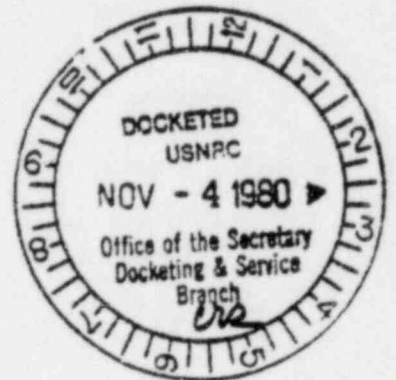


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Commissioners:

John F. Ahearne, Chairman
Victor Gilinsky
Joseph M. Hendrie
Peter A. Bradford

SERVED NOV 4 1980



In the Matter of
PUBLIC SERVICE CO. OF OKLAHOMA, et al.
(Black Fox Station, Units 1 and 2)

Docket Nos. 50-556
50-557

NOV 5 PM 2 42
RECEIVED
GENERAL INVESTIGATIVE
SERVICES UNIT

ADDENDUM TO OCTOBER 9, 1980 DECISION
ON CERTIFIED QUESTION

CLI-80-35

On October 9, 1980, the Commission ordered that the General Electric Nuclear Reactor Study (the Reed Report) be retained by the Commission for release under the Freedom of Information Act. CLI-80-35, 12 NRC ____ (1980). Commissioners Hendrie and Bradford have provided separate statements for inclusion in that decision. The Commission's October 9 decision is modified accordingly.



It is so ORDERED

For the Commission

Samuel J. Chilk
SAMUEL J. CHILK
Secretary of the Commission

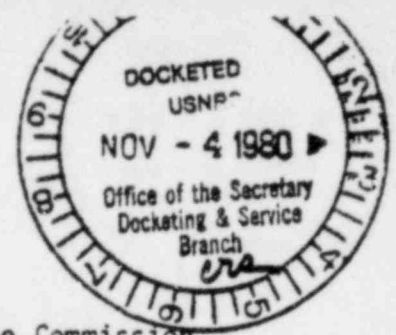
PS02
S0/1

Dated at Washington, DC,
this 4th day of November, 1980.

8011070018

G

Separate Views of Commissioner Hendrie,
Concurring in part and Dissenting in part



I am advised by the Office of the General Counsel that the Commission may not return the General Electric Nuclear Reactor Study, known as the Reed Report, to GE during the pendency of Freedom of Information Act claims for the Report. In that aspect of the October 9 order, I concur. However, I strongly disagree with the split Commission decision to disclose the Reed Report. NRC acquired the Reed Report through GE's voluntary cooperation on the written understanding that the confidentiality and privileged nature of the document would be respected by the Commission. Under these circumstances it is patently unfair to treat the document as an agency record and release it. The Commission's split decision to release the Reed Report welves on its assurances to GE, signals the industry to be much more circumspect in its dealings with NRC, and will hamper the Commission in the future in obtaining important information promptly from vendors and licensees. In short, not only is the Commission's decision to release the Reed Report a breach of its word; it is also dismal regulatory policy.

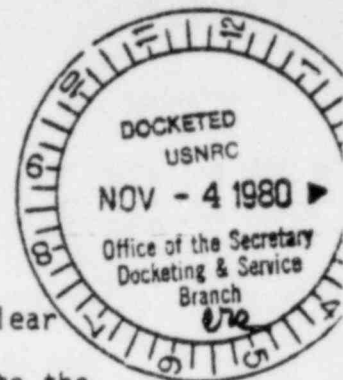
For this we can thank not only the Commissioners who have voted for release but the Department of Justice as well. Urged by one of its members the Commission decided to solicit the Department's advice on whether the Reed Report was an agency record for purposes of the Freedom of Information Act. The Department advised that it was an agency record and that the Department would refuse to defend in court the contrary position. It is well to recall at this point that the Reed Report is a product improvement study intended by GE to study the marketing and economic aspects of the availability and performance of GE's boiling water reactors. NRC had no involvement in the creation or core planning and execution of the document, and it was created without regard to any NRC regulatory program. When it was completed in 1975 GE reviewed the Report to determine whether it contained any safety-related information reportable to the NRC under Section 206 of the Energy Reorganization Act. GE concluded that it did not since NRC was aware of all safety issues mentioned in the Report, but nevertheless reported the results of its review to the NRC Chairman. The NRC senior staff thereupon reviewed the Reed Report in GE offices in 1976, concluded that the focus of the Report was marketing rather than safety, and that the NRC did not need a copy of the Report for its work. The matter was thoroughly explored by Congress 4-1/2 years ago. See Hearings on "Investigation of Charges Related to Nuclear Reactor Safety," before the Joint Committee on Atomic Energy, 94th Cong., 2d Sess., Vol. 1 (Feb.-March 1976).

As I noted at the outset a Commission Licensing Board later obtained the Reed Report in confidence from GE during administrative hearings on the licensing of the Black Fox nuclear power plant. An appropriate protective order, recognizing that confidence, was entered into. Given these facts the Department's position that the report is an NRC record seems to me wholly misguided. The Department's advice revealed a fundamental misunderstanding of the facts and a patent lack of deference due the views of this agency on the importance to its regulatory charter of promptly obtaining information that might have a bearing on nuclear safety issues. The NRC regulatory program has always relied on voluntary industry cooperation, especially in providing

access to information that might otherwise not have been required to be submitted to the NRC. Disclosure of such information, provided in confidence to assist the NRC, will undermine that important aspect of the agency program. Groups, such as GE, will be less likely to produce such documents for NRC's use, and the Commission will become mired in subpoena enforcement proceedings to procure the information it wants. Even if NRC were to prevail in such proceedings, the cost to the agency in time, resources, and lack of prompt information would be high.

For these reasons I believe that disclosure of the Reed Report is a grave mistake. This should be an object lesson for those who would deal with NRC with any sense of trust. From this turn of events, I must strongly dissent.

STATEMENT OF COMMISSIONER BRADFORD



This case does not turn on a breach of confidence by the Nuclear Regulatory Commission. The extension of confidential protection to the Reed Report depended on a 1978 NRC staff conclusion, specifically described as preliminary, that the Report contained proprietary information. Neither the current staff position nor the Commission opinions dispute that in fact the Reed Report does not contain proprietary information. Without proprietary information or some other basis for confidentiality, an agency record cannot be withheld given the strong public interest in full access to nuclear safety information that is embodied in our applications of the Freedom of Information Act. The Nuclear Regulatory Commission protected this document for the five years during which it was believed to contain proprietary information. Indeed, it remains protected to this day in order that General Electric may have its day in court.

To understand fully why the Nuclear Regulatory Commission's relationship with the nuclear industry is not at issue here, one must begin with an accurate history of the NRC's dealings with the Reed Report. The most significant points are as follows:

1) The Reed Report was not reported to the NRC. Its existence was disclosed orally in "very general"^{1/} terms to the Chairman and one other Commissioner at a luncheon at the San Francisco airport on August 21, 1975. This is not "reporting" as that term is normally used in nuclear regulation. Of course, GE was not required to report the document.

^{1/} "Investigation of Charges Relating to Nuclear Reactor Safety," Hearings of the Joint Committee on Atomic Energy, February 18, 23, and 24, and March 2 and 4, 1976. Volume II, p. 1774.

However, claims that GE voluntarily reported it to the NRC are excessive.

2) The Reed Report was mentioned in passing to the New York Society of Security Analysts by GE Chairman Reginald Jones in a question-and-answer session on December 17, 1975. The contents of the Report were not mentioned, other than that they "confirmed" GE's general approach to the nuclear business. The document was described as "overwhelming . . . a five-foot shelf."

3) The general nature of the Reed Report became public in February, 1976, not as a result of the luncheon five months earlier, but because three GE engineers resigned in protest of safety deficiencies. These engineers discussed the Report in testimony before Congress on February 18, 1976, and GE then described it further at subsequent Joint Committee sessions.

4) Beginning the following Sunday, February 22, nine days before the NRC was due to respond to the former GE engineers' testimony, two members of the NRC staff reviewed the Report for the first time. This review was explicitly "as a result of the February 18 testimony,"^{2/} not the August 21 luncheon. It did conclude that, while numerous safety matters were discussed, no new safety concerns were raised by the document. It made no determination as to whether the Report contained proprietary information. Instead of a five foot shelf, the document reviewed totaled 713 pages and was three and one-half inches thick.

5) Seventeen months later, the NRC staff did find that the three and one-half inch version of the Reed Report was proprietary information and so informed General Electric in a July 10, 1978 letter from Roger Mattson to Glenn Sherwood.

^{2/} Ibid, p. 1495.

6) On August 25, 1978, the Commission was advised by its Office of Policy Evaluation that that office could not "see the basis for categorizing the entire list of items as proprietary."

7) In a December 27, 1978 letter to Congressman John Dingell, the Commission made clear that it considered the staff's August determination regarding proprietary information to be tentative. Specifically, it noted that the Report was the subject of agency litigation and indicated that "the Commission normally treats documents of this type as proprietary pending a final determination (emphasis added)." The letter, itself a public document, states that General Electric will be notified.

8) On October 18, 1978, the Licensing Board in the Black Fox case issued a subpoena requiring GE to produce the Reed Report. GE moved to quash the subpoena on October 30. On January 2, 1979, GE proposed a settlement which the Board approved, thereby rendering moot the motion to quash. The Board's order noted that the Report was available "in confidence." The order makes clear that this "in confidence" status is based upon the proprietary information contained in the document.

9) On June 5, 1979, a Freedom of Information Act request for the Reed Report was filed by the Sunbelt Educational Foundation. This request was denied by the Black Fox Licensing Board on June 18. An appeal was taken in a letter of June 28.

10) On March 19, 1980, in the context of the Sunbelt FOIA appeal, the General Counsel asked the Justice Department whether the document constituted an agency record within the meaning of the Freedom of Information Act. This request was made as a result of a 3-2 Commission vote (Commissioners Hendrie and Ahearne dissenting). The Department replied

that the Reed Report was an agency record. Both the Commission and the Justice Department took the position that if the document contained proprietary information, such information could still be withheld.

11) On September 9, 1980, the NRC staff in effect revoked the July 10, 1978 letter and concluded that "General Electric has not provided the agency with sufficient bases to support the view that public disclosure of the Reed Report would cause substantial harm to its competitive position." Since this memorandum notes that the Reed Report is now some five years old, it may not be entirely inconsistent with the equally brief determination that the document was proprietary that was made in July 1978, when the material was somewhat more current.

12) On October 16, 1980, the Commission split 2-2 and thereby failed to apply any of the Freedom of Information Act exemptions. No Commissioner argued, then or now, that the proprietary information exemption was applicable.

* * *

The foregoing chronology makes very clear that the Commission's ability to cooperate with the nuclear industry is not at issue here. The only difficult question in this case is the narrow one presented by the Commission's having to disregard the fact that the document in question is in the Licensing Board's possession "in confidence." In this context, two points must be understood:

First, given that the document is an agency record, the confidence in which it is held derives entirely from General Electric's claim that

it is proprietary. Had the NRC review shown it to be proprietary, it would have been withheld.

Second, the fact is that the subpoena for the Reed Report would very likely have been enforced had GE not entered into the confidential agreement. Had that happened, the document would in all likelihood be public already. Hence, to term this phase of the case an example of "voluntary" cooperation is again somewhat misleading. The alternative from GE's point of view was not to withhold the document; it was to be compelled to produce it. Even granting the possibilities of delay in litigation, it is a mistake to visualize this as a situation in which the company had a choice that would have enabled it to keep the document to itself and chose instead to cooperate "voluntarily."

In conclusion then, assertions to the effect that the NRC will no longer be able to rely on voluntary industrial cooperation "especially in providing access to information that might not have otherwise have been required to be submitted to the NRC" are unfathomable. Vendors and utilities remain under an affirmative duty to provide safety-significant information. That has never been an issue in this case. If the NRC requires access to documents to verify their lack of safety significance, visits to company offices or other protective arrangements remain as available and as effective as they have been for five years in this case. Licensing proceedings in which documents containing proprietary information must be reviewed will not be subverted by the Freedom of Information Act because proprietary information will be protected. Self-flagellating statements to the effect that the NRC is no longer to be trusted are more likely to undermine cooperation than is a clear

understanding of what has actually occurred in the case of the Reed Report.