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November 15, 1990

Debra A. Ridgway
COUNSEL

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U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attention: Thomas J. Kenyon, Project Manager

Reference: (1) Project No. 669; Volumes II and III of
the ALWR Requirements Document
(Proprietary)

(2) Letter from E.E. Kintner to
Document Control Desk (Attn: Thomas
J. Kenyon), dated September 7, 1990

Dear Mr. Kenyon:

By letter dated September 7, 1990 (Reference 2, above), EPRI transmitted to the Nuclear Regulatory Commission (NRC) the "EPRI Advanced Light Water Reactor Utility Requirements Document," Volume II (ALWR Evolutionary Plant) and Volume III (ALWR Passive Plant), for which EPRI seeks proprietary protection. That submittal includes a substantial amount of material previously provided to the NRC in the form of early drafts of individual chapters, without restrictions on disclosure. But that fact does not compromise EPRI's claim that its September 7, 1990 submittal (the final Requirements Document) is entitled to be withheld from public disclosure on the grounds that it contains trade secrets and confidential commercial information. As discussed below, the application of basic principles of intellectual property law to the facts of this case support EPRI's application for withholding.

In addition, EPRI reiterates its desire to work with the NRC Staff to identify a means of preserving EPRI's commercial interest in the final ALWR Requirements Document, while facilitating the Staff's review of that submittal and affording appropriate

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members of the public reasonable access to the information contained therein.

The Facts

The final Requirements Document differs from EPRI's earlier submittals in several important respects.

First, EPRI's earlier submittals (made over a three-year period, from 1986 to 1989) were early drafts of individual chapters of the design requirements for future light water reactors utilizing "evolutionary" designs. The final Requirements Document includes final design requirements for both evolutionary plants (Volume II) and plants utilizing new "passive" designs (Volume III). These passive plant design requirements were never provided to the NRC as part of EPRI's earlier submittals, and appear for the first time as Volume III of the final Requirements Document.

Moreover, there were extensive changes to the evolutionary plant design requirements between the early drafts provided to the NRC and the final text embodied in Volume II of the final Requirements Document. For example, Chapter 1 has been completely rewritten. Many other changes were made to the document to resolve several hundred issues raised during regulatory review of the early drafts. Thousands of comments from utilities, vendors and contractors were incorporated into the document. In addition, changes were made to more than 100 major technical requirements, based on decisions of the Utility Steering Committee. A new 240-page Appendix was added to address regulatory requirements across the full scope of the document.

But perhaps the most important distinction between the two submittals is the different processes by which they were developed. The early draft of the design requirements for the evolutionary plant was developed by a relatively small group of EPRI staff and consultants, and represented their best personal judgment concerning the design of the next evolutionary light water reactor, with limited utility input.

By contrast, the final design requirements embodied in Volumes II and III of the Requirements Document are the product of an unprecedented consensus-building process over a period of two to three years, involving representatives of all segments of the nuclear industry (both domestic and international) -- nuclear

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utilities, nuclear steam supply system vendors, architect/engineering firms, nuclear consulting firms, and engineering service and construction companies. Volumes II and III present a clear, comprehensive statement of utility requirements for the next generation of nuclear plants, and have the endorsement of the nuclear industry as a whole. It is that endorsement and the process which led to it which give the final Requirements Document inherent and independent commercial value apart from -- and far in excess of -- the early submittals to the NRC.

Volumes II and III of the final EPRI ALWR Requirements Document thus constitute a unique and valuable set of documents. Indeed, the Commission itself has recognized the value of the documents. The Commission has assigned top review priority to the Requirements Document and has directed the NRC Staff to evaluate ALWR designs against the EPRI requirements. Further, the Commission has directed that major technical and policy issues be formally resolved in the context of the EPRI review.

EPRI, its members and its co-sponsors of the ALWR Project have expended considerable resources in the development of the final Requirements Document, and expect that work to be distributed in a manner that will permit them to recoup the costs associated with the research and development effort. Their recoupment will contribute to future EPRI research to improve the safety and economic operation of nuclear generating facilities in the U.S., which ultimately benefits taxpayers, utility rate-payers and the general public. EPRI contemplates licensing this confidential document to interested third parties for valuable consideration (fees). This opportunity will be lost unless the NRC protects the confidential nature of the final Requirements Document.^{1/}

The independent value of the final Requirements Document, separate and apart from the earlier submittals, is illustrated by

^{1/} For example, negotiations are presently ongoing with 10 to 15 organizations (mostly international) concerning participation in the EPRI ALWR Program (including access to the final Requirements Document). These organizations represent potential funding of \$50 million to \$100 million. Such organizations would have little incentive to participate in and fund the EPRI ALWR Program, if they could obtain a photocopy of the final Requirements Document from the NRC's Public Document Room.

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a concrete example. Vendors, utilities and other interested entities can obtain copies of the early draft chapters of the evolutionary plant design requirements from the NRC's Public Document Room at the cost of \$.06/page. But it is the final Requirements Document which has the industry's endorsement and is to serve as the basis for the NRC Staff's review of future plant designs. Even though vendors and utilities may know that some of the text of the early draft chapters appears unchanged in the final Requirements Document, they must obtain a copy of the final document to determine which parts have been changed and which have not. Thus, even those vendors and utilities with copies of the early draft of evolutionary plant design requirements wish to purchase copies of the final document. This is a very practical measure of the value of the final Requirements Document vis-a-vis the earlier submittals to the NRC.^{2/}

Applicable Law

Basic principles of intellectual property law support EPRI's claim of proprietary protection for the final Requirements Document, even though some of the information was included in early draft chapters provided to the NRC without restrictions on disclosure. In the eyes of the law, these are two different works, entitled to differential treatment.

Under Copyright Law, the unique character of each work is recognized by virtue of the fact that each work is separately entitled to copyright protection and would also be registered

^{2/} Proprietary treatment of the final Requirements Document is essential to protect U.S. technology from unfair foreign competition. Absent such protection, a foreign competitor of U.S. utilities and/or vendors could simply obtain a copy of the document from the NRC's Public Document Room and use the detailed design requirements without a license from EPRI. Such a foreign competitor could design and sell competing Light Water Reactors without any consideration to EPRI, its members or cosponsors for the considerable domestic resources invested in the development of the final Requirements Document. Such a competitor would have a competitive advantage over those domestic utilities and vendors who have funded the development of the ALWR Requirements Document, because its research and development costs would be lower.

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separately. Under Copyright Law, the final Requirements Document would be categorized as a "derivative work." See 17 U.S.C. § 101. "The copyright in [a derivative work] is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material." 17 U.S.C. § 103(b) (emphasis added).

The confidential treatment requested by EPRI is also supported by trade secret law. It is a general principle of trade secret law that "a trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret." Imperial Chemical Industries v. National Distillers and Chemical Corporation, 342 F.2d 737, 742 (2d Cir. 1965) (citations omitted). See Wilkes v. Pioneer American Insurance Company of Fort Worth, Texas, 383 F. Supp. 1135, 1140 (D. S.C. 1974) ("It is well settled law that the fact that part, or even eventually all, of the components of a trade secret are matters of . . . public knowledge does not prohibit a claim of trade secret"); Boeing Company v. Sierracin Corporation, 738 P.2d 665, 675 (Wash. 1987) ("trade secrets frequently contain elements that by themselves may be in the public domain but together qualify as trade secrets"); R.M. Milgrim, Milgrim on Trade Secrets, Vol. 1, § 2.08[3] at p. 2-202 (1990) ("Recognition is accorded to a novel combination of familiar substances or principles, which combination constitutes a new result"); see also Water Services, Inc. v. Tesco Chemicals, Inc., 410 F.2d 163, 173 (5th Cir. 1969) (composition of a system constituted a trade secret even though it was developed by applying known techniques and manufactured with publicly available components); FMC Corporation v. Spurlin, 596 F. Supp. 609, 612 (W.D. Pa. 1984) (design manual which contained unique combination of information, much or all of which may have been derived from basic engineering principles, held to be a protectable trade secret).

The technical data and industry recommendations contained in the final Requirements Document were compiled through a special review and evaluation process. That process took information that was in the public domain, as well as nonpublic information, and presented it to experts in the field for their analysis. That analysis and the conclusions drawn from this process are the focus of the final Requirements Document. It was this process that provided the additional value which EPRI is entitled to have protected by the NRC.

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Public Access and Administrative Burden

Proprietary protection of Volumes II and III of the final Requirements Document will preserve the public's interest in adequate access to information about the ALWR design requirements, because Volume I will be published and made available to the public without restriction. Volume I is a non-licensed summary of the design requirements, entitled "ALWR Policy and Summary of Top-Tier Requirements" (EPRI Document No. NP-6780). EPRI has no objection to the placement of Volume I in the NRC's Public Document Room for unrestricted access and copying by members of the general public.

In addition, EPRI is willing to consider possible means of allowing interested persons representing the public interest to have access to Volumes II and III of the final Requirements Document. Of course, in future certification proceedings involving these documents, access and use by participants in the proceeding could be controlled through use of a Protective Order, pursuant to 10 C.F.R. § 2.790(b)(6). Even outside the context of a formal proceeding, EPRI would be willing to consider procedures to allow interested non-commercial entities to inspect Volumes II and III, based upon execution of a Confidentiality Agreement and posting of a bond or other appropriate security.

Finally, EPRI recognizes the added administrative burden associated with the Staff's handling and use of proprietary information. EPRI wishes to work with the NRC to minimize the Staff's burden in reviewing the final Requirements Document while preserving EPRI's interest in the licensability of the document. For example, EPRI may be willing to relinquish in advance its claim of proprietary protection as to that material from the final Requirements Document which the NRC Staff includes in its Safety Evaluation Report (SER). This would eliminate the need for the NRC Staff to prepare both proprietary and non-proprietary versions of the SER.

EPRI is entitled to have the final Requirements Document withheld from public disclosure. As discussed above, EPRI's request for withholding is not prejudiced by the fact that the document includes material which is already in the public domain.

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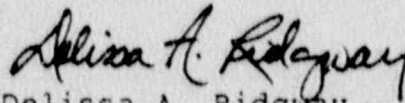
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EPRI would appreciate any ideas the NRC Staff may have concerning the handling of this proprietary information, and looks forward to working with the NRC Staff to resolve any concerns the Staff may have with regard to EPRI's request for withholding. See generally Carson Products Co. v. Califano, No. 77-1603 (5th Cir. 1979) (due process requires that owner of trade secret have opportunity to respond to agency's arguments and legal authorities, with meaningful agency review of that response, before final agency determination is made), cited in O'Reilly, Federal Information Disclosure at 10-7 n. 29.

Please contact me (202/663-8227) or William R. Sugnet of EPRI (415/855-2996) if you have any questions regarding this matter.

Sincerely,



Delissa A. Ridgway
Counsel for EPRI

DAR/d

cc: C. Holzle, Esq., NRC/OGC (w/enclosures)
J. Taylor, NRC/EDO
T. Murley, NRC/NRR

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