Intervenors' failure to make the required showing as to the general relevance of the Reed Report and the particularized relevance of the report to their contentions, and b) Intervenors' failure to meet the higher threshold burden of relevance associated with untimely discovery requests, it is clear that the instant subpoena was erroneously issued and must therefore be quashed.

2. The Intervenors' Motion Was Untimely, And The Record Is Devoid Of Any Showing Of Good Cause For Untimely Filing

On June 29, 1978, the Board denied the Intervenors' contention concerning the Reed Report on the ground, inter alia, that the contention was inexcusably untimely. The Board made specific reference to the fact that Mr. Hubbard, one of the Intervenors' consultants, had been well aware of the Reed Report since February of 1976, and that, accordingly, there was no basis in the record to excuse the Intervenors' untimeliness in raising the issue. More significantly, the

52/ In addition, the issuance of a subpoena against a third party at this late date should properly be preceded by a showing that the information requested is "necessary" to the Intervenors' case, a showing which they have also not even attempted to make. See Commonwealth Edison (Zion 1 and 2), 6 AEC at 259, n. 4. CF. Allied-General Nuclear Services (Barnwell), 5 NRC at 491.

Board found compelling reason to deny the contention in light of the fact that, had the Intervenors filed the contention in a timely manner, the Intervenors could have moved for discovery and objections to the production of the Reed Report could have been resolved in a timely manner. Since the Intervenors inexcusably failed to do so, the Board expressly found that, ". . . [a]t this late date to begin that procedure could broaden the issues and most certainly will delay this proceeding." ^{53/}

In spite of the compelling logic inherent in this ruling of the Board, on October 17, 1978 the Board reversed its position and granted an even more untimely Intervenor motion for production of the Reed Report. GE submits that: 1) circumstances have not changed in the meantime to erode the validity of the Board's June 29 order; and 2) the record is absolutely devoid of any showing of good cause for an untimely motion entered several months after the Board's June 29 order and after the evidentiary hearings were well underway. In light of this, it is inevitable that the Board's belated reversal of its prior ruling will now broaden the issues, and, as previously found by the Board, most certainly delay this proceeding. ^{54/}

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^{53/} Tr. 4172-73.

^{54/} Delay in a hearing is a well recognized basis for limiting or denying requests for the production of documents. See 4A Moore's Federal Practice (2d Ed.), ¶ 34.06; Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 15 F.R.D. 32 (S.D. N.Y. 1953); Commonwealth Edison Co.

The Intervenors have made it plain that they not only wish to inquire of witnesses concerning their contentions, but also to look beyond their contentions in connection with the Reed Report. ^{55/} In its ruling granting the Intervenors' motion, the Board forewarned that the Reed Report could be employed only in relation to the Intervenors' contentions. The Intervenors expressed intentions, however, cannot be harmonized with a narrow and expedient use of the Reed Report in these proceedings. Moreover, the fact that the Board's rationale for issuing the subpoena contemplates a broader scope of issues than the Intervenors' contentions, and in fact encompasses the entire Reed Report, lends a hollow ring to the Board's forewarning. ^{56/}

55/ Tr. 5570-71. In contrast, Intervenors' original motion was predicated upon use of the Report only for questioning GE witnesses with respect to the remaining Intervenor contentions. Tr. 4208-09.

56/ The Appeal Board's decision in the Clinton proceeding is particularly relevant here. As in the situation here, the controversy in Clinton arose after one of the applicant's witnesses was unable to answer certain questions on cross-examination during the hearings because some of the underlying data supporting his testimony was at his home office in New York, and the Intervenors sought discovery of this underlying data. The Licensing Board denied this discovery request since it was untimely and might delay the proceeding. The Appeals Board affirmed this decision since it was satisfied that the additional data sought was far more extensive than necessary to provide answers to the questions to which [the witness] was unable to respond and, further, that the particular information bearing upon such answers would have been of too little potential worth to justify holding up the evidentiary hearing to await its receipt and analysis. Illinois Power Co. (Clinton 1 and 2), ALAB-340, 4 NRC at 33.

GE submits that the Board's June 29, 1978 ruling was well founded and properly recognized the Intervenor's obvious failure to assume its obligations in regard to expedient conduct of these proceedings. ^{57/} The record contains no subsequent showing of good cause for the Intervenor's most recent untimely motion. By necessary implication, the Board's prior ruling concedes that there is a certainty for broadening the issues and delaying the proceedings. ^{58/} In view of these circumstances, the Board must reaffirm its prior ruling and the subpoena must be quashed.

57/ Intervenor's have an obligation to "make the system work" by fulfilling the responsibilities such as compliance with discovery schedules and the Rules of Practice, which they have assumed by virtue of their participation in NRC proceedings. Consumers Power Co. (Midland 1 and 2), ALAB-123, 6 AEC 331, 332 (1973); Northern States Power Co. (Prairie Island 1 and 2), ALAB-288, 2 NRC 390, 393 (1975); Northern Indiana Public Service Co. (Bailly 1), ALAB-224, 8 AEC 244, 250 (1975); Northern States Power Co. (Tyrone 1), LBP-77-37, 5 NRC 1298 (1977).

58/ Moreover, the doctrines of repose apply to NRC proceedings (see Alabama Power Co. (Farley 1 and 2), ALAB-182, 7 AEC 210, 212-13, remanded on other grounds, CLI-74-12, 7 AEC 203 (1974)), and both the applicant and GE justifiably relied upon the Board's earlier ruling excluding the Reed Report. Since Intervenor's have made no showing of changed circumstances which might undermine the validity of the reasoning which supported the original order, that order can, by analogy, be viewed as the law of the case and should not be disturbed. Cf. In re Sanford Fork and Tool Co., 160 U.S. 247, 255 (1895); Banco Nacional de Cuba v. Farr, 383 F.2d 166, 178 (2d Cir. 1966), cert. den'd, 390 U.S. 956 (1968).

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B. The Information Sought By The Subpoena Is Not Necessary To A Sound Decision In These Proceedings

Having established that the record is insufficient in regard to the required showings of relevance and excusable untimeliness, it follows that the Board must quash the subpoena for these reasons alone. The inquiry, however, might be extended to consider whether some overriding reason may exist for production of the Reed Report, even in the absence of a sufficient showing of relevance and good cause for untimely production. In that regard, the Board's ruling presupposes that the Intervenors must have the Reed Report in order to conduct meaningful cross-examination in regard to their contentions. As with relevance and good cause, the record is barren of any showing on this point.

The public record clearly demonstrates that: 1) the Reed Report was not a safety review; 2) it did not attempt to assess the safety significance of matters addressed within the report; and 3) the information in that 1975 report does not disclose any safety issues not otherwise known to NRC, and 4) all significant and unresolved safety issues are being addressed by the NRC Staff in its generic licensing programs. The Intervenors' consultants have been well aware of these facts and findings since February of 1976, and through reasonable efforts could have obtained all substantive information

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relating to any generic NRC safety issue or program without need for the Reed Report. Further, it is simply inconceivable that a report which was not a safety review and was completed in the summer of 1975 could be useful, much less necessary, for meaningful cross-examination. There is simply no basis in this record for the finding that Intervenors must have the Reed Report in order to cross-examine meaningfully on their contentions. ^{59/}

Although the subpoena was issued in direct response to an Intervenor motion relating solely to the Intervenors' contentions, the Board's initial October 11 ruling encompassed the "27 safety-related issues," and, its final October 17 ruling encompassed the entire Reed Report. Although GE acknowledges that the Board may have an independent duty to inquire whether or not heretofore undisclosed safety matters were included in the Reed Report, ^{60/} GE is and remains willing to

^{59/} In situations such as this a licensing board must balance the effects of delay against "such countervailing factors as the alacrity with which the information was requested when its materiality became apparent, the particular relationship of the requested information to unresolved questions in the proceeding, and the overall importance of the information to a sound decision". Illinois Power Co. (Clinton 1 and 2), ALAB-340, 4 NRC at 33. Even a cursory review of the record in this proceeding demonstrates that the Intervenors have not shown that they are entitled to favorable consideration under any of these "countervailing factors".

^{60/} Licensing Boards have the power to raise sua sponte significant environmental or safety issues; however, this power should be used sparingly. See Consolidated Edison Co. (Indian Point 1, 2, and 3), ALAB-319, 3 NRC 188, 190 (1976); 10 CFR § 2.760(a).

accommodate the Board itself. The Board's duty to inquire further when an issue is raised by an Intervenor is not triggered unless at least a "colorable question" is presented to give rise to that duty. ^{61/} In the instant case, however, the public record clearly shows that the purpose, structure and prior reviews of the Reed Report do not provide a basis for triggering the Board's independent duty to inquire. Moreover, since the Board's June 29, 1978 denial of the Intervenor's "Reed Report" contention, no information has been advanced by the Intervenor to raise as much as a "colorable question." In fact, the instant subpoena has been issued in an adversary context in favor of a single party, and in spite of the fact that the record does not show the information sought to be necessary to meaningful cross-examination, much less a sound decision.

Accordingly, in the absence of any showing or basis to conclude that the information sought by the subpoena is necessary to a sound decision, GE's motion to quash must be granted.

^{61/} It is clear that Licensing Boards are not required to conduct independent research or de novo reviews of applications and other submittals to the NRC Staff (Consumers Power Co. (Midland 1 and 2), ALAB-123, 6 AEC 331, 334-35 (1973)) and need not inquire further as to any issues raised by Intervenor unless a threshold showing is made by the Intervenor as to the litigability of that issue. Vermont Yankee Nuclear Power Corp. v. NRDC, U.S. ___, 55 L. Ed. 460 at 483-86 (1978); Public Service Co. of New Hampshire (Seabrook 1 and 2), ALAB-471, 7 NRC 477, 488-89 (1977).

C. Issuance and Enforcement of the Instant Subpoena Will Result in Severe and Irreparable Harm to GE, the Applicant, and the Public Interest

The Board's ruling granting the Intervenors' motion and directing production of the entire Reed Report focuses only upon those interests which the Intervenors have asserted. As shown in the foregoing, the Board has accommodated those interests without an adequate record basis. Beyond this, the Board must consider the severe and irreparable harm to GE, the Applicant, and the public interest which will result from issuance and enforcement of the subpoena.

1. GE's Interests are not Reflected in the Board's Consideration of the Intervenors' Motion

The Reed Report itself is a generic product improvement study which was intended to provide top management with an objective technical evaluation of GE's BWR product for improving the reliability and performance of that product. Disclosure of the Reed Report would result in substantial competitive harm to GE. The marketing advantages which GE's competitors could gain from negative inferences drawn from GE's self-analysis is obvious enough. Moreover, the NRC Staff has agreed with GE that GE's competitors could obtain information of considerable strategic value, in terms of GE's

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efforts toward product improvement, if the report were disclosed. ^{62/}

GE submits that the Board must recognize GE's interest in maintaining the confidentiality of their Report as well as the express policy contained in the Atomic Energy Act favoring the promotion of competition in the peaceful uses and development of nuclear power. ^{63/} To the extent that the Board's ruling orders disclosure of the Reed Report, however limited, it raises a significant potential for competitive harm to GE, and contravention of the express purposes and policies of the Atomic Energy Act.

62/ The NRC Staff has agreed that the Reed Report is also clearly entitled to proprietary designation and confidential treatment under NRC case law since, inter alia, (1) the information contained in the Report is of the type customarily held in confidence by GE, (2) there is a rational basis for customarily holding such information in confidence, (3) the Report has, in fact, been kept in confidence, and (4) it is not found in public sources. See Kansas Gas and Electric Co. (Wolf Creek 1), ALAB-327, 3 NRC 408 (1976); Wisconsin Electric Power Co. (Point Beach 2), ALAB-137, 6 AEC 491 (1973). Likewise the Congressional Staff's reviewing the Reed Report have recognized the commercial sensitivity of the Report and have conducted their reviews in confidence.

63/ The Atomic Energy Act of 1954, as amended, declares it to be the policy of the United States that "the development use and control of atomic energy shall be directed to . . . strengthen free competition in private enterprise." 42 U.S.C. § 2011. As a result, one of the purposes of the Act itself, and the regulatory program established pursuant to the Act, is to "encourage widespread participation in the development and utilization of atomic energy for peaceful purposes." 42 U.S.C. § 2013.

The Board ruled that a protective agreement is sufficient to preclude or minimize the risk of disclosure and competitive harm to GE. GE submits that the Board must carefully examine whether or not a protective order will provide adequate protection to GE's interest in the circumstances of this case. ^{64/} Moreover, the Board must examine this consideration in light of the fact that the harm to GE from disclosure, whether inadvertant or not, is both substantial and irreparable. If disclosure is made, notwithstanding a protective order, GE's competition cannot erase that disclosure from its memory. Nor can GE avail itself of any adequate remedy at law to undo the harm.

The Intervenors' consultants are former GE employees, and it is fair to characterize their position as opposing nuclear power in general, and GE's participation and effectiveness in the development and deployment of nuclear power plants in particular. Given the circumstances and relationship between GE and the Intervenors' consultants, it should be understandable

64/ In connection with the NRC Staff's February 22, 23, and 24 review of the Reed Report, the NRC General Counsel recognized the commercial sensitivity of the Reed Report, the possibility of leakage from any government agency, and the need for additional precautions in protecting against disclosure. JCAE Hearings at 254-55.

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that GE perceives a real risk associated with disclosure of the Reed Report to the Intervenor's consultants. ^{65/}

This perception of risk is fortified by GE's view that a protective order issued by this Board will not be accompanied by sanctions and enforcement authority against disclosure, which are commensurate with the magnitude and irreparability of harm to GE. ^{66/} NRC's Rules of Practice do not include explicit authority or sanctions in connection with possible violations of protective orders, and it is questionable as to whether the Board's authority -- whatever that may be -- reaches technical consultants, as well as attorneys. In short, under the circumstances of this case, it is doubtful that a protective order can protect GE's interests, in a manner consistent with the magnitude and irreparability of harm.

^{65/} As in Consumers Power Co. (Midland 1 and 2), ALAB-122, 6 AEC at 329, the Board need not impugn the integrity of Intervenor's or their consultants to conclude that any protection accorded to GE in conjunction with disclosure to these consultants would be "more theoretical than real." See Covey Oil Co. v. Continental Oil Co., 340 F.2d 993, 997 (10th Cir.) cert. denied, 380 U.S. 964 (1965).

^{66/} The inadequacy of sanctions available to a licensing board for the violation of an NRC protective order has been noted in prior NRC proceedings. Pacific Gas and Electric Co. (Diablo Canyon 1 and 2), ALAB-410, 5 NRC 1398, 1402 (1977).

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Finally, GE believes that the Board has failed to consider a vital policy question in issuing the instant subpoena. GE believes that issuance of the instant subpoena, particularly in light of the absence of any showing by the Interveners of 1) the relevance, 2) the necessity for production of the report to their cross-examination and the rendering of a sound decision in this proceeding, or 3) good cause for their untimely motion, will have a decidedly chilling effect upon any future efforts at self-analysis, whether or not those analyses relate to product improvement, or any other subject. ^{67/} Unless this adverse impact upon the future conduct of GE's business is recognized and afforded appropriate weight by requiring substantial showings of relevance, necessity, and good cause, GE and other nuclear industry vendors similarly situated will surely be inhibited from conducting their business in the same objective and candid manner as they have in the past.

67/ Such a concern is analogous to the public policy underlying the inadmissibility of evidence relating to subsequent remedial measures in negligence proceedings since permitting such evidence to be admitted would otherwise have a chilling effect on the taking of such remedial measures. Limbeck v. Interstate Power Co., 69 F.2d 249 (8th Cir. 1934); McCormick on Evidence, ¶ 275 (2d Ed. 1972).

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GE submits that each of the aforementioned interests have been ignored or inadequately accommodated by the Board's ruling. Moreover, the mere execution of a protective agreement and protective order does not provide protection commensurate with the potential for harm to GE. Thus, unless a substantial showing of relevance, necessity, and good cause is made, the motion to quash must be granted.

2. Issuance of the Subpoena has and will Continue to adversely impact the Applicant Unless the Motion to Quash is Granted

The Board's ruling ignores or inadequately accommodates the Applicant's interests. The Applicant has assumed substantial burdens in connection with preparation for these proceedings. As noted previously, the Applicant had a substantial right to rely on the Board's June 29, 1978 ruling, which effectively foreclosed production of the Reed Report prior to commencement of the evidentiary hearings. Further, the Applicant had a right to rely upon the NRC Rules of Practice and the case law interpreting those rules. Inasmuch as the instant subpoena was issued without regard for and in abrupt conflict with: 1) the prior ruling of the Board, 2) any showing of excuse for untimely filing, 3) any showing of relevance (much less a sufficient showing), and 4) any showing of necessity for a sound decision, or the conduct of meaningful cross-examination, the Applicant can fairly be said to have relied upon the Board's ruling and the NRC Rules of Practice to its detriment.

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The Applicant is now faced with a belated reversal of the Board's ruling without an adequate record basis for that reversal, and the virtual certainty that the issues would be broadened and the proceedings delayed while objections to production of the Reed Report are resolved. Of course, there is now a much greater potential for delay if the subpoena is not quashed. The Applicant has a substantial need for an expeditious and fair decision, and is utterly blameless with respect to the belated presentation of the instant controversy. The Board's forewarnings and cautions about the Intervenor's narrow use of the Reed Report are small consolation. The inconsistency between narrow use and the scope of the subpoena, ^{68/} as well as the immediate prospect of delay resulting from protracted litigation, have presented the

68/ Under NRC Rules of Practice, the Reed Report as "proprietary commercial information" pursuant to 10 CFR § 2.790(d) is to be afforded the same protection and is subject to disclosure in the same manner as security plans. Pacific Gas and Electric Co. (Diablo Canyon 1 and 2), ALAB-410, 5 NRC 1398, 1402 (1977). As the Appeals Board observed in Diablo Canyon

the plans 'relevancy' must be demonstrated by the party requesting access to the plan. In the context of a request by an intervenor for access to a security plan, we read that provision as contemplating that only those portions of a plan which an intervenor can demonstrate are relevant to its contentions should be released to it. All the parties agree that a plan involves not only different subject areas but also different levels of

Applicant with a Hobson's choice.' On the one hand, it may seek reversal of the Board's order, and accept the delays inevitably attending that effort. On the other, it may accept the Board's ruling in spite of the record, and accept the delays inevitably resulting from the belated injection of the Reed Report in these proceedings.

At the very least, the Applicant's legitimate interests must be recognized and accommodated by requiring a substantial showing of relevance, necessity and good cause for the untimely motion. In the absence of any showing in these respects, one must conclude that the Board has utterly disregarded the Applicant's interests.

3. The Board's Ruling Fails to Consider the Substantial Harm to the Public Interest

There are at least three vital public interests which are adversely impacted by the Board's ruling. First, the Applicant's ratepayers can now anticipate a certainty of delay and a substantial likelihood that the issues in this

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detail, and that all the . . . details . . . may not be necessary to litigate a particular contention. 5 NRC at 1404 (emphasis added).

So also here, the Reed Report is a confidential document which involves different subject areas and different levels of detail, none of which should be released to Intervenor unless and until the Intervenor specifically demonstrate such relevance.

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proceeding will be broadened. The additional costs associated with that delay will inevitably be borne by the ratepayers in the form of higher power costs. Inasmuch as the Board has not even paid lip service to the Applicant's interest, and, hence, the ratepayer's interest, in requiring no showing of relevance, necessity, or good cause, and inasmuch as ratepayers are indistinguishable from the public at large, the Board's ruling will inexorably result in an adverse impact upon the public interest.

Second, the Board's own prior ruling points to a certainty for delay resulting from granting the Intervenor's belated motion for production of the Reed Report. The overriding public interest in expeditious decision making is well recognized in the NRC case law, and the conflict between the instant ruling and that overriding public interest is self-evident.^{69/}

Thirdly, production of the Reed Report under the conditions set forth by the Board would contravene two additional public policies. First the potential for impeding free competition in the development of nuclear power is obvious

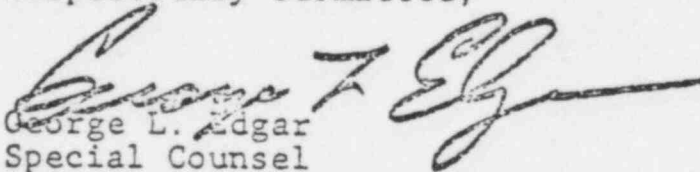
^{69/} It is by now well-settled that there is a compelling public interest in arriving at an early decision in nuclear licensing proceedings. Allied-General Nuclear Services (Barnwell), ALAB-296, 2 NRC 671, 684-85 (1975); Potomac Electric Power Co. (Douglas Point 1 and 2), ALAB-277, 1 NRC 539, 552 (1975).

enough. Second, the order will have a decidedly chilling effect and will inevitably hinder the future efforts of GE and other vendors to undertake objective, critical, and candid self-analysis toward product improvement.^{70/}

IV. CONCLUSION

GE submits that the subject subpoena has an inadequate basis in the record in terms of relevance, good cause for untimely filing, and necessity for cross-examination or a sound decision in this proceeding. Moreover, issuance of the subpoena pursuant to the Board's ruling fails to consider and accommodate the legitimate interests of GE, the Applicant, and the public. Consequently, GE's motion to quash must be granted.

Respectfully submitted,


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Dated: October 30, 1978

^{70/} See n. 67 and accompanying text at p. 39.

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Attachment 4 to Section II.D
 UNITED STATES
 NUCLEAR REGULATORY COMMISSION
 WASHINGTON, D. C. 20555

COPY

February 25, 1976



Ben C. Rusche, Director
 Office of Nuclear Reactor Regulation

On February 23-24, 1976, a review was made of the GE Nuclear Reactor Study (Reed Report) at the General Electric Offices (GE) in Washington, D.C. The review of this report was made for two specific purposes: (1) to determine if any information in the report expressing safety concerns by GE had not previously been known to the Nuclear Regulatory Commission (NRC); and (2) to determine if Section 205 of the Energy Reorganization Act of 1974 had been met by the reporting of significant safety items. In our review of the report we did not identify any instances of new areas of safety concern; nor, were any instances identified where significant safety concerns were not previously reported to the NRC. The GE Nuclear Reactor Study consists of the main report plus ten (10) appendices as follows:

- A. Nuclear Systems
- B. Fuel
- C. Electrical Control and Instrumentation
- D. Mechanical Systems and Equipment
- E. Materials, Processes and Chemistry
- F. Production, Procurement and Construction
- G. Quality Control Systems Overview
- H. Management/Information Systems
- I. Regulatory Consideration
- J. Scope and Standardization

In our review of the GE Nuclear Reactor Study it was apparent that the study was mainly directed at marketing rather than safety per se. The report does contain items which had implication on the safe construction and operation of BWRs; however, the examples were used to illustrate the point that identified problems (some of which had safety significance) do have an effect on the availability of BWR plants and hence the cost and marketing potential of that plant. In those instances where problem having safety significance were cited there was no analysis in the GE Report of the significance from a safety standpoint of the particular phenomenon.

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Ben C. Rusche

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In our review of the report, we did not attempt to provide a track record of how the particular issue was reported or made known to the NRC, rather we were interested in determining whether or not the NRC was previously made aware of the particular issue as discussed. From our review of the safety related items cited in the report it was our view that many of the issues were raised by the NRC itself in its review of specific applications as submitted by GE. We did not find any examples wherein the NRC was not cognizant of the particular concern. In our review there were also issues raised as a consequence of operating problems in BWRs and again we did not attempt to trace how a reported problem was communicated to the NRC. In some instances problems could have been reported by the operator of the plant or by GE itself, but since we did not identify any instance where the NRC was not fully aware of the event, we made no attempt to track the means of reporting.

There was one category of information which we did not have sufficient documentation to determine if the events identified in the GE Nuclear Reactor Study were themselves reportable. This was in the area of quality assurance where the report indicated that the GE task force identified instances based on their review of audit reports where detailed procedures related to quality assurance were not followed. The specific examples were not provided in the report. The GE representative stated that the GE licensing group however, had reviewed the specific items reviewed by the task force itself and had determined that the quality assurance breakdown did not have the significance indicated in Section 205 for reportability. We are aware that the audit reports mentioned in the GE Nuclear Reactor Study are also available to the vendors as well as the NRC inspection staff. Since these reports are available and are reviewed on a selected basis by the NRC inspectors, we did not delve into this issue at any greater depth.

Warren Minners, Section Leader
Section A, Reactor Systems Branch
Division of Systems Safety, NRR

Donald F. Knuth, Director
Reactor Safety Research, RES

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF)	
)	
PUBLIC SERVICE COMPANY OF)	
OKLAHOMA, ASSOCIATED ELECTRIC)	Docket Nos.
COOPERATIVE, INC., AND)	STN 50-556
WESTERN FARMERS ELECTRIC)	STN 50-557
COOPERATIVE, INC.)	
)	
(Black Fox Stations,)	
Units 1 and 2)	

AFFIDAVIT OF ROBERT M. KETCHEL

I, Robert M. Ketchel, being duly sworn, depose and state as follows:

1. I am Manager, Regulation & Market Support in General Electric's Washington, D.C. office.

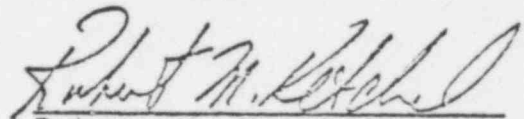
2. On December 19, 1977, I attended a closed meeting with the Staff of the House Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce in Washington, D.C. at which the Subcommittee Staff reviewed the Reed Report and the internal review of the Report prepared by General Electric's Nuclear Energy Division with respect to potentially reportable safety information contained in the Report.

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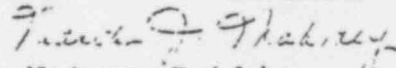
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3. On February 24, 1978, I attended another closed meeting with the Subcommittee Staff along with D. K. Willett, the Manager of GE's BWR Product Service Division, and T. R. Dankmeyer, Jr., GE Associate Group Counsel, to discuss the actions that GE had taken in response to the recommendations contained in the Reed Report and the practices which GE was following in its dealings with its customers with respect to matters discussed in the Report. Due to the commercial sensitivity of the topics under discussion, this meeting was also closed.

4. At the conclusion of the meeting the Subcommittee Staff thanked GE for its cooperation and assured us that it was satisfied concerning GE's actions in response to the Reed Report. The Staff also informed us that the Subcommittee did not have any plans to hold hearings with respect to the Reed Report. No such hearings were held and, to the best of my knowledge and belief, the Subcommittee did not pursue this matter any further.


 Robert M. Ketchel

Subscribed and sworn to before me this 27th day of June 1978.


 Notary Public

My Commission Expires March 31, 1982

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5838-002

ATTACHMENT C

MAR 6 1978

Dr. Glen Sherwood, Manager
Safety & Licensing
General Electric Company
175 Curtner Avenue
San Jose, California 95125

Dear Dr. Sherwood:

As you recall, in testimony before the Joint Committee on Atomic Energy on February 18, 1976, Mr. Hubbard urged that the findings of the General Electric Nuclear Reactor Study be shared with the NRC. Dr. Reed, the director of the study, later testified that all safety issues identified in the report had been previously reported to the NRC. Subsequently two senior members of the NRC staff reviewed the study in the Washington, D. C. offices of GE with the purpose of verifying that all items of safety significance identified in the study had been reported to the NRC as required by Section 206 of the Energy Reorganization Act of 1974. Based on this review, it was concluded that all of the safety-related issues discussed in the study were previously known to the staff. These conclusions were reported to the Director, NRR and included in testimony to the JCAE.

In a December 15, 1977 letter to Chairman Hendrie, Congressman Dingell, Chairman of the Subcommittee on Energy and Power, requested a list of all safety related items discussed in the GE Nuclear Reactor Study, identification of when the NRC became aware of each item, a description of the nature of each problem, and an explanation of what actions have been taken by either GE or the NRC to correct each problem. Since the NRC staff members who reviewed the study did not retain a list of the items identified in the study, we are unable to provide a complete response to this request.

Chairman Hendrie replied to Congressman Dingell that the NRC would request GE to release the study or the list of safety-related issues in order to verify that all of the safety issues identified in the study are being adequately addressed. Therefore, we request that GE

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MAR 6 1978

Dr. Glen Sherwood

- 2 -

provide us with a copy of the study or a list of the safety issues identified in the study. As an aid in our response to Congressman Dingell, we wish to meet with you to confirm that we understand the nature of each issue and the status of actions taken by GE to resolve them. If we require further written information, we will advise you subsequent to that meeting.

Sincerely,

Original signed by
Roger J. Mattson

Roger J. Mattson, Director
Division of Systems Safety

Enclosures:
Dingell letter dtd 12/15/77
Hendrie response dtd 2/9/78
Rusche memo dtd 2/25/76

cc: L. Gifford, GE

Distribution:
Central Files
NRR Reading
WM Reading
RJM Reading
R. Boyd
V. Stello
H. Denton
E. Volgenau
J. Scinto
D. Hoefling, OELD
J. Snell, DPM
T. Rehm, EDO

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200 855 NRR:DSS NRR:DSS ONRR NRR:DSS
UM: [unclear] ESchneider EGCase RJMattson

GENERAL ELECTRIC

ATTACHMENT D

NUCLEAR ENERGY

PROJECTS DIVISION

GENERAL ELECTRIC COMPANY, 175 CURTNER AVE., SAN JOSE, CALIFORNIA 95125
MC 676, (408) 925-5040

March 22, 1978

Dr. Roger J. Mattson, Director
Division of Systems Safety
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dear Dr. Mattson:

SUBJECT: REQUEST FOR REED REPORT INFORMATION

I am responding to your letter of March 6, 1978, in which you requested that General Electric provide either a copy of the Nuclear Reactor Study (known as the Reed Report) or a list of the safety issues identified in the Study. In addition, you requested a meeting to discuss each issue and the actions taken by GE to resolve them.

In your letter you stated that Congressman Dingell had requested that the Nuclear Regulatory Commission (NRC) provide a report on the safety-related items discussed in the GE Nuclear Reactor Study. Your letter stated that you were unable to provide a complete response to Congressman Dingell's request because the NRC Staff members who had previously reviewed the Study did not retain a list of the safety items. This situation lead to your request to us.

Attached to this letter is a list of the issues in the Reed Report which GE's Safety and Licensing component had identified in 1975 as having some safety significance. A determination was then made by Safety and Licensing as to whether any of these items needed to be reported to the NRC under Section 206 of the Energy Reorganization Act of 1974. In each case it was determined either that the item was not reportable or that it was already known to the NRC.

The list is marked "General Electric Company Proprietary Information." We request that it be withheld from public disclosure. Also attached to this letter is an affidavit stating the basis for this request, particularly the commercial sensitivity of the list.

As has previously been discussed with the NRC, the Nuclear Reactor Study was conducted under the direction of Dr. Charles Reed, a Senior Vice President of General Electric Company, as a product improvement study. General Electric's purpose in conducting the Study was to identify the improvements required in the Boiling Water Reactor to make it a demonstrably superior product - with the same reputation for quality and reliability as GE's turbine generators. The Company has conducted similar studies in many technology areas, including computers, aircraft engines, plastics, etc.

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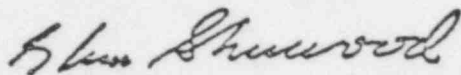
GENERAL  ELECTRIC

Dr. Roger J. Mattson
Page 2
March 22, 1978

The Nuclear Reactor Study was not a safety study, and the report itself does not specifically identify which of the issues discussed have safety or licensing implications.

We certainly wish to cooperate with you in answering questions concerning this matter. I would be happy to meet with you at your convenience to discuss the current status of the issues contained on the attached list.

Very truly yours,



Glenn G. Sherwood, Manager
Safety and Licensing Operation

GGG:daj/77-78

Attachment

cc: L. S. Gifford
R. M. Ketchel
J. Restrick

bcc: AP Bray
TR Dankmeyer -
WR Morgan

2238 066

5238 067

GENERAL ELECTRIC COMPANY

AFFIDAVIT

I, Glenn G. Sherwood, being duly sworn, depose and state as follows:

1. I am Manager of Safety and Licensing Operation, General Electric Company, 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 a list of safety-related items derived from General Electric Company's Reed Report and attached to a letter, dated March 22, 1978 from Dr. Glenn G. Sherwood to Dr. Roger J. Mattson of the U.S. Nuclear Regulatory Commission.
3. In designating material as proprietary, General Electric utilizes the definition of proprietary information and trade secrets set forth in the American Law Institute's Restatement Of Torts, Section 757. This definition provides:

"A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.... A substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring information.... Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others."

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 where prevention of its use by General Electric's competitors without license from General Electric constitutes a competitive economic advantage over other companies;
 - b. Information consisting of supporting data and analyses, including test data, relative to a process, method or apparatus, the application of which provide a competitive economic advantage, e.g., by optimization or improved marketability;

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- c. 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;
- d. Information which reveals cost or price information, production capacities, budget levels or commercial strategies of General Electric, its customers or suppliers;
- e. Information which reveals aspects of past, present or future General Electric customer-funded development plans and programs of potential commercial value to General Electric;
- f. Information which discloses patentable subject matter for which it may be desirable to obtain patent protection;
- g. Information which General Electric must treat as proprietary according to agreements with other parties.
5. In addition to proprietary treatment given to material meeting the standards enumerated above, General Electric customarily maintains in confidence preliminary and draft material which has not been subject to complete proprietary, technical and editorial review. This practice is based on the fact that draft documents often do not appropriately reflect all aspects of a problem, may contain tentative conclusions and may contain errors that can be corrected during normal review and approval procedures. Also, until the final document is completed it may not be possible to make any definitive determination as to its proprietary nature. General Electric is not generally willing to release such a document to the general public in such a preliminary form. Such documents are, however, on occasion furnished to the NRC staff on a confidential basis because it is General Electric's belief that it is in the public interest for the staff to be promptly furnished with significant or potentially significant information. Furnishing the document on a confidential basis pending completion of General Electric's internal review permits early acquaintance of the staff with the information while protecting General Electric's potential proprietary position and permitting General Electric to insure the public documents are technically accurate and correct.
6. Initial approval of proprietary treatment of a document is made by the Subsection Manager of the originating component, the man most likely to be acquainted with the value and sensitivity of the information in relation to industry knowledge. Access to such documents within the Company is limited on a "need to know" basis and such documents at all times are clearly identified as proprietary.

900 8000 The procedure for approval of external release of such a document is review by the Section Manager, Project Manager, Principal Scientist or other equivalent authority, by the Section Manager of the cognizant Marketing function (or his delegate) and by the Legal

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Operation for technical content, competitive effect and determination of the accuracy of the proprietary designation in accordance with the standards enumerated above. Disclosures outside General Electric are generally limited to regulatory bodies, customers and potential customers and their agents, suppliers and licensees only in accordance with appropriate regulatory provisions or proprietary agreements.

8. The document mentioned in paragraph 2 above has been evaluated in accordance with the above criteria and procedures and has been found to contain information which is proprietary and which is customarily held in confidence by General Electric.
9. The information sought to be withheld consists of a list of safety-related items from the candid findings and conclusions of a task force created to improve the availability and reliability of the General Electric boiling water reactor. As such, this summary list is of important competitive commercial value.
10. The information, to the best of my knowledge and belief, has consistently been held in confidence by the General Electric Company, no public disclosure has been made, and it is not available in public sources. All disclosures to third parties have been made pursuant to regulatory provisions or proprietary agreements which provide for maintenance of the information in confidence.
11. Public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the General Electric Company and deprive or reduce the availability of profit making opportunities because disclosure could enable competitors to obtain a better understanding of our product concerns and programs and utilize this information so as to adversely impact on our sales. Additionally, the value of reviews such as that conducted by General Electric depends on the participants providing their frank opinions on the matters under review. Public disclosures of the findings and opinions could well jeopardize future efforts of this type at product improvement.

Glenn G. Sherwood, being duly sworn, deposes and says that he has read the foregoing affidavit and the matters stated therein are true and correct to the best of his knowledge, information, and belief.

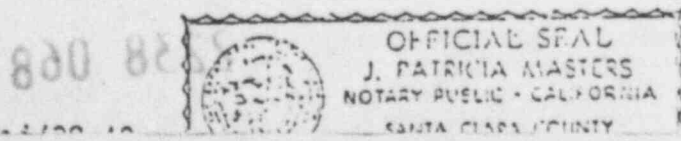
Executed at San Jose, California, this 22 day of March, 1978.

Glenn G. Sherwood
Glenn G. Sherwood
General Electric Company

STATE OF CALIFORNIA)
COUNTY OF SANTA CLARA) ss:

2238 069

Subscribed and sworn before me this 22 day of March 1978.



Patricia Masters
NOTARY PUBLIC IN AND FOR SAID
COUNTY AND STATE

GENERAL ELECTRIC

NUCLEAR ENERGY
PROJECTS DIVISION

GENERAL ELECTRIC COMPANY, 175 CURTNER AVE., SAN JOSE, CALIFORNIA 95125
MC 682, (408) 925-5040

May 26, 1978

U. S. Nuclear Regulatory Commission
Office of Nuclear Reactor Regulation
Washington, D. C. 20555

Attention: Dr. Roger J. Mattson, Director
Division of Systems Safety

Gentlemen:

SUBJECT: REQUEST FOR REED REPORT INFORMATION

This is to respond to your verbal request of May 1, 1978, wherein you asked that General Electric provide a status report on the 27 licensing issues identified by General Electric in the Nuclear Reactor Study (known as the Reed Report and completed in 1975). This material is to assist you in answering questions by Congress as to the status of the 27 licensing issues.

Attached to this letter is a summary of the issues in the Reed Report which GE's Safety and Licensing component had identified in 1975 as having some safety significance. A determination was then made by Safety and Licensing as to whether any of these items needed to be reported to the NRC under Section 206 of the Energy Reorganization Act of 1974. In each case it was determined that the item was not reportable or that it was already known to the NRC.

This material is marked "General Electric Company Proprietary Information." We request that it be withheld from public disclosure. Also attached to this letter is an affidavit stating the basis for this request, particularly the commercial sensitivity of the list.

As has previously been discussed with the NRC, the Nuclear Reactor Study was conducted under the direction of Dr. Charles Reed, a Senior Vice President of General Electric Company, as a product improvement study. General Electric's purpose in conducting the study was to identify the improvements required in the Boiling Water Reactor to make it a demonstrably superior product, with the same reputation for quality and reliability as GE's turbine generators. The Company has conducted similar studies in many technology areas, including computers, aircraft engines, plastics, etc.

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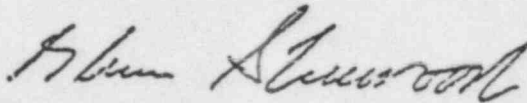
GENERAL  ELECTRIC

U. S. Nuclear Regulatory Commission
ATTN: Dr. Roger J. Mattson
Page 2

The Nuclear Reactor Study was not a safety study, and the report itself does not specifically identify which of the issues discussed have safety or licensing implications.

We trust that the enclosed material provides the status you requested.

Very truly yours,



Glenn G. Sherwood, Manager
Safety and Licensing Operation

GGG:csc/260

Attachments

cc: L. S. Gifford (Wash.)
R. M. Ketchel (Wash.)
J. Restruck (Fairfield)

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GENERAL ELECTRIC COMPANY

AFFIDAVIT

I, Glenn G. Sherwood, being duly sworn, depose and state as follows:

1. I am Manager of Safety and Licensing Operation, General Electric Company, 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. This information sought to be withheld is a summary status by General Electric of the twenty-seven (27) safety related items derived from General Electric Company's Reed Report and attached to a letter, dated May 26, 1978 from Dr. Glenn G. Sherwood to Dr. Roger J. Mattson of the U. S. Nuclear Regulatory Commission.
3. In designating material as proprietary, General Electric utilizes the definition of proprietary information and trade secrets forth in the American Law Institute's Restatement Of Torts, Section 757. This definition provides:

"A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.... A substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring information... Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others."

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 where prevention of its use by General Electric's competitors without license from General Electric constitutes a competitive economic advantage over other companies;
 - b. Information consisting of supporting data and analyses, including test data, relative to a process, method or apparatus, the application of which provide a competitive economic advantage, e.g., by optimization or improved marketability;

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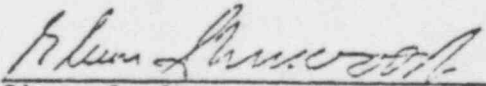
- c. Information which if used by a competitor, would reduce his expenditure of resources or improve his competitive position in the design, manufacture, shipment, installation, assurance of quality or licensing of a similar product;
 - d. Information which reveals cost or price information, production capacities, budget levels or commercial strategies of General Electric, its customers or suppliers;
 - e. Information which reveals aspects of past, present or future General Electric customer-funded development plans and programs of potential commercial value to General Electric;
 - f. Information which discloses patentable subject matter for which it may be desirable to obtain patent protection;
 - g. Information which General Electric must treat as proprietary according to agreements with other parties.
5. In addition to proprietary treatment given to material meeting the standards enumerated above, General Electric customarily maintains in confidence preliminary and draft material which has not been subject to complete proprietary, technical and editorial review. This practice is based on the fact that draft documents often do not appropriately reflect all aspects of a problem, may contain tentative conclusions and may contain errors that can be corrected during normal review and approval procedures. Also, until the final document is completed it may not be possible to make any definitive determination as to its proprietary nature. General Electric is not generally willing to release such a document to the general public in such a preliminary form. Such documents are, however, on occasion furnished to the NRC staff on a confidential basis because it is General Electric's belief that it is in the public interest for the staff to be promptly furnished with significant or potentially significant information. Furnishing the document on a confidential basis pending completion of General Electric's internal review permits early acquaintance of the staff with the information while protecting General Electric's potential proprietary position and permitting General Electric to insure the public documents are technically accurate and correct.
6. Initial approval of proprietary treatment of a document is made by the Subsection Manager of the originating component, the man most likely to be acquainted with the value and sensitivity of the information in relation to industry knowledge. Access to such documents within the Company is limited on a "need to know" basis and such documents at all times are clearly identified as proprietary.
7. The procedure for approval of external release of such a document is review by the Section Manager, Project Manager, Principal Scientist or other equivalent authority, by the Section 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 in accordance with the standards enumerated above. Disclosures outside

General Electric are generally limited to regulatory bodies, customers and potential customers and their agents, suppliers and licensees only in accordance with appropriate regulatory provisions or proprietary agreements.

8. The document mentioned in paragraph 2 above has been evaluated in accordance with the above criteria and procedures and has been found to contain information which is proprietary and which is customarily held in confidence by General Electric.
9. The information sought to be withheld consists of a list of safety-related items from the candid findings and conclusions of a task force created to improve the availability and reliability of the General Electric boiling water reactor. As such, this summary list is of important competitive commercial value.
10. The information, to the best of my knowledge and belief, has consistently been held in confidence by the General Electric Company, no public disclosure has been made, and it is not available in public sources. All disclosures to third parties have been made pursuant to regulatory provisions or proprietary agreements which provide for maintenance of the information in confidence.
11. Public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the General Electric Company and deprive or reduce the availability of profit making opportunities because disclosure could enable competitors to obtain a better understanding of our product concerns and programs and utilize this information so as to adversely impact on our sales. Additionally, the value of reviews such as that conducted by General Electric depends on the participants providing their frank opinions on the matters under review. Public disclosures of the findings and opinions could well jeopardize future efforts of this type at product improvement.

Glenn G. Sherwood, being duly sworn, deposes and says that he has read the foregoing affidavit and the matters stated therein are true and correct to the best of his knowledge, information, and belief.

Executed at San Jose, California, this 16th day of May, 1978.

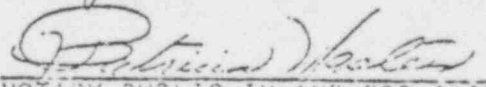

Glenn G. Sherwood
General Electric Company

STATE OF CALIFORNIA)
COUNTY OF SANTA CLARA) ss:

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Subscribed and sworn before me this 16th day of May, 1978.




NOTARY PUBLIC IN AND FOR SAID
COUNTY AND STATE



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

July 10, 1978

Dr. Glenn Sherwood
General Electric Company
175 Curtner Avenue
San Jose, California 95125

Dear Dr. Sherwood:

Subject: Request for Withholding Information from Public Disclosure

By your application and affidavit dated May 26, 1978, you requested that a list and summary status report of the 27 safety-related items derived from the General Electric Company's "Reed Report", which were attached to your letter, be withheld from public disclosure.

In accord with Section 2.790(b)(1)(ii) of 10 CFR Part 2 of the NRC regulations, your affidavit contains a statement of the reasons on the basis of which it is claimed that the information should be withheld from public disclosure.

In essence, your claim is that public disclosure of the list of safety-related items and the summary status report is likely to cause substantial harm to the competitive position of G.E. We agree that if the "Reed Report" in its entirety were submitted, it should be afforded the protection of proprietary information under the Commission's regulations because it is a product improvement study of important competitive value and because disclosure of this sort of study could act to inhibit thoughtful self-criticism by nuclear equipment vendors since it would enable competitors to obtain a better understanding of a manufacturer's product concerns and programs.

The aggregate list and summary status of the 27 safety-related items is derived from the report and therefore can be afforded the same protection of proprietary information. Because of the historical context of a product improvement study, we agree that the public disclosure of the aggregate list of the 27 issues could cause substantial harm to the competitive position of G.E.

We have reviewed your application and based on the requirements and criteria of 10 CFR 2.790 have determined that the list of safety-related items and the summary status report sought to be withheld contain confidential or privileged commercial information.

We also have found at this time that the right of the public to be fully apprised as to the bases for and effects of licensing actions

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Dr. Glenn Sherwood

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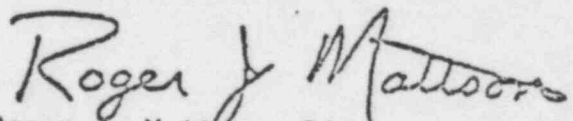
July 10, 1978

is not affected, and therefore does not outweigh the demonstrated concern for protection of your competitive position. Accordingly, we have determined that the information should be withheld from public disclosure.

We therefore approve your request for withholding pursuant to Section 2.790 of 10 CFR Part 2, and are withholding the list of safety-related items and summary status report from public inspection as proprietary.

Withholding from public inspection shall not affect the right, if any, of persons properly and directly concerned to inspect the documents. If the need arises, we may send copies of this information to our consultants working in this area. We will, of course, assure that the consultants have signed the appropriate agreements for handling proprietary data.

Sincerely,



Roger J. Matuson, Director
Division of Systems Safety
Office of Nuclear Reactor Regulation

cc: L. Gifford, GE Bethesda
NRC Public Document Room

2238 076

TTO BESS

GENERAL ELECTRIC COMPANY

AFFIDAVIT OFGLENN G. SHERWOOD

I, Glenn G. Sherwood, being duly sworn, depose and state as follows:

1. I am Manager of Safety and Licensing Operation in the Nuclear Energy Group of the General Electric Company. I have held this position since August, 1976.
2. I have reviewed the Nuclear Reactor Study dated July 1, 1975 (the so-called "Reed Report") prepared by a task force under the direction of Dr. Charles E. Reed, then Senior Vice President for Corporate Strategic Planning and Studies of the General Electric Company.
3. The Reed Report consists of 146 pages of text plus two appendices consisting of an aggregate of 80 pages. Attached as Attachment I to this Affidavit in the Table of Contents of the Reed Report.
4. In addition to the Reed Report itself, there are two volumes, containing an aggregate of approximately 700 pages, which contain the separate findings and recommendations of the sub-task force groups which were headed up in each case by one member of the Reed Task Force and included a number of other persons who were not members of the Reed Task Force. The sub-task reports served as input data to the Task Force, and only the findings, conclusions, and recommendations contained in the Reed Report itself were endorsed by the Task Force.

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5. The opening paragraph of the Executive Summary of the Reed Report reads:

"Objective of Study. The Nuclear Reactor Study was a highly technical study with the objectives of determining the basic requirements for implementing the Nuclear Energy Division's (NED) quality strategy through continuing improvement in the availability and capability of Boiling Water Reactor Nuclear Plants (BWR's). This strategy is predicated on the view that leadership of the BWR in these characteristics represents the greatest opportunity for reducing the Utility customer's power generation cost, with resulting lower power cost for industry and for the ultimate consuming public. The study included review of the broad range of opportunities for development of BWR leadership in all aspects of availability and capability across the entire range of design, development, manufacturing, construction and operation."

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6. Under a heading entitled "Safety Aspects" in the Executive Summary of the Reed Report, the following sentences appear:

"The Nuclear Reactor Study Group concentrated on reviewing opportunities for improvement in the availability and capability factors of the BWR plants. Although in the course of the Study Group's review, nuclear safety aspects were considered, this study was not a safety review. However, the Study Group found no reason to believe that applicable safety requirements are not

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7. Each subsection of the Summary of Findings and Recommendations in the Reed Report contains several specific findings (separately numbered) and some (but not all) subsections begin with some general findings and recommendations. Each specific finding or recommendation relates to a single technical or organizational matter.
8. Because the Reed Report does not discuss the safety significance of any of the matters covered, a significant amount of judgment would be required to determine whether a particular matter has safety significance. For this reason, it is very difficult to separate parts of the report which might have safety significance from those that do not. As a result, verbatim excerpts from the report itself would not provide a clear, concise, comprehensive or useful view of the safety significance of the items discussed. Moreover, the information in the Reed Report was prepared in early 1975 and a substantial amount of additional work has subsequently been done on those matters addressed in the Reed Report. For these reasons, in making its settlement offer, General Electric believed that a more appropriate form for extraction of the Reed Report would consist of preparation of an issue-by-issue report, which would consolidate the pertinent findings and conclusions of the Reed Report for each issue and would include a discussion of safety significance and current status.
9. Because of the above-described characteristics of the report, it is difficult, but not impossible, to excerpt verbatim the parts of the Reed Report which deal with particular technical or organizational

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AFFIDAVIT - PAGE FOUR
GLENN G. STERWOOD

zational subject; although, as indicated above, the verbatim
excerpt would not, in most cases, provide a clear, concise,
comprehensive and useful view of the safety significance, if
any, of the information.

Glenn G. Sterwood, being duly sworn, deposes and says that he has
read the foregoing affidavit and that the matters stated therein
are true and correct to the best of his knowledge, information, and
belief.

Executed at San Jose, California, this 27th day of October, 1978.

POOR ORIGINAL

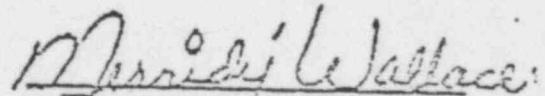


Glenn G. Sterwood
General Electric Company

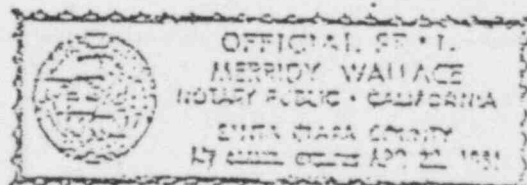
STATE OF CALIFORNIA)
COUNTY OF SANTA CLARA) SS:

2238 080

Subscribed and sworn before me this 27th day of October, 1978.



NOTARY PUBLIC IN AND FOR
SAID COUNTY AND STATE



180 8855

ATTACHMENT I

NUCLEAR REACTOR STUDY

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ASLBP



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF

PUBLIC SERVICE COMPANY OF
OKLAHOMA, ASSOCIATED ELECTRIC
COOPERATIVE, INC., and
WESTERN FARMERS ELECTRIC
COOPERATIVE, INC.

(Black Fox Stations,
Units 1 and 2)

)
)
) Docket Nos.
) STN 50-556
) STN 50-557
)
)
) Attachment 2
)

PROTECTIVE ORDER

On October 18, 1978 this Board issued a subpoena duces tecum to the General Electric Company (GE), the reactor manufacturer for Black Fox Station Units 1 and 2, directing GE to produce the Nuclear Reactor Study regarding GE's BWR Nuclear Steam Supply System (NSSS) which had been prepared under the direction and supervision of Dr. Charles Reed in 1975 ("The Reed Report"). GE appeared specially and moved to quash this subpoena on October 30, 1978, asserting, inter alia, that the subpoena was untimely and overly broad and that production of the report could result in competitive harm to GE because the report contained confidential commercial information. The Applicants and Intervenor filed responses to this motion on November 7, 1978 and the NRC Staff responded on November 9, 1978. The Board heard oral

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argument on GE's motion to quash on December 13, 1978 in Tulsa, Oklahoma.

In response to a suggestion made by the Board during the course of this oral argument, shortly thereafter GE resumed negotiations with the other parties to this proceeding in an attempt to reach a settlement agreement with respect to the production of the Reed Report. In a conference call among counsel for all parties and the members of the Board on January 2, 1979, GE, in order to avoid the possibility of protracted litigation on this issue, made an offer of settlement regarding the production of this report. This offer of settlement was formalized in GE's letter of the same date to the Board and all parties.

Under the basic terms of this settlement, GE offered to: 1) make the entire Reed Report available to the Board in confidence, 2) prepare a verbatim extraction of the Report insofar as it relates to intervenor's contentions and Board questions and make this extraction available to counsel for all parties subject to a protective agreement, and 3) make the Reed Report available to counsel, again subject to a protective agreement, for the purposes of evaluating the faithfulness of this extraction. Moreover, GE also offered to consult with counsel and, if necessary, seek rulings from the Board in order to resolve any disputes over the faithfulness of GE's extraction of the report. GE also offered to extract and make available to

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counsel and consultants for all parties, again subject to a protective agreement, these and any other portions of the Reed Report which the Board determined to be necessary for consideration in this proceeding.

The Board was advised during the conference call that the parties were in agreement on all aspects of the GE offer of settlement except one; namely, whether the entire Reed Report should be made available to counsel for the sole purpose of evaluating GE's extraction of the report with respect to the existing intervenor contentions and Board questions and other matters which the Board determined to be necessary for consideration (the view expressed by counsel for GE, the Applicants, and the NRC Staff) or whether the report should also be made available to counsel for the purpose of enabling counsel to independently propose additional matters to the Board for consideration in this proceeding (the view expressed by counsel for intervenors). Upon consideration of the views expressed by counsel for all parties, the Board concluded that the entire report should be made available only for the former purpose and so ruled.

Subject to that ruling, the Board finds the proposed offer of settlement to be entirely reasonable and acceptable and adopts it without change, thereby rendering moot GE's motion to quash the subpoena.

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NOW THEREFORE, pursuant to 10 CFR § 2.720(f) and 2.740(c),

1. IT IS HEREBY ORDERED that since a rational basis exists to treat as confidential the Nuclear Reactor Study prepared under the direction and supervision of Dr. Charles Reed of the General Electric Company in 1975 ("The Reed Report") and there are no countervailing considerations militating in favor of public disclosure of this report which clearly outweigh the potential harm to the General Electric Company which might arise from such disclosure, the scope of discovery of said report shall be limited to protect against disclosure of the information contained in the report to the general public.

2. IT IS HEREBY FURTHER ORDERED that, subject to paragraphs 3 and 4 of this Order, those portions of the Reed Report, which are relevant to Intervenor Citizen's Action For Safe Energy's contentions and Board questions or otherwise necessary for consideration in this proceeding in accordance with the procedure specified in paragraph 3 of this Order, shall be produced.

3. IT IS HEREBY FURTHER ORDERED that the discovery granted herein be conditioned as follows:

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- 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

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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, 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

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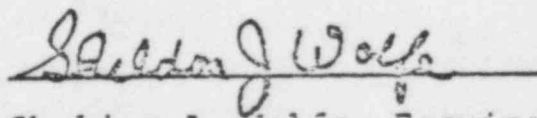
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in accordance with sub-paragraphs d. and e. above available to consultants for the parties subject to the provisions of this Order and the protective agreement contained in Attachment A hereto.

4. IT IS HEREBY FURTHER ORDERED that in the event Intervenors need to utilize any of the information discovered pursuant to this protective order during the evidentiary hearing in this proceeding, the information shall only be disclosed in camera under the conditions set forth in paragraph 3 hereof and the protective agreements attached hereto and the transcript of such portion of the evidentiary hearing shall be sealed.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD


Sheldon J. Wolfe, Esquire
Chairman

Dated at Bethesda, Maryland

this 5th day of January, 1979

2238 088

FREEDOM OF INFORMATION ACT REQUEST

Director, Office of Administration
U. S. Nuclear Regulatory Commission
Washington, D. C. 2055

FREEDOM OF INFORMATION
ACT REQUEST

FOIA-79-51
No'd 2-23-79

Dear Madam or Sir:

By this letter, I request disclosure of copies of the Reed Report which is in the possession of the NRC. The Reed Report was compiled by Westinghouse's own engineers and details 27 safety problems with their boiling water reactor. This report came into the possession of the NRC during the course of the licensing hearings concerning Black Fox Station 1 & 2 which are proposed to be constructed near Inola, Oklahoma.

This request is made pursuant to 5 USC sec. 552.

I am willing to pay reasonable standard charges for actual search time and copying fees. However, I would request waiver or reduction of the fee in that disclosure is in the public interest and primarily benefiting the general public. See sec. 552 (a)(4)(A).

I further request a response within ten days.

It is my strong belief that this Reed Report is available to the public and not exempt under the "trade secrets" or "commercial or financial matters" exemptions. Safety relates to safety, not business.

If any portion of this request is deemed denied, I request a detailed statement of reasons for the withholding.

Even if your agency feels exempt, I am asking you to invoke your discretionary powers which permit disclosure in the public interest.

Brian D. Hunt

Brian D. Hunt
1534 E. 3 St.
Tulsa, Ok. 74120
February, 13, 1979



2238 089



LEAH S. KOSIK
ATTORNEY AT LAW
3454 Cornell Place
Cincinnati, Ohio 45220
(513) 221-7084

Attachment 4

March 7, 1979

FREEDOM OF INFORMATION
ACT REQUEST

FOIA-79-70
REC'D 3-13-79

Chairman
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Sir:

This is to request that your agency provide a copy of the Reed Report, a document compiled by General Electric Company, concerning the safety of certain types of nuclear power plants, which report has come into the possession of your agency in the course of a licensing hearing for a nuclear power station. This request is made pursuant to the Freedom of Information Act, 5 U.S.C. sec.552, and your agency's implementing regulations.

I understand that I am obligated to pay costs of duplication of the above requested document. Please send an invoice for those costs along with the copy of the document.

Very truly yours,

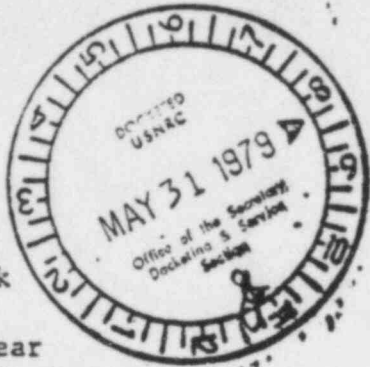
Leah S. Kosik

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GENERAL ELECTRIC
GENERAL ELECTRIC COMPANY
175 CURTNER AVENUE
SAN JOSE, CALIFORNIA 95125

1410
MNBB
GRIMSLEY

T. ROGNALD DANKMEYER
COUNSEL
NUCLEAR ENERGY GROUP



March 15, 1979

Mr. Samuel J. Chilk
Secretary
United States Nuclear
Regulatory Commission
Washington, D. C. 20555

Attachment 5

Dear Sir:

This is to request confirmation that certain General Electric (GE) proprietary information furnished, in confidence and subject to a protective order and agreements, to several NRC employees in connection with the Black Fox proceedings (Docket Nos. STN 50-556 and 50-557) is exempt from disclosure pursuant to 10 C.F.R. § 2.790 and 10 C.F.R. Part 9 of the Commission's regulations. The information in question consists of a GE Nuclear Reactor Study on the subject of GE's Boiling Water Nuclear Steam Supply System which had been prepared under the direction and supervision of Dr. Charles Reed in 1975 (the Reed Report) and verbatim extractions of certain portions of that Report relating to the Intervenor contentions and Board questions in the Black Fox construction permit proceedings.

The NRC has previously found, by letter dated July 10, 1978, that a list of certain issues in the Reed Report, and a status report on those issues, which were submitted to the NRC Staff by GE's letters dated March 22, and May 26, 1978, respectively, were exempt from disclosure pursuant to 10 C.F.R. § 2.790. While it would follow a fortiori that the Reed Report and verbatim extractions therefrom are similarly exempt, the commercial sensitivity of those documents warrants our obtaining confirmation of that fact. Pursuant to the Atomic Safety and Licensing Board (ASLB) Protective Order, dated January 5, 1979, and the related protective agreements, a copy of the Reed Report and the verbatim extractions were furnished to the ASLB in confidence for its review and use in connection with the Black Fox proceedings. Pursuant to the same Protective Order and agreements, the aforementioned verbatim extractions were similarly furnished in confidence to counsel and certain designated consultants for all parties, including the NRC Staff, for use in the Black Fox proceedings and any subsequent appeals. In addition, those portions of the hearings that pertained to the Reed Report were held in camera.

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Mr. Samuel J. Chilk

-2-

March 15, 1979

In order to assure that the confidentiality of the information furnished to the ASLB and Staff is continued in accordance with the ASLB's duly issued and authorized Order, we are herewith submitting the attached affidavit and requesting confirmation that the subject information is exempt from disclosure pursuant to 10 C.F.R. § 2.790 and 10 C.F.R. Part 9.

Respectfully submitted,

J. K. Danziger

TRD:rk
Attachment

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GENERAL ELECTRIC COMPANY

AFFIDAVIT OF

WILLIAM J. ROTHS

I, William J. Roths, being duly sworn, depose and state as follows:

1. I am Manager of the Reliability Engineering Operation for General Electric Company and have been authorized by the General Electric Company to state that the General Electric Company considers the information described in paragraph 2 as proprietary information and exempt from disclosure pursuant to 10 C.F.R. § 2.790 and 10 C.F.R. Part 9 of the Commission's regulations.
2. The Nuclear Reactor Study on the subject of GE's Boiling Water Reactor Nuclear Steam Supply System which has been prepared under the direction and supervision of Dr. Charles Reed in 1975 and known as the "Reed Report" was the product of a study conducted at the request of the Chairman of the Board of General Electric Company by a task force chaired by Dr. Charles E. Reed, Senior Vice President for Corporate Strategic Planning and Studies, General Electric Company. This highly technical study had the objective of determining the basic requirements for continuing improvement in the availability and capability of nuclear plants manufactured by General Electric. The principal purpose of the study was to provide a basis for assessing the level of corporate resources -- including engineering and development facilities, technical personnel and financial support -- required to enable General Electric's product to achieve technical and competitive success. In addition, the task force made numerous recommendations intended to improve the availability of nuclear plants manufactured by General Electric. These recommendations dealt with overall design considerations, as well as with specific components and services. Recommendations were made concerning development and test facilities, management and organization. The Reed Report candidly discusses opportunities for improvement in General Electric's product line and organization and recommends steps to strengthen General Electric's competitive position.
3. In designating material as proprietary, General Electric utilizes the definition of proprietary information and trade secrets set forth in the American Law Institute's Restatement of Torts, Section 757. This definition provides:

"A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business and which gives

him an opportunity to obtain an advantage over competitors who do not know or use it.... A substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring information.... Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others."

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 where prevention of its use by General Electric's competitors without license from General Electric constitutes a competitive economic advantage over other companies;
 - b. Information consisting of supporting data and analyses, including test data, relative to a process, method or apparatus, the application of which provide a competitive economic advantage, e.g., by optimization or improved marketability;
 - c. 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;
 - d. Information which reveals cost or price information, production capabilities, budget levels or commercial strategies of General Electric its customers or suppliers;
 - e. Information which reveals aspects of past, present or future General Electric customer-funded development plans and programs of potential commercial value to General Electric;
 - f. Information which discloses patentable subject matter for which it may be desirable to obtain patent protection.

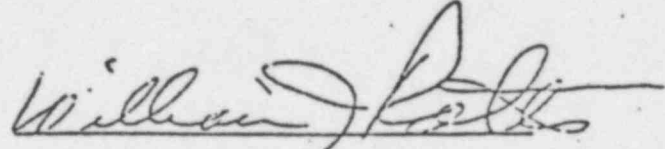
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- g. Information which General Electric must treat as proprietary according to agreements with other parties.
5. Within General Electric Company, access to documents containing proprietary information, including the Reed Report or verbatim extractions of portions thereof, is limited on a "need to know" basis and such documents, including the Reed Report or verbatim extractions of portions thereof, are clearly identified as proprietary.
6. The Reed Report or verbatim extractions of portions thereof has, to the best of my knowledge and belief, consistently been held in confidence by General Electric, no public disclosure has been made and it is not available in public sources. Disclosures of the Reed Report and/or verbatim extractions of portions thereof outside of General Electric Company have been extremely limited:
- a. The Nuclear Regulatory Commission staff examined the Reed Report at General Electric's offices in Washington, D. C. in February, 1976. (No copy of the Reed Report was released.)
- b. In 1976, 1977, and 1978, the staffs of three congressional committees reviewed the Reed Report subject to safeguards designed to protect the proprietary nature of the report. (No copy of the Reed Report was released.)
- c. The Reed Report or verbatim extractions of portions thereof has been made available to counsel and designated technical consultants for parties and Atomic Safety and Licensing Board (Board) members in hearings concerning the issuance of a construction permit for Black Fox Stations 1 and 2 to the Public Service Company of Oklahoma subject to a Protective Order issued by the Board and subject to signed protective agreements implementing the Protective Order.
7. The Reed Report and verbatim extractions of portions thereof have been evaluated in accordance with the criteria mentioned above and have been found to contain information which is proprietary and which is customarily held in confidence by General Electric.
8. Public disclosure of the information sought to be withheld (the Reed Report or verbatim extractions of portions thereof) is likely to cause substantial harm to the competitive position of the General Electric Company and deprive or reduce the availability of profit-making opportunities because disclosure could enable competitors to obtain a better understanding of our product concerns, designs, manufacture, installation, assurance of quality, licensing,

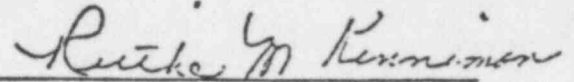
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commercial strategy, and development programs and utilize this information so as to adversely impact General Electric sales. Additionally, the value of reviews such as that conducted by General Electric depends on the participants providing their frank opinions on the matters under review. Public disclosure of the findings and opinions could well jeopardize future efforts of this type of product improvement.



William J. Roths

Subscribed and sworn to before me this 15th day of March, 1979.



Notary Public

My commission expires:

March 28, 1981

2238 096



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555



Attachment 6

Mr. Brian D. Hunt
1534 E. 3rd Street
Tulsa, OK 74120

IN RESPONSE REFER
TO FOIA-79-51

Dear Mr. Hunt:

This is in further response to your letter of February 13, 1979 in which you requested, pursuant to the Freedom of Information Act, "copies of the Reed Report which is in the possession of the NRC." Your request was received by the Office of Administration on February 23, 1979.

For your information, the NRC is in possession of a General Electric (GE) Nuclear Reactor Study on the subject of GE's Boiling Water Nuclear Steam Supply System which was prepared under the direction and supervision of Dr. Charles Reed in 1975 (the Reed Report) and the related Sub-Task Force Reports which serve as appendices to the Reed Report.

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 CFR 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.

This denial may be appealed to the Commission within 30 days from the receipt of this letter. As provided in 10 CFR 9.15, any such appeal

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must be in writing, addressed to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should clearly state on the envelope and in the letter that it is an "Appeal from an Initial FOIA Decision."

Sincerely,

Sheldon J. Wolfe
for

Sheldon J. Wolfe, Chairman
Atomic Safety and Licensing Board

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S. Walfe
EW 450

March 23, 1979

Mr. Brian D. Hunt
1534 E. 3rd Street
Tulsa, OK 74120

IN RESPONSE REFER
TO FOIA-79-51

Dear Mr. Hunt:

This is in further response to your letter of February 13, 1979 in which you requested, pursuant to the Freedom of Information Act, "copies of the Reed Report which is in the possession of the NRC." Your request was received by the Office of Administration on February 23, 1979.

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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 CFR 9.15, any such appeal

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OFFICE					
JMNAME					
DATE					

must be in writing, addressed to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should clearly state on the envelope and in the letter that it is an "Appeal from an Initial FOIA Decision."

Sincerely,

(for) S J Frederick Slus
Sheldon J. Wolfe, Chairman
Atomic Safety and Licensing Board

DISTRIBUTION:

DRR Rdg
DRR Subj
EDO Rdg (5467)
DJDonoghue
JMaynard
EShomaker
JFouchard
BShields
JMFelton
DHGrimsley
JYore
JFrye
SWolfe

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*covered
per conversation
with EShomaker*

RRD BESS

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INITIALS	DHGrimsley	JMFelton	BShields	SWolfe	
DATE	3/23/79	3/23/79	3/23/79	3/1/79	



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

Rec'd: MAR 29 1979
for:

MAR 29 1979

Attachment 7

Mr. Leah S. Kosik
Attorney-at-Law
3454 Cornell Place
Cincinnati, OH 45220



IN RESPONSE REFER
TO FOIA-79-70

Dear Mr. Kosik:

This is in response to your letter of March 7, 1979 in which you request pursuant to the Freedom of Information Act, "copies of the Reed Report which is in the possession of the NRC."

For your information, the NRC is in possession of a General Electric (GE) Nuclear Reactor Study on the subject of GE's Boiling Water Nuclear Steam Supply System which was prepared under the direction and supervision of Dr. Charles Reed in 1975 (the Reed Report) and the related Sub-Task Force Reports which serve as appendices to the Reed Report.

SOI RESS
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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 CFR 9.15, any such appeal

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MAR 29 1979

must be in writing, addressed to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should clearly state on the envelope and in the letter that it is an "Appeal from an Initial FOIA Decision."

Sincerely,

Sheldon J. Wolfe

Sheldon J. Wolfe, Chairman
Atomic Safety and Licensing Board

2238 102

101 8255

Swalfe
EN 450

March 29, 1979

Mr. Leah S. Kosik
Attorney-at-Law
3454 Cornell Place
Cincinnati, OH 45220

IN RESPONSE REFER
TO FOIA-79-70

Dear Mr. Kosik:

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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 CFR 9.15, any such appeal

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OFFICE					
SUMMARY					
DATE					

must be in writing, addressed to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should clearly state on the envelope and in the letter that it is an "Appeal from an Initial FOIA Decision."

Sincerely,

/s/

Sheldon J. Wolfe, Chairman
Atomic Safety and Licensing Board

DISTRIBUTION

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EDO Rdg (5594)
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JMaynard
EShomaker
JFouchard
BShields
JMFleton
DHGrimsley
JYore
JFrye
SWolfe

2238 104

PDR

501 888

*See Concurrence for FOIA-79-51 Identical Letter

OFFICE	ADM: DRR	ADM: DRR	OGC	ASLBP		
SURNAME	DHGrimsley: lms	JMFelton*	BShields*	SJWolfe*		
DATE	3/27/79	3/23/79	3/23/79	3/27/79		

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COUNSEL
JULIUS SCHLEZINGER

*NOT A MEMBER OF THE D.C. BAR

March 28, 1979

Attachment 8

HAND DELIVER

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

Mr. Frederick J. Shon, Member
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. Paul W. Purdom
Director, Environmental Studies
Group
Drexel University
32nd and Chestnut Streets
Philadelphia, Pennsylvania 19104



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Re: Public Service Co. of Oklahoma,
Associated Electric Cooperative,
Inc., and Western Farmers Electric
Cooperative (Black Fox Station
Units 1 and 2), Docket Nos. STN
50-556, STN 50-557

Gentlemen:

On behalf of the General Electric Company (GE), I
respectfully request that the Licensing Board return to GE's

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custody the copy of the Reed Report and related Sub-Task Force Reports which were transmitted to the Board under cover of my letter, dated January 5, 1979, for the Board's use pursuant to the provisions of the Board's Protective Order of the same date in the above-referenced proceeding.

As indicated in this Protective Order, the Reed Report and the related Sub-Task Force Reports were provided to the Board in confidence to enable the Board to conduct an independent review of the Report and rule upon the faithfulness of the verbatim extractions from these reports which GE had prepared. These verbatim extractions were made available to the Board and all parties to this proceeding, subject to the terms of the Order and the protective agreements attached thereto, with respect to existing intervenor contentions, Board questions, and other matters which the Board determined to be necessary for consideration in the Black Fox construction permit proceeding.

GE originally provided the Board and all parties with verbatim extractions from these reports related to intervenor contentions and Board questions. Additional extractions were subsequently provided based upon the Board Questions Presented Pursuant To Protective Order, dated January 17, 1979, and the Board's rulings on those matters as to which disagreement existed among the parties concerning the faithfulness of the original extractions. The Board confirmed the accuracy and faithfulness of all of these verbatim extractions and then conducted hearings in which the issues related to the extractions were addressed in considerable detail. It is GE's understanding that all of the hearings in the Black Fox proceeding have now been completed. The Reed Report and the related Sub-Task Force Reports were provided to the Board for a very limited purpose and, now that these hearings have been completed, that purpose has been satisfied. Indeed, the use of the Report by the Board contemplated under the Protective Order was actually completed once the faithfulness of the last set of extractions was confirmed.

As noted in prior filings by GE in this proceeding with respect to the Reed Report, the Report itself is a comprehensive product improvement study prepared under the supervision of Dr. Charles Reed, Senior Vice President for Corporate Strategic Planning and Studies at GE, which was designed to provide GE with the information necessary to improve its overall competitive position in the nuclear reactor steam supply system business.

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This Report contains highly confidential commercial information, the release of which could cause competitive harm to GE. Under the terms of the protective agreements which all parties in the Black Fox proceeding entered into pursuant to the Board's Protective Order, the Reed Report was made available to these parties for inspection at various GE offices. The Board was provided with a copy of the Report in confidence for the purposes described above.

As the Board knows, GE has rigidly controlled the dissemination of this Report and has always scrupulously avoided any unnecessary disclosure to or retention by outside parties. Since the Board's need for the Report no longer exists, GE therefore respectfully requests that the Board return its copy of the Report to GE. Of course, the Board would retain the extractions from the Report which GE provided. Moreover, GE is willing to make the Report itself available to the Board on an immediate basis at GE's Bethesda, Maryland office, or some other location convenient to the Board, should any need later arise.

GE's request for the return of this document is in keeping with the substantive rights and procedures established in Section 2.790 of the Commission's Rules of Practice, the pertinent case law, and the terms and conditions of the protective order itself.

Under the Commission's Rules of Practice, participants in NRC proceedings have the opportunity to request that any document which they submit in connection with these proceedings be withheld from public disclosure on the ground that it contains privileged or confidential commercial information. 10 C.F.R. § 2.790(b)(1). GE made such a request in this proceeding by virtue of its October 30, 1978 Motion To Quash Intervenor's Subpoena and its memorandum in support of that motion. However, the Rules of Practice also provide that even when a decision has been made that the document should be withheld from public disclosure, the document may still "be subject to inspection" by the Board and other parties in the proceeding under protective order. 10 C.F.R. § 2.790(b)(6). This is precisely what occurred in this proceeding pursuant to the Board's January 5, 1979 Protective Order. In this regard, the Rules also provide that the party who originally requested that the document be withheld

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from public disclosure has the right to request withdrawal of the document and that the document "will be returned" without disclosure to the public in the event that the Commission denies the request for confidential treatment. 10 C.F.R. § 2.790(c). Indeed, in Westinghouse v. U.S. Nuclear Regulatory Commission, 555 F.2d 82, 88 (3rd Cir. 1977), the U.S. Court of Appeals for the Third Circuit noted that under the Commission's Rules of Practice:

[A]n applicant requesting confidentiality has the absolute right to demand the return of any document claimed to contain proprietary information in all NRC proceedings [except rulemaking proceedings] (emphasis added).

The various Protective Agreements under which the Reed Report was provided to the other parties in the Black Fox proceeding all contained the provision that

In the event any NRC regulation, rule or ASLB order, other administrative order, or judicial ruling requires the disclosure of the information without providing the equivalent protection accorded under this Agreement, GE will have the right to immediately withdraw the information from Signator upon request and Signator will promptly abide by that request.

GE originally provided the Reed Report to the Board with the understanding that the same protection would be accorded to GE under the Protective Order with respect to the Board as would be accorded to GE under the Protective Agreements with respect to the other parties to the proceeding. It is GE's understanding that the Licensing Board has recently denied a request for disclosure of the Report under the Freedom of Information

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Act (FOIA). 1/ The very existence of such a request raises the possibility that, if the Report is retained by the Board, 2/ it may not be afforded the same degree of protection which was originally contemplated when the Report was provided to the Board.

1/ The Reed Report is clearly exempt from disclosure under either or both of the tests utilized to determine whether a document falls within Exemption 4 of the FOIA (5 U.S.C. § 552(b)(4)), since the disclosure of the Report would likely (1) cause substantial competitive harm to GE and (2) impair the NRC's ability to obtain such information in the future. See National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974); Porter County Chapter of the Izaak Walton League v. USAEC, 380 F. Supp. 630, 634 (N.D. Ind. 1974). It appears that the Report would also be exempt from disclosure under Exemption 3 of the FOIA (5 U.S.C. § 552(b)(3)) since it was submitted in conjunction with a reactor licensing proceeding and, therefore, under Section 103(b)(3) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2133(b)(3), "may be used by the Commission only for the purposes of the common defense and security and to protect the health and safety of the public." See Westinghouse Electric Corp. v. USNRC, 555 F.2d 82, 89-92 (3rd Cir. 1977).

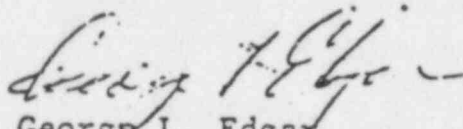
2/ Even though the Board now has custody of a copy of the Report, GE believes that the provisions of the FOIA would not even apply to the Report since it is not an "agency record" within the meaning of the FOIA. Only "agency records" are subject to disclosure under the FOIA. See 5 U.S.C. § 552(a)(6). Mere possession of, control over, or access to a document by an agency at a given point in time does not transform a document into an agency record. See e.g., Goland v. CIA, ___ F. Supp. ___, No. 76-0166 (D.D.C. May 23, 1978). A document, such as the Reed Report, which is not actually a part of the evidentiary record in an agency proceeding and which is not directly utilized in the agency decisionmaking process, but which is prepared and permanently held by a private party and only made available to a government agency as part of the underlying basis for other information that is a part of the record and is

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Accordingly, since the Board's use of the Report contemplated under the Order has been completed, GE respectfully requests that the Board return the Reed Report and the related Sub-Task Reports to the undersigned as soon as possible.

Respectfully submitted,


George L. Edgar
Attorney for
General Electric Company

/mb

cc: All parties on attached Service List

2/ cont.

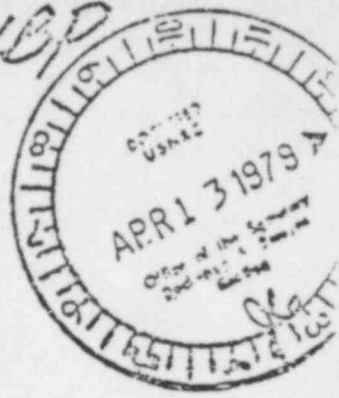
directly utilized by the agency (in this case the extractions from the Report), does not constitute an "agency record" within the meaning of the FOIA. CIBA-GEIGY Corp. v. Mathews, 428 F. Supp. 523 (S.D. N.Y. 1977).

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

PUBLIC SERVICE COMPANY OF OKLAHOMA,
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

Attachment 9

ORDER

In a letter dated March 28, 1979, the General Electric Company requested that the Board return the copy of the Reed Report and related Sub-Task Force Reports which had been sent to us under cover of a letter dated January 5, 1979. Treating GE's request as a Motion, in an Order of April 2, 1979 we requested that Staff advise whether or not it recommended that GE's Motion be granted. On April 9, 1979, Staff filed its response.

The instant Motion is denied.^{1/} In the first place, GE's reliance on 10 C.F.R. § 2.790(c) is misplaced or, at best, is premature since the NRC, to our knowledge, has not acted upon GE's letter of March 15, 1979 requesting that the Reed Report and the verbatim extractions therefrom be exempt from disclosure pursuant to 10 C.F.R. § 2.790

^{1/} The Board has not considered either the conjectural statement at page 5 of GE's letter or the FOIA arguments advanced in footnotes 1 and 2. Pursuant to 10 C.F.R. § 9.15, only the Chairman of a Board (or of the Atomic Safety and Licensing Board Panel, or a designee) initially determines FOIA requests and there are no FOIA requests pending before Chairman Wolfe.

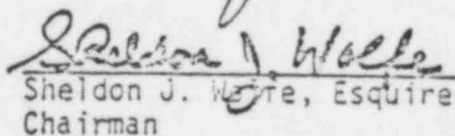
and 10 C.F.R. Part 9. Second, this Board was not requested to nor did it sign the Protective Agreements, and whatever GE's understanding might be, we are not bound by the cited provision of these Protective Agreements. Third, we are unable to comply with GE's request pending appellate review of our ultimate initial decision. For example, in reviewing our in camera rulings on the faithfulness of the verbatim extracts, the Appeal Board may wish to compare in camera the Reed Report with the verbatim extracts. Finally, lest the letter or spirit of the Freedom of Information Act, 5 USC 552, be violated, we could not accede to GE's request at least until such time as the pending FOIA procedures have been concluded.

Dr. Purdom concurs but was unavailable to sign the instant Order.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD


Frederick J. Shon, Member


Sheldon J. Weire, Esquire
Chairman

Dated at Bethesda, Maryland
this 12th day of April, 1979.

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555



April 13, 1979

Attachment 10

Mr. T. RognaId Dankmeyer, Counsel
Nuclear Energy Group
General Electric Company
175 Curtner Avenue
San Jose, California 95125

IN RESPONSE REFER
TO FOIA-79-51 & 79-70

Dear Mr. Dankmeyer:

We have pending Freedom of Information Act requests from Brian Hunt of Tulsa, Oklahoma, and Leah Kosik of Cincinnati, Ohio, for copies of the Reed Report and the related Sub-Task Force Reports which are in the possession of the Black Fox Atomic Safety and Licensing Board.

We are in receipt of your letter of March 15, 1979 and the attached affidavit of William J. Roths. While this information is helpful to the NRC in making its determination to release or withhold the requested documents, it does not alone provide an adequate basis to support your claim for withholding under Exemption 4 of the Freedom of Information Act and 10 CFR 9.5(a)(4) of the Commission's regulations. In this regard, it is NRC's view that the material submitted addressing these considerations merely states conclusions and fails to provide sufficient factual support for these conclusions. Consequently, you may wish to address with greater specificity each of the following considerations as they relate to the current status of the information claimed to be proprietary:

- (i) Whether the requested documents or any portion thereof are available in public sources, and if so, please state the justification for withholding this information;
- (ii) How the public disclosure of the information sought to be withheld is likely to cause substantial competitive harm to the General Electric Company.

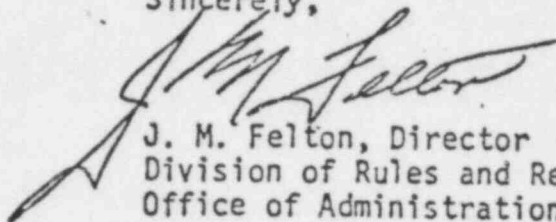
Additionally, the Freedom of Information Act and the Commission's regulations require that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this section." Accordingly, your response to this letter should indicate your position as to what portions, if any, of the Reed Report and the related Sub-Task Force Reports can be released.

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At present, the Atomic Safety and Licensing Board has denied access to the documents in issue pursuant to Exemption (4). The requestors have been informed of this denial. The requestors have also been advised that the NRC is reviewing the proprietary claim of the General Electric Company and that they will be notified if any material can be released to them. To enable the NRC to furnish a timely response to the requestors, it is imperative that we receive your comments no later than April 30, 1979.

Finally, the documents in issue have been maintained in confidence pursuant to the Black Fox Protective Order of January 5, 1979 and only members of the Atomic Safety and Licensing Board have had access to the Reed Report and the related Sub-Task Force Reports. To enable the NRC to review properly your proprietary claim, it will be necessary for members of the NRC legal and technical staff to have access to the requested documents.

Sincerely,



J. M. Felton, Director
Division of Rules and Records
Office of Administration

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SS28-113

MORGAN, LEWIS & BOCKIUS

COUNSELORS AT LAW
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Attachment 11

May 4, 1979



Mr. J. M. Felton
Director
Division of Rules and Records
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: FOIA Nos. 79-51 and 79-70

Dear Mr. Felton:

General Electric Company (GE) is in receipt of your letter dated April 13, 1979 concerning the above-referenced Freedom of Information Act (FOIA) requests to NRC for copies of the Reed Report and the related Sub-Task Force Reports which are currently in the possession of the Atomic Safety and Licensing Board in the Black Fox construction permit proceeding. As you know, these reports were provided to the Black Fox Licensing Board in confidence solely for the purposes specified in the Board's Protective Order, dated January 5, 1979, in that proceeding. As noted in your letter, the Licensing Board has denied these FOIA requests in its initial determinations rendered pursuant to 10 C.F.R. § 9.15(a). In your letter you requested additional information as to (i) whether the requested documents or any portion thereof are available in public sources, and (ii) how the public disclosure of the information sought to be withheld is likely to cause substantial competitive harm to GE.

It is GE's position that 1) the requested documents or portions thereof are not available in public sources, and 2) the public disclosure of those documents is likely to cause

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substantial competitive harm to GE. The Reed Report is an internal product improvement study designed to enhance the availability, and, by necessary implication, the marketability of GE's Boiling Water Reactors (BWR's). The Report contains significant information concerning GE's product improvement program and overall marketing strategy which would be of great value to GE's competitors. Accordingly, the Report has always been held in strictest confidence by GE.

GE's previous submittals to NRC in connection with the Reed Report have briefly addressed both of the points which you raised in your letter. As to the first point, the March 15, 1979 affidavit of William J. Roths, the Manager of the Reliability Engineering Operation for General Electric Company states, inter alia, that

the Reed Report or verbatim extractions or portions thereof has, to the best of my knowledge and belief, consistently been held in confidence by General Electric, no public disclosure has been made and it is not available in public sources.

Moreover, in response to an earlier NRC request for a report on safety-related items discussed in the Reed Report, Glenn G. Sherwood, the Manager of the Safety and Licensing Operation for General Electric Company stated in an affidavit, dated March 22, 1978, that

the information [from the Reed Report related to these items], to the best of my knowledge and belief, has consistently been held in confidence by the General Electric Company, no public disclosure has been made, and it is not available in public sources.

As to the second point, both the Roths and Sherwood affidavits describe in considerable detail how the disclosure of the information contained in the Reed Report is likely to cause substantial competitive harm to GE. Further, in his July 10, 1978 response to Dr. Sherwood's request that the status report

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on the safety-related items taken from the Reed Report be withheld from public disclosure, Roger J. Mattson, the Director of the Division of Systems Safety of the NRC Office of Nuclear Reactor Regulation found that

In essence, your claim is that public disclosure of the list of safety-related items and the summary status report is likely to cause substantial harm to the competitive position of G.E. We agree that if the 'Reed Report' in its entirety were submitted, it should be afforded the protection of proprietary information under the Commission's regulations because it is a product improvement study of important competitive value and because disclosure of this sort of study could act to inhibit thoughtful self-criticism by nuclear equipment vendors since it would enable competitors to obtain a better understanding of a manufacturer's product concerns and programs.

The aggregate list and summary status of the 27 safety-related items is derived from the report and therefore can be afforded the same protection of proprietary information. Because of the historical context of a product improvement study, we agree that the public disclosure of the aggregate list of the 27 issues could cause substantial harm to the competitive position of G.E.

To further assist you in evaluating GE's claim, and in further response to the two points raised in your letter, GE is submitting the detailed information contained herein and in the accompanying affidavit to show that:

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- I. The Reed Report itself is not subject to disclosure pursuant to the FOIA since it is not an agency record within the meaning of the FOIA.
(See Section I below)
- II. The Reed Report is exempt from disclosure since disclosure would not only cause substantial competitive harm to GE, but also impair the Government's ability to obtain necessary information in the future.
(See Section II below and the attached affidavit)
- III. Since the Reed Report was furnished to the Licensing Board in confidence, and pursuant to the Protective Order, disclosure would constitute an abuse of discretion
(See Section III below)
- IV. Since the Reed Report was submitted to the Licensing Board in connection with a licensing proceeding, disclosure of the Reed Report without GE's prior consent would violate the provisions of 10 C.F.R. § 2.790, Section 103(b) of the Atomic Energy Act, and the Trade Secrets Act and would be contrary to the policy embodied in Exemption 3 of the FOIA.
(See Section IV below)
- V. Any arguably non-exempt portions of the Report are "inextricably intertwined" with exempt portions and there are thus no "reasonably segregable" portions of the Report which can be disclosed under the FOIA.
(See Section V below and the attached affidavit)

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I. The Reed Report Itself Is Not Subject To Disclosure Pursuant To The FOIA Since It Is Not An Agency Record Within The Meaning Of The FOIA

The Reed Report was submitted to and used by the Black Fox Licensing Board for certain limited purposes set forth in the Protective Order. GE had originally provided the Licensing Board and all parties to the proceeding with verbatim extractions of the Report related to intervenor contentions in the Black Fox proceeding. Upon completion of the Board's independent review of the Reed Report, consultation among counsel, oral argument before the Board, and rulings thereon, GE produced additional verbatim extractions of the Reed Report related to intervenor contentions and Board questions. These verbatim extractions, and not the Reed Report itself, were then used for purposes of cross-examination, and were admitted into evidence in the Black Fox proceeding. Consequently, the Reed Report itself is not part of the NRC evidentiary record in the Black Fox proceeding, and will not be relied upon by the Licensing Board in reaching an initial decision in this proceeding. For the reasons more fully discussed herein, the Reed Report is therefore not an "agency record" within the meaning of the FOIA and is not subject to disclosure pursuant to that statute.

The only documents which are subject to disclosure pursuant to an FOIA request are actual "agency records." See e.g., 5 U.S.C. § 552(a)(6). The Act itself does not define the phrase "agency records." The NRC regulations implementing the FOIA define "record" as follows:

(b) 'Record' means any book, paper, map, photograph, brochure, punch card, magnetic tape, paper tape, sound recording, pamphlet, slide, motion picture, or other documentary material regardless of form or characteristics made by, in the possession of, or under the control of NRC pursuant to Federal law or in connection with the transaction of public business as evidence of NRC organization, functions, policies, decisions, procedures, operations, programs or other

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activities. 'Records' do not include objects or articles such as structures, furniture, tangible exhibits or models, or vehicles and equipment.
10 C.F.R. § 9.3a(b). (emphasis added).

In CIBA-GEIGY Corp. v. Mathews, 428 F. Supp. 523 (S.D. N.Y., 1977), the district court concluded that data compiled by private researchers working under a government grant were not "agency records" within the meaning of the FOIA and could not be reached by an FOIA request, even though the FDA relied upon a report based on this data in deciding to revise the labeling requirements for the drugs involved. The FDA was operating under the definition of "records" contained in the GSA FOIA regulations, 41 C.F.R. § 105-60.107, which is essentially the same as the NRC definition.

In CIBA-GEIGY, the court concluded that

in evaluating whether these records are agency records, this Court holds that the goals and purposes of the Act would be served best by imposing a standard which calls for proof that the records were either Government-owned or subject to substantial Government control or use. In other words it must appear that there was significant government involvement with the records themselves in order to deem them agency records. 428 F. Supp. at 529. (emphasis added)

The court also concluded that the extent of the government funding, access to, or reliance on the documents would indicate whether or not such "significant government involvement with the records themselves" existed. The court concluded that federal funding under the grant did not vest the documents in question with a public character. With respect to "access" the court pointed out that the documents were never "permanently" in the government agency's possession, and, in any event, that "mere possession at a particular point in

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time [does not transform] the nature of the documents." 428 F. Supp. at 531. See also Goland v. CIA, ___ F. Supp. ___ (D.D.C. May 23, 1978).

The CIBA-GEIGY court discussed several other recent FOIA cases and found that the documents released in these other cases were

clearly distinguishable from the data in question here, which is permanently held by private parties and not directly utilized in agency decisionmaking. 428 F. Supp. at 531 (emphasis added).

In this regard, the Court also noted that

mere access without ownership and mere reliance without control will not suffice to convert the . . . data into agency data. Id. (emphasis added).

With respect to the "reliance" factor, the court found that there was no direct reliance on the underlying data by any of the agencies involved and finally concluded that

the raw data of the research organization's study was its own private property and not Government property. Because there has not been an adequate showing that the underlying data of the researchers was directly controlled or substantially utilized by a Government agency in the performance of governmental operations, the records cannot be deemed 'agency records' for the purposes of disclosure under the FOIA. 428 F. Supp. at 532. (emphasis added).

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Applying the CIBA-GEIGY approach in this instance compels the conclusion that the Reed Report is also not an agency record. The Reed Report is an internal GE product improvement study which was merely in the possession of the Licensing Board in the Black Fox proceeding for certain limited purposes set forth in the Protective Order. The Reed Report was reviewed by the Board and utilized to evaluate the faithfulness of all of the verbatim extractions which GE had provided with respect to both intervenor contentions and Board questions. Similarly, the data in CIBA-GEIGY had been made available to the FDA to evaluate the accuracy of the report on which FDA was actually going to base its labeling decision. The Reed Report itself is not a part of the evidentiary record in the Black Fox proceeding. The verbatim extractions, not the Report itself, will be relied upon by the Board in making findings of fact in this proceeding. The temporary possession of the Reed Report by the Board for the purposes set forth in the Protective Order simply cannot transform the Report into an agency record within the meaning of the FOIA.

The functional analysis provided in the CIBA-GEIGY decision delineating the boundaries of the FOIA's applicability has been endorsed by FOIA commentators. For example, in its annual review of developments under the FOIA for 1977, the Duke Law Journal concluded:

The approach of the CIBA-GEIGY court, which focuses on the underlying purpose of the Act, provides a margin of protection for private ownership interests at the very threshold of the FOIA. . . . The flexible test relied upon in CIBA-GEIGY offers a helpful avenue of analysis which insures that the Act will not be abusively used to reach information bearing only a tangential relationship to government function. Notes, Developments Under the Freedom of Information Act - 1977, 1978 Duke L. J. 189, 192.

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A similar approach was also followed by the U.S. Court of Appeals for the District of Columbia Circuit in Forsham v. Califano, ___ F.2d ___, Civil Action No. 75-1608 (D.C. Cir. July 11, 1978). In Forsham, the court held that research data on the use of certain drugs in the treatment of diabetes were not agency records subject to disclosure within the meaning of the FOIA merely because funding for the collection of such data was provided under federal grants and various federal agencies had access to and utilized this data. The D.C. Circuit reached this conclusion even though portions of this data were relied upon by FDA in a proceeding before that agency related to one of the drugs under investigation and even though these portions of the data were previously made available to the parties to that proceeding.

In like manner here, even though verbatim extractions from the Reed Report were made available to parties to the Black Fox proceeding pursuant to the protective agreement and even if the Board may rely on these verbatim extractions in this proceeding, the Reed Report itself cannot be considered to be an actual agency record within the meaning of the FOIA. See also cases cited at n. 3 in Judge Bazelon's dissenting opinion in Forsham. Under the tests set forth in both the CIBA-GEIGY and Forsham decisions, the Reed Report cannot be considered an agency record within the meaning of the FOIA. Accordingly, the provisions of the FOIA, and the NRC regulations in Subpart A of 10 C.F.R. Part 9 implementing FOIA, are inapplicable to the Reed Report and the Report cannot be disclosed under the FOIA.

II. The Reed Report Is Exempt From Disclosure Since Disclosure Would Not Only Cause Substantial Competitive Harm To GE, But Also Impair The Government's Ability To Obtain Necessary Information In The Future

In response to NRC's request, the attached affidavit provides additional information to demonstrate that disclosure of the Reed Report would cause substantial competitive harm to GE. Although this would be sufficient to support a claim for withholding under Exemption 4 of the FOIA, the Reed Report is also exempt under Exemption 4 since its disclosure would impair

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the Government's ability to obtain necessary information in the future. In what follows, GE will develop the pertinent case law concerning Exemption 4 to show that the Reed Report qualifies for exemption on both of the foregoing bases.

Even if the Reed Report is somehow considered to be an "agency record" within the meaning of the FOIA, the Report is exempt from disclosure under Exemption 4 of the Act. Exemption 4 of the FOIA precludes the disclosure of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Although the terms "confidential" and "commercial" are not defined in the Act, these terms should be afforded their ordinary meaning within a business context. See American Airlines v. National Mediation Board, 453 F. Supp. 430 (S.D. N.Y. 1978); Brockway v. Dept. of Air Force, 370 F. Supp. 738, 740 (N.D. Iowa), rev'd on other grounds, 518 F.2d 1184 (8th Cir. 1975). As noted in the various affidavits which GE has submitted to NRC in connection with this matter, GE has utilized the definitions set forth in the American Law Institute Restatement of Torts in designating the material contained in the Reed Report as proprietary. The use of this definition has been cited with approval by the Supreme Court for other purposes. Kewanee Oil Co v. Bicorn Corp., 416 U.S. 470, 474-75 (1974).

As a general rule, Exemption 4 is designed to protect the confidentiality of information which is obtained by the government but which would customarily not otherwise be released to the public by the person from whom it was obtained. Pacific Architects and Engineers, Inc. v. Renegotiation Board, 550 F.2d 383 (D.C. Cir. 1974); Sterling Drug v. FTC, 450 F.2d 698 (D.C. Cir. 1971). In addition, Exemption 4 serves the important function of protecting the privacy and competitive position of a company which provides information to a government agency to assist that agency in the performance of its statutory responsibilities. Bristol Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir.), cert denied, 400 U.S. 824 (1970).

The dual purposes of Exemption 4 are reflected in the tests to be employed to determine whether any given document is exempt from disclosure. Under Exemption 4 the tests are whether it is likely that disclosure would either "impair the

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Government's ability to obtain necessary information in the future" or "cause substantial harm to the competitive position of the person from whom the information was obtained." National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974); Continental Oil Co. v. FPC, 519 F.2d 31, 35 (5th Cir. 1975), cert denied sub nom, Superior Oil Co. v. FPC, 425 U.S. 971 (1976).

GE's October 30, 1978 Memorandum in Support of its Motion to Quash in the Black Fox proceeding and the affidavit attached to this letter, as well as the Roths affidavit submitted on March 15, 1979, make it abundantly clear that the Reed Report qualifies for exemption from disclosure under both of these tests.

As to the first test, it is noteworthy that the July 10, 1978 determination issued by the Director of the Division of Systems Safety of NRC's Office of Nuclear Reactor Regulation found that information concerning the so-called 27 safety-related items in the Reed Report qualified for withholding, based, in part, upon his view that the entire Reed Report would also qualify for withholding. Consistent logic would compel a similar result now with respect to the entire Reed Report. Moreover, the Protective Order issued by the Licensing Board and the prior NRC denials of the FOIA requests explicitly recognized that disclosure of the Report could cause substantial harm to GE's competitive position. As to the second test, GE voluntarily entered into settlement negotiations and voluntarily supplied this information to NRC. Thus, the fact that the Licensing Board had previously subpoenaed this information does not negate the fact that disclosure would also likely impair NRC's ability to obtain similar information in the future. See Amway Corp. v. FTC, Civil Action No. 75-1274, 1976-1, Trade Cas. ¶ 60,798 (D.D.C. Mar. 10, 1976).

In an analogous situation in Porter County Chapter of the Izaak Walton League of America, Inc. v. USAEC, 380 F. Supp. 630 (N.D. Ind. 1974), the court upheld the AEC's denial of an FOIA request seeking disclosure of proprietary information submitted to the AEC by GE in connection with the Bailly construction permit proceeding. In so ruling, the court stated

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[U]nrestricted release of such private commercial information would tend to adversely affect the Government's own ability to gain access to similar information in the future. Ultimately, such release could seriously affect the thoroughness of AEC review of license applications and have an adverse impact on public health and safety. 380 F. Supp. at 634.

The attached affidavit provides additional information to demonstrate that the disclosure of the Reed Report would cause substantial competitive harm to GE and impair NRC's ability to obtain similar information in the future. On this basis, disclosure of the Reed Report would contravene Exemption 4 in the following respects:

- a. The Reed Report is an internal product improvement study with the objective of enhancing the availability of GE's product. The disclosure of the Reed Report would provide GE's competition with an identification of the specific area where GE's product improvement efforts would be focused, and the recommended actions which could be taken to effectuate those improvements. This would effectively provide GE's competition with GE's "game plan" for product improvement, and without any significant expenditure of resources, enable them to adjust or modify their own activities to obtain a competitive advantage vis a vis GE. In short, the competition would receive a significant windfall of vital strategic information. As a corollary, the same competitors would have access to frank statements of fact and opinion which would identify a comprehensive array of GE's views as to availability problem areas, the significance of those areas, and actions for addressing each area. It goes without saying that, given the highly competitive dynamics of the nuclear industry, GE's competition could also use the Reed

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Report to cast aspersions on the availability of GE's products and adversely influence purchasing decisions by GE's existing and potential customers.

- b. The Reed Report was never intended as a safety study and was intended to provide an objective assessment of the need for and potential value of product improvements in regard to availability. In spite of the essential business purpose of the document, certain availability issues discussed in the Report could in another context have safety significance. Although by virtue of its purpose and objectives the Reed Report does not address the safety significance of such issues, the ASLB believed that the information may have had some relevance to the Black Fox proceeding. Notwithstanding the fact that the subpoena in that proceeding was clearly untimely, and grounded upon a tenuous showing of relevance and necessity, GE entered into settlement negotiations which led to GE's providing the Board with a copy of the Reed Report. Given these circumstances, one could fully expect that the disclosure of the Reed Report would have a chilling effect upon any future product improvement studies and on the willingness of GE and other vendors to reach any future accommodations in NRC proceedings similar to that reached in Black Fox. This would inevitably impair NRC's ability to obtain similar information in the future.

Accordingly, GE submits that any reasoned analysis of this information, in conjunction with the information submitted previously on this subject, leads to the ineluctable conclusion that the Reed Report is exempt from disclosure under Exemption 4 of the FOIA.

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III. Since The Reed Report Was Furnished To The Licensing Board In Confidence, And Pursuant To The Protective Order, Disclosure Would Constitute An Abuse Of Discretion

The validity of any NRC determination with respect to the disclosure of the Reed Report must be viewed within the context of the unique circumstances of this case and the manner in which the Licensing Board came into possession of a copy of this Report. The Licensing Board in the Black Fox proceeding issued a subpoena duces tecum to GE for the Reed Report on October 10, 1978. GE appeared specially on October 30, 1978 and moved to quash this subpoena on the grounds, inter alia, that production of the Report could result in substantial competitive harm to GE since the Report contained confidential commercial information.

In response to a suggestion from the Board during oral argument on this motion and in order to avoid protracted litigation, GE entered into settlement negotiations with the other parties to the proceeding. A settlement agreement was negotiated by the parties and subsequently adopted by the Board whereby, inter alia, GE provided a copy of the Report to the Licensing Board in confidence for the limited purposes listed in the Board's January 5, 1979 Protective Order.

The Licensing Board also adopted the Protective Order which GE had prepared for the Board's signature as part of this settlement agreement. In this Order the Board specifically ordered that "there were no countervailing considerations militating in favor of public disclosure to this report which clearly outweigh the potential harm to the General Electric Company" and that "the scope of discovery of said report shall be limited to protect against disclosure of the information contained in the report to the general public."

Moreover, the various Protective Agreements under which the Reed Report was provided to the other parties in the Black Fox proceeding all contained the provision that

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In the event any NRC regulation, rule or ASLB order, other administrative order, or judicial ruling requires the disclosure of the information without providing the equivalent protection accorded under this Agreement, GE will have the right to immediately withdraw the information from Signator upon request and Signator will promptly abide by that request.

Without the assurances against public disclosure contained in both the Protective Order and the Protective Agreements, GE would not have voluntarily provided the Board with a copy of the Report. Although the Board itself did not sign a Protective Agreement at that time, and recently denied GE's request for the return of the Report pending completion of the Black Fox proceeding, GE certainly had every reason to expect (i) that the Board would protect the Reed Report consistent with the terms of the Protective Order and the Protective Agreement when it provided the Report to the Board in confidence, and (ii) that the Report itself would receive the protection afforded by 10 C.F.R. § 2.790.

As a general rule, information which "is obtained in large part through promises of confidentiality must be kept confidential." See e.g., Brockway v. Dept. of Air Force, 518 F.2d 1184, 1194 (8th Cir. 1975). More specifically, the disclosure pursuant to an FOIA request of commercial information submitted to an agency by a private party after, and in reliance upon, assurances of confidentiality with respect to that information have been made to the private party by that agency, constitutes an abuse of discretion. Metropolitan Life Insurance Co. v. Usery, 426 F. Supp. 150, 172 (D.D.C. 1976). See Charles River Park "A", Inc. v. HUD, 519 F.2d 935, 943 (D.C. Cir. 1975). Cf. Chrysler Corp. v. Brown, ___ U.S. ___, No. 77-922 (April 18, 1979), n. 49. An agency action which constitutes an abuse of discretion is a violation of the Administrative Procedure Act and must be set aside upon review. 5 U.S.C.A. § 706(2)(A); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

Given the fact that GE would not have voluntarily provided NRC with a copy of the Reed Report without these assurances

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of confidentiality, NRC cannot disclose the Reed Report under the FOIA without violating the provisions of the Administrative Procedure Act. See Chrysler v. Brown, supra.

IV. Since The Reed Report Was Submitted To The Licensing Board In Connection With A Licensing Proceeding, Disclosure Of The Reed Report Without GE's Prior Consent Would Violate The Provisions Of 10 C.F.R. § 2.790, Section 103(b) Of The Atomic Energy Act, And The Trade Secrets Act And Would Be Contrary To The Policy Embodied In Exemption 3 Of The FOIA

As indicated earlier, the Reed Report was provided to an NRC Licensing Board during the course of the Black Fox proceeding in accordance with the procedures governing the conduct of such proceeding set forth in the NRC Rules of Practice, 10 C.F.R. Part 2. More specifically, the Reed Report was provided to the Licensing Board in confidence in accordance with the provisions of 10 C.F.R. § 2.790 governing the production and protection of confidential commercial information submitted in connection with such proceedings. Pursuant to 10 C.F.R. § 2.740(c), the Licensing Board's January 5, 1979 Protective Order restricted the disclosure of the Reed Report in that proceeding subject to the provisions of 10 C.F.R. §. 2.790.

Nevertheless, your letter suggests that NRC is evaluating the question of disclosure of the Reed Report solely on the basis of Subpart A of 10 C.F.R. Part 9, NRC's FOIA regulations (e.g., whether the Reed Report is exempt under 10 C.F.R. § 9.5(a)(4) and whether there are any "reasonably segregable" portions under 10 C.F.R. § 9.5(b). Given the circumstances of this case, 10 C.F.R. Part 9 cannot be read in isolation in order to determine whether all or any part of the Reed Report can or should be disclosed; rather, it is 10 C.F.R. § 2.790 which is controlling. At the very least, 10 C.F.R. Part 9 must be read in pari materia with the requirements of 10 C.F.R. § 2.790 and the underlying statutory provisions related to 10 C.F.R. § 2.790.

Under Section 2.790, participants in NRC proceedings have the opportunity to request that any document which they submit in connection with such proceedings be withheld from public disclosure on the ground that it contains privileged or

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confidential commercial information. 10 C.F.R. § 2.790(b)(1). GE made such a request in this proceeding by virtue of its October 30, 1978 Motion To Quash Intervenor's Subpoena and its memorandum in support of that motion. This request was renewed in Mr. Dankmeyer's letter of March 15, 1979 to Mr. Samuel J. Chilk, the Secretary of the Nuclear Regulatory Commission. However, § 2.790 also provides that even when a decision has been made that the document should be withheld from public disclosure, the document may still "be subject to inspection" by the Board and other parties in the proceeding under protective order. 10 C.F.R. § 2.790(b)(6). This is precisely what occurred in this proceeding pursuant to the Board's January 5, 1979 Protective Order. In this regard, § 2.790 also provides that the party who originally requested that the document be withheld from public disclosure has the right to request withdrawal of the document and that the document "will be returned" without disclosure to the public in the event that the Commission denies the request for confidential treatment. 10 C.F.R. § 2.790(c). Indeed, in Westinghouse Electric Co. v. NRC, 555 F.2d 82 (3d Cir. 1977), the Third Circuit observed that under § 2.790:

[A]n applicant requesting confidentiality has the absolute right to demand the return of any document claimed to contain proprietary information in all NRC proceedings [except rulemaking proceedings] 555 F.2d at 88 (emphasis added).

The Reed Report was obtained by the NRC as a result of a subpoena issued during the course of an adjudicatory proceeding. In this regard, the Westinghouse court also concluded that "Congress must have intended the agency be subject to the established general law applicable to administrative agencies, including the case law respecting the protection of proprietary information obtained by compulsory process." 555 F.2d at 93. See also Wearly, et al. v. FTC, ___ F. Supp. ___, 44 Ad. L. 2d 1045 (D.N.J. 1978) (failure to provide adequate protection to assure confidentiality of proprietary information, when disclosure to the government is compelled by subpoena, amounts to unconstitutional "taking" and FTC has no right to release such information under the FOIA).

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Accordingly, GE has an absolute right to demand the return of the Reed Report if NRC should determine that the Reed Report is not exempt from disclosure under 10 C.F.R. § 2.790, and NRC must comply with this demand prior to any public disclosure of this Report. */ Any public disclosure of the Report, or any portions thereof, by the NRC, pursuant to an FOIA request or otherwise, in contravention of the procedure outlined above would constitute a violation of 10 C.F.R. § 2.790. Moreover, as shown below, such a disclosure would also violate the underlying statutory provisions upon which 10 C.F.R. § 2.790 is based as well as the policies embedded in Exemption 3 of the FOIA.

Exemption 3 of the FOIA precludes the disclosure of information which is "specifically exempted from disclosure by statute" provided such statute "leaves no discretion on the issue" or "establishes particular criteria for withholding" or "refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3). The Reed Report is "specifically exempted from disclosure" within the meaning of Exemption 3 under both the Trade Secrets Act, 18 U.S.C. § 1905, and Section 103(b)(3) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2133 (b)(3), by virtue of the operation of 10 C.F.R. § 2.790.

The Trade Secrets Act, in pertinent part, imposes criminal sanctions on any "officer or employee of the United States or any department or agency" of the United States who "discloses or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties" if such information "concerns or relates to the trade secrets, processes, operations, style of work, or apparatus" of any business entity. 18 U.S.C. § 1905.

Section 103(b) of the Atomic Energy Act provides in pertinent part that

*/ As noted previously, GE has requested that the Licensing Board return the Reed Report to GE's custody, subject to GE's making the Report available to the Licensing Board or Appeal Board as needed in the future. The Licensing Board denied this request as premature in its Order dated April 12, 1979. Nevertheless, GE was acting within its rights in making this request and does not intend to waive any such rights in providing this response. Should any doubt exist on this point, GE requests that this letter be treated as a reiteration of that request.

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The Commission shall issue licenses on a non-exclusive basis to persons applying therefor . . . (3) who agree to make available to the Commission such technical information and data concerning activities under such licenses as the Commission may determine necessary to promote the common defense and security and to protect the health and safety of the public. All such information may be used by the Commission only for the purposes of the common defense and security and to protect the health and safety of the public. 42 U.S.C. § 233(b) (emphasis added).

Congress adopted Exemption 3 of the FOIA in its present form in response to the Supreme Court's decision in FAA v. Robertson, 422 U.S. 255 (1975) in order to narrow the scope of this exemption. However, both the Trade Secrets Act and Section 103(b)(3) of the Atomic Energy Act are still "exemption statutes" within the meaning of Exemption 3 since they are "delegations of authority to withhold information" and "refer to the particular types of matters to be withheld." See FAA v. Robertson; Chrysler v. Brown.

The regulations which NRC has adopted to implement the requirements of the Atomic Energy Act and the Trade Secrets Act concerning the production and protection of proprietary information are contained in 10 C.F.R. § 2.790, not 10 C.F.R. Part 9. Since these regulations must be consistent with the requirements of both the Trade Secrets Act and Section 103(b)(3) of the Atomic Energy Act, the question of whether disclosure of the Reed Report is permissible under either or both of these statutes, and, by necessary implication, whether Exemption 3 is applicable in this instance, hinges upon whether disclosure is permissible under 10 C.F.R. § 2.790, not 10 C.F.R. Part 9. See Chrysler v. Brown, supra, n. 49; Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190, 1203 (4th Cir. 1975); Sears Roebuck & Co. v. GSA, 553 F.2d 1378, 1383-85 (D.C. Cir. 1977).

In upholding the validity of Section 2.790 in Westinghouse Electric Co. v. NRC, 555 F.2d 82 (3d Cir. 1977),

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the Third Circuit had occasion to review the interrelationships among this regulation, Section 103(b) of the Atomic Energy Act, the Trade Secrets Act and the FOIA. In particular, the Court noted that in one of the later drafts of what was to become the Atomic Energy Act of 1954, Section 103(b)(3) stipulated that proprietary information provided to the Commission in connection with licensing proceedings could be used by the Commission "only for the purposes of common defense and security and to protect the health and safety of the public and for no other purpose." 555 F.2d at 90. The Court also noted that this language "was added to express a strong congressional policy against disclosure of proprietary information" and, although the phrase "and for no other purpose" was subsequently deleted to insure that Section 103(b)(3) did not limit the use of such information by the government, that "deletion does not appear to have been intended to alter the congressional policy against nondisclosure of such information." 555 F.2d at 91.

The Court also concluded that any release of information in accordance with the § 2.790 would be "authorized by law" and therefore permissible under the Trade Secrets Act (555 F.2d at 94) and that

there was no reason to believe that in applying this test [for release of information contained in §2.790] NRC will disregard the long-standing congressional policy [articulated in § 103(b)(3) of the Act] which disfavors disclosure of proprietary information or that NRC will disclose proprietary information obtained in a licensing proceeding other than such as bears on defense and health and safety. 555 F.2d at 92.

Accordingly, any public disclosure of the Reed Report by NRC pursuant to 10 C.F.R. Part 9 without the prior consent of GE or without providing GE with the opportunity to withdraw the Report prior to such disclosure would violate 10 C.F.R. § 2.790, Section 103(b)(3) of the Atomic Energy Act and the Trade Secrets Act. As a result, the Reed Report must

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be considered exempt from disclosure under Exemption 3 of the FOIA by virtue of the operation of 10 C.F.R. § 2.790 and these two statutes until such time as NRC obtains GE's consent to its release or GE elects not to withdraw the Report upon notification by NRC that the Report is not exempt from disclosure under 10 C.F.R. § 2.790. As is the case with Exemption 4, any disclosure of the Report in violation of § 2.790 and these statutes would constitute an abuse of NRC discretion under the Administrative Procedure Act.

V. Any Arguably Non-Exempt Portions Of The Report Are "Inextricably Intertwined" With Exempt Portions And There Are Thus No "Reasonably Segregable" Portions Of The Report Which Can Be Disclosed Under The FOIA

The attached affidavit demonstrates that, given the purpose and contents of the Reed Report, there are no reasonably segregable portions which can or should be disclosed to the public. Consequently, even if Part 9 applies in this instance, disclosure is not warranted.

The "reasonably segregable" provision of the FOIA was added by Congress in the 1974 amendments to the Act. However, this provision actually merely codified existing law. See EPA v. Mink, 410 U.S. 73 (1973). It should be noted that material which is "inextricably intertwined" with exempt material is itself exempt from disclosure by virtue of such inextricable intertwining, and that it is only material which is non-exempt and also not "inextricably intertwined" that may or may not be "reasonably segregable," and therefore possibly subject to disclosure under the Act. See generally, Attorney General's Memorandum on the 1974 Amendments to the FOIA.

The Reed Report is a complex array of fact and opinion which was prepared by a blue-ribbon panel of GE experts with the objective of improving the availability and competitive prospects of GE's product. The Report itself and the presentation, selection, characterization, and opinion of those facts by this blue-ribbon panel have never been made public. Surely, NRC can appreciate the intense competition among nuclear steam

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supply vendors, and the impact which the decreasing number of orders for new nuclear plants in recent years has had upon that competition. Thus, the smallest competitive edge obtained by a competitor can yield a disproportionately significant competitive advantage.

In the instant case, the mere fact that a particular fact is identified in the Reed Report by the blue-ribbon panel carries with it a direct signal to the competition of the significance of that fact from a product improvement standpoint. Moreover, if the facts in the Reed Report are viewed as a whole, GE's competition would obtain a complete picture of the array of issues which are significant to product improvement. In essence, these facts would precisely define the problem of product improvement. Beyond this, the characterization of fact and recommendations for action by the blue-ribbon panel provide the competition with a more finely tuned definition of the problem, and ultimately, a complete game plan to track GE's future product improvements in the marketplace. Consequently, any single fact in the Reed Report cannot be divorced from the fact that it was identified as significant by a task force charged with recommending product improvements. In addition, any characterization of those facts cannot be divorced from the source of that characterization.

Likewise, the totality of those facts cannot be disclosed without providing the competition with the totality of GE's problem definitions, and, of course, the ultimate recommendations cannot be disclosed without providing a complete windfall to the competition. Given the particular competitive circumstances in which GE is placed, even the most limited disclosure would enable competitors to gain a significant advantage in anticipating GE's product improvement. Moreover, even the most limited disclosure of fact -- being indelibly associated with the purpose and constitution of the Reed Report and Task Force -- cannot be disclosed without significant potential for negative aspersions by GE's competition. NRC must also surely recognize the adverse impact on potential customers that would be associated with the disclosure of the details of one company's searching self-analysis on product availability.

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In situations where a document goes beyond a mere recitation of primary facts, includes a characterization of those facts as they relate to a confidential business purpose, and is indelibly identified with that confidential business purpose, the entire document is exempt from disclosure since the non-exempt portions of the document are "inextricably intertwined" with the exempt portions. See e.g., Montrose Chemical Corp. v. Train, 491 F.2d 63 (D.C. Cir. 1974); Washington Research Project v. HEW, 504 F.2d 238, 250-51 (D.C. Cir. 1974).

Portions of the Reed Report, whether fact or opinion, can be pieced together by competitors to reconstruct confidential information which would substantially disadvantage GE in the marketplace (see, e.g., Fisher v. Renegotiation Board, 473 F.2d 109, 113 (D.C. Cir. 1972)) and the release of this information to GE's competitors would be akin to giving an opposing team a "game plan" or a "play book" before a football game. Cuneo v. Schliesinger, 484 F.2d 1086, 1089 (D.C. Cir. 1973). Since any meaningful non-exempt portions of the Reed Report are not severable from the Report without compromising the exempt portions of the Report, those portions are not subject to disclosure either. See Brockway v. Dept. of Air Force 518 F.2d at 1194; American Federation of Gov't Employees v. Dept. of Army, 441 F. Supp. 1308 at 1312-13 (D.D.C. 1977); Amway Corp. v. FTC, 1976-1 Trade Cas. at 68,441-45. NRC is therefore not required "to commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately have minimal or no information content." Mead Data Central v. Dept. of Air Force, 566 F.2d 242, 261, n. 55 (D.C. Cir. 1977).

To recapitulate, on the basis of the foregoing, GE submits that (1) the Reed Report is not an agency record and therefore not subject to disclosure under the FOIA, (2) the Reed Report is exempt from disclosure under Exemption 4 of the FOIA, (3) disclosure of the Reed Report by NRC would constitute an abuse of discretion, (4) disclosure of the Reed Report without GE's prior consent would violate 10 C.F.R. § 2.790, the statutes upon which that regulation is based, and the policies embodied in Exemption 3 of the FOIA, and (5) the entire Reed Report is exempt from disclosure.

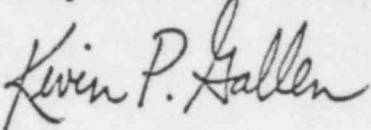
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Since any additional access to the Reed Report by NRC's legal and technical staff without the express consent of GE would be contrary to the spirit, if not the letter, of the Protective Order, GE respectfully requests that NRC conduct a thorough review of the foregoing analysis, the affidavit attached hereto, and the other materials previously submitted to NRC in connection with this matter before making any determination as to whether such additional access is either necessary or desirable.

If GE can provide any additional information with respect to any of the matters discussed above, please contact the undersigned.

Respectfully submitted,

for 
George L. Edgar
Attorney for
General Electric Company

/mb1

Attachment

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GENERAL ELECTRIC COMPANY

AFFIDAVIT OF

WILLIAM J. ROTHS

I, William J. Roths, being duly sworn, depose and state as follows:

1. I am Manager of the Reliability Engineering Operation of the Nuclear Energy Group of the General Electric Company ("GE") and have been authorized by GE to state that GE considers the information described in paragraph 2 as proprietary information and exempt from disclosure under the FOIA pursuant to 10 C.F.R. § 2.790 and 10 C.F.R. Part 9 of the Commission's regulations.
2. The Nuclear Reactor Study dated July 1975 on the subject of GE's Boiling Water Reactor Nuclear Steam Supply System and known as the "Reed Report" was the product of a study conducted at the request of the Chairman of the Board of GE by a task force chaired by Dr. Charles E. Reed, Senior Vice President for Corporate Strategic Planning and Studies. The Reed Report or verbatim extractions of portions thereof has, to the best of my knowledge and belief, consistently been held in confidence by GE, no public disclosure has been made and it is not available in public sources. Disclosures of the Reed Report and/or verbatim extractions of portions thereof outside of GE have been limited to the following instances:
 - a. The Nuclear Regulatory Commission staff examined but was not permitted to retain a copy of the Reed Report at GE's offices in Washington, D. C. in February, 1976. (No copy of the Reed Report was released.)
 - b. In 1976, 1977, and 1978, the staffs of three congressional committees reviewed the Reed Report subject to safeguards designed to protect the proprietary nature of the report. (No copy of the Reed Report was released.)
 - c. The Reed Report or verbatim extractions of portions thereof has been made available to counsel and designated technical consultants for parties and Atomic Safety and Licensing Board (Board) members in hearings concerning the issuance of a construction permit for Black Fox Stations 1 and 2 to the Public Service Company of Oklahoma subject to a Protective Order issued by the Board and subject to signed protective agreements implementing the Protective Order.

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- d. Portions of the Report have been made available to Counsel in connection with an NRC licensing proceeding.
3. The Reed Report discusses potential improvements which could be made in GE nuclear reactors, as well as organizational and other internal changes that GE could make, all to improve the availability and competitive advantage of GE's product. While many of the separate technical issues which are discussed in the Report may be in public sources, such as the NRC public document room or GE communications to customers, neither the identity of the issues considered by the Reed Report, nor the analyses of and opinions concerning the issues contained in the Report have ever been available in public sources. Thus, the Reed Report is a document containing material available in public sources inextricably intertwined with material that has never been revealed to the public. No portion can be reasonably segregated so as to avoid revealing information relating to the choice of issues discussed or analyses undertaken.
4. a. The Reed Report is an internal product improvement study with the objective of enhancing the availability and competitive advantage of GE's product. The disclosure of the Reed Report would provide GE's competitors with an identification of the specific areas where GE's product improvement efforts would be focused, and the recommended actions which could be taken to effectuate those improvements. In addition, the fact that a particular issue is identified in the Reed Report carries with it a direct signal to GE's competitors of the significance of that issue from a product improvement standpoint. Moreover, if the facts in the Reed Report are viewed as a whole, GE's competitors would obtain a complete picture of the array of issues which are significant to product improvement. The characterization of fact and recommendations for action in the Reed Report provide GE's competitors with an even more finely tuned definition of the problem, and ultimately, a complete game plan to track GE's future product improvements in the marketplace. This would provide GE's competitors with GE's strategic plan for product improvement, and, without any significant expenditure of resources, enable them to adjust or modify their own activities to obtain a competitive advantage. In addition, since the intent of the Reed Study was to identify potential improvements in the GE product, the Reed Report is a very one-sided view in that it presents only weaknesses and potential changes to improve them. Such information could be used by competitors to discredit GE's product.

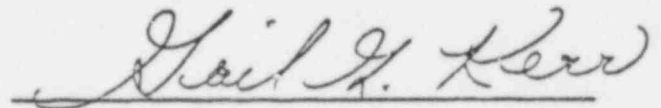
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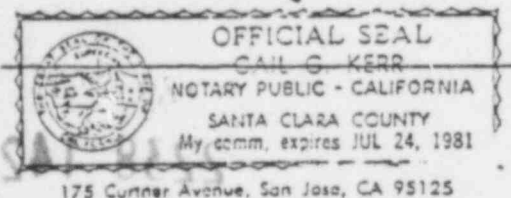
- b. By its very nature, the Reed Report was not intended to be a document to which customers had access; no attempt was made in the document to balance the opinions (by stating contrary opinion, analyzing the costs of particular changes or prioritizing the improvements in terms of the importance of the problems addressed or the likelihood of successful implementation of an improvement) stated in the Report or to answer the concerns which such opinions would be likely to raise. Consequently, disclosure of the Reed Report would cause substantial competitive harm to GE because potential customers might be less likely to buy the GE product after reading the one-sided view presented.


William J. Roths

Subscribed and sworn to before me this 21st day of May,
1979.


Notary Public

My commission expires:



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April 13, 1979

BY HAND

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

Attachment 12

Mr. Frederick J. Shon, Member
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555



Dr. Paul W. Purdom
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Re: In the Matter of the Application of
Public Service Company of Oklahoma,
Associated Electric Cooperative, Inc.
and Western Farmers Electric Cooperative
(Black Fox Station, Units 1 and 2)
Docket Nos. STN 50-556, STN 50-557

Gentlemen:

In accordance with the request contained in your Order of April 2, 1979 in the above-referenced proceeding, on April 9, 1979 the NRC Staff filed its "Response to General Electric's Request For Licensing Board To Return Reed Report." In this Response, the Staff concluded that GE's request for the return of this report was "premature" and should be denied without prejudice to GE's right to resubmit the motion after the Board "has completed its Partial Initial Decision in this matter and all appellate review is completed." The Staff

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opposed the return of the Report at this juncture because (1) the Board will have "a continuing need for access to the full report" until it completes its decision, and (2) the Appeal Board has indicated in other proceedings that it has the authority to "take testimony and determine factual matters de novo."

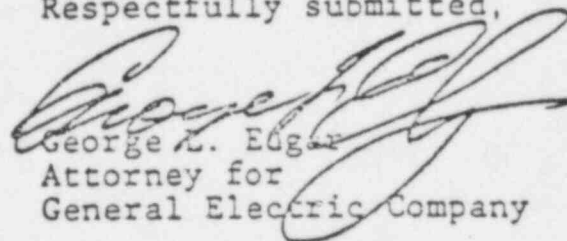
The Staff has apparently misconstrued the nature of GE's request. Although the Staff correctly noted that GE has not requested the return of the verbatim extractions from the Reed Report, which was introduced into evidence and made part of the record, the Staff overlooked the fact that GE also offered

to make the Report itself available to the Board on an immediate basis at GE's Bethesda, Maryland office, or some other location convenient to the Board, should any need later arise.

The Staff's desire that the Board continue to "have access to the full report" after it returns its copy to GE will thus be satisfied. In addition, the Appeal Board's authority to take testimony and determine factual matters de novo is really not germane to the question of whether the Report can or should be returned to GE at this juncture. Neither the Appeal Board's authority nor its ability to take testimony and make factual determinations will be impaired by returning the report to GE now. The Report was never introduced into evidence and is not a part of the record in the Black Fox proceeding. Nevertheless, if for some reason the Appeal Board desires to review the Reed Report at some point in the future, GE will make the Report available to the Appeals Board at that time.

Since the Staff could point to no legal impediment to the return of the report, and since the concerns which prompted the Staff's opposition to the return of the Report have been resolved, GE submits that the Reed Report and the related Sub-Task Reports should be returned as soon as possible.

Respectfully submitted,


George L. Edgar
Attorney for
General Electric Company

cc: All parties on Service List

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Mrs. Ilene H. Younghein
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Oklahoma City, Oklahoma 73112

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

Atomic Safety and Licensing
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U. S. Nuclear Regulatory
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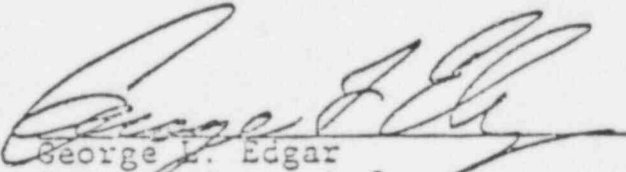
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Special Counsel for
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Dated: April 13, 1979

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