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HAND DELIVERED
August 6, 1984

William Dircks
Executive Director for Operations
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

APPEAL OF INITIAL FOIA DECISION
84-A-66E(84-175)
Rec'd 8-9-84

SUBJECT: Appeal of Denial of FOIA-84-175

Dear Mr. Dircks:

On March 13, 1984, Steven Sholly of the Union of Concerned Scientists (UCS) submitted to NRC a Freedom of Information Act request for the Probabilistic Risk Assessment (PRA) performed by the General Electric Company for its GESSAR II standardized plant design, for any NRC-sponsored reviews of the PRA, and for identification of the reviewing organizations and contract details. A copy of that letter is attached.

When the NRC did not respond to Mr. Sholly's request in a timely manner, UCS appealed the failure to respond in a letter to you dated April 5, 1984. J. M. Felton of the Division of Rules and Records finally responded to Mr. Sholly's original request and to the April 5 appeal on June 25, 1984. Mr. Felton's response identified and denied four documents, and stated that the review of additional documents responsive to Mr. Sholly's request was "continuing." Mr. Sholly has received no further correspondence from Mr. Felton.

Having appealed the NRC's original failure to make a timely response to Mr. Sholly's FOIA request, UCS is entitled to bring this matter directly before a federal District Court. 5 U.S.C. § 552(a)(6)(C). However, we have chosen to take an additional administrative appeal of Mr. Felton's response letter, because we believe you will agree that he has not provided adequate or consistent justification for denial of these documents. We also appeal once more the Commission's failure to complete its response to this request within the statutory time frame required by the Freedom of Information Act, 5 U.S.C. § 552(a)(6)(A)(i).

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Mr. Felton's June 25 letter identifies and denies in their entirety four documents: the PRA and three reviews of the PRA by the Brookhaven National Laboratory. Although Mr. Felton's letter does not specifically identify the FOIA exemption claimed, he apparently invokes exemption 4 of the Act, which protects

trade secrets and commercial or financial information obtained from a person and privileged or confidential.

5 U.S.C. § 552(b)(4). Mr. Felton does not claim that the documents constitute "trade secrets," and none of the documents fits the description of a trade secret given by the U.S. Court of Appeals for the District of Columbia:

an unpatented, commercially valuable plan, appliance, formula, or process, which is used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities.

Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1287 (D.C. Cir. 1983). Rather, Mr. Felton claims that disclosure of the materials could cause "substantial harm to the competitive position of the General Electric Company." Thus, he appears to invoke the second prong of exemption 4, for confidential commercial or financial information that is obtained from a person.

However, Mr. Felton has not satisfied the second prong of exemption 4 because he has not shown that the materials are actually confidential, i.e., that the release of the materials would cause substantial harm to GE's competitive position. Id. at 1290. A significant amount of the information being withheld is already available to the public, and thus disclosure of these documents would have little effect on the ability of competitors to obtain the information they contain. "Clearly, if the information is already available to competitors, then it does not qualify as confidential." United Technologies Corp. v. Marshall, 464 F. Supp. 845, 852 (D. Ct. 1979), citing Hughes Aircraft Company v. Schlesinger, 384 F. Supp. 292, 297 (C.D. Cal. 1974).

GE and the NRC have already released -- and thus made available to GE competitors -- a significant amount of information related to the GESSAR PRA. The NRC released one of

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the Brookhaven review documents, virtually in its entirety, to another FOIA requester*, and it has held at least one open meeting discussing the contents of the GESSAR PRA in detail. The Brookhaven document that has been released discusses the contents of the PRA in detail and demonstrates that GE's claim to a level of "detail, sophistication, and NRC acceptance which is not remotely approached with respect to BWR's by GE's present or potential competitors" is highly inflated. According to Brookhaven, GE used the MARCH, CORRAL, and CRAC codes as the bases for its source term and consequence analyses. All three of these codes were developed for NRC and are available in NRC publications and technical literature. The versions of these codes used by GE are not highly sophisticated, state-of-the-art codes, but have been used for many years. There is thus simply no basis to GE's claim that release of these materials will have a substantial detrimental effect on its competitive position in the marketplace.

Moreover, some of the methodologies that GE would like the NRC to protect as proprietary information were developed at government expense. Such government-generated information is not exempt from disclosure under the Freedom of Information Act. Consumers Union of United States, Inc. v. Veterans' Administration, 301 F. Supp. 796, 803 (S.D.N.Y. 1969). If anything, the NRC's refusal to disclose GE's use of PRA-related codes developed at government expense constitutes an illegal and unwarranted subsidy of GE.

The Brookhaven report also discusses some of the PRA's input assumptions in great detail. Many of these assumptions are not design-specific, but relate to standardized concepts regarding nuclear power plant accidents. Other assumptions, although somewhat design-dependent, do not involve the use of detailed design information which might be proprietary or confidential. Their disclosure would reveal little information that is not already widely known in the industry. Moreover,

* "Review and Evaluation of the GESSAR-II Probabilistic Risk Assessment - Containment Failure Modes and Fission Product Release," Letter Report by Accident Analysis Group, Department of Nuclear Energy, Brookhaven National Laboratory (July 27, 1983). This is identified as document # 3 in Mr. Felton's June 25 response to Mr. Sholly. It was released to Susan Hiatt on January 3, 1984 in FOIA-83-460.

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any design-specific assumptions should be available to the public, since GE has not claimed the plant design itself as proprietary information.

The Brookhaven report also contains a great deal of information on the results of the PRA. Although specific figures have been deleted from the tables, PRA results are described and discussed in the text. In any event, competitors could obtain approximately the same results by using the methodologies and assumptions as described in the Brookhaven study.

Inconsistent positions taken in the past by GE and NRC with regard to the confidentiality of the GESSAR PRA and related documents raise serious questions about the sincerity and veracity of GE's claim that release of the information will cause "substantial" harm to its competitive position. GE and NRC officials have orally stated to UCS that they are not interested in protecting the results of the PRA, but only the methodology. Yet, the Brookhaven Laboratory study released by the NRC discusses the methodology in great detail, but it omits many of the results. Although GE and NRC now claim complete confidentiality for the PRA, they participated in an open ACRS meeting on April 22, 1983, in which the methodology and assumptions used in the PRA were discussed in great detail. The transcript of that meeting is publicly available. Having permitted the release of so much of the PRA-related information in the past, GE and NRC are no longer in a position to claim that the requested materials are confidential.

As discussed above, Mr. Felton has failed to provide adequate justification for the denial of the requested documents under exemption 4 of the FOIA. Moreover, he has failed to satisfy the Act's requirement to release "reasonably segregable" portions of the documents. 5 U.S.C. § 552(b). Any changes that GE has made to publicly available assumptions and methodologies could easily be segregated from other parts of the PRA. Yet, the NRC has not made the slightest attempt to identify releasable portions of the documents.

In addition to the requirements of the Freedom of Information Act, strong policy reasons compel the release of

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these documents to the public. The GESSAR PRA is being used to obtain a generic license that will be valid over the next ten years. The quality of this license application will therefore be critical to the safety and reliability of any individual plants that are licensed pursuant to this standardized design. For this reason, it should be opened to the closest scrutiny possible. GE's sudden and inconsistent attempts to protect the confidentiality of its PRA and related review documents may demonstrate more of a wish to hide flaws in the GESSAR PRA from public scrutiny than a need to protect valuable business secrets. As a matter of policy, the NRC should make the GESSAR PRA and related review documents available to the public, with the exception of only those limited portions that GE can demonstrate are truly confidential. The NRC must not endorse and promote GE's blanket attempts to shield this vital safety information from the public eye.

Moreover, although no regulatory requirement for PRAs exists now, we understand that the NRC intends to use the GESSAR PRA to evaluate and perhaps require changes in the GESSAR standardized plant design. If this is true, then the PRA is a part of the design application that must be made available for public review and comment under the hearing requirement of the Atomic Energy Act, 42 U.S.C. § 2239(a)(1). The public's right to a hearing on the safety of the standardized plant design will effectively be denied if important supporting information is withheld from public scrutiny.

As far as we know, this is the first PRA that has been withheld by NRC as confidential commercial information. If, as recent NRC regulatory proposals indicate, the Commission intends to use PRAs to evaluate design adequacy in the future, it should be prepared to share that information with the public as required by the hearing provision of the Atomic Energy Act. If it intends to protect such information from public scrutiny, it should reconsider its intention to use PRAs as licensing documents.

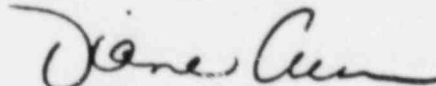
We look forward to receiving your response within the 20 working days permitted by the statute. If UCS does not receive a full response, with either complete disclosure or substantial

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justification for deletion of minor portions of the documents,
we intend to pursue this matter in federal court.

Sincerely,



Diane Curran



William S. Jordan, III
Attorneys for Union of
Concerned Scientists