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.	)	Docket Nos. STN 50-556 STN 50-557
	)	
(Black Fox Stations, Units 1 and 2)	)	

MEMORANDUM IN SUPPORT OF
GENERAL ELECTRIC MOTION TO QUASH

Dated: October 30, 1978

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ABSTRACT OF FACTS

During evidentiary hearings on October 12, 1978, the Intervenors 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 Intervenors' 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 Intervenors' 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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MEMORANDUM IN SUPPORT OF
GENERAL ELECTRIC MOTION TO QUASH

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 Intervenors' motion on October 18, 1978, which subpoena seeks the production of GE's "Reed Report," and inspection of that Report by the Intervenors' 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,

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.

> 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

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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

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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.

> 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 Intervenors' 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

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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.

10/ See JCAE Hearings at 174-77; 178-185.

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 determine 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 obligation 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 Reorganization 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 equipment 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 discussed 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

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14/ JCAE Hearings at 188.

15/ JCAE Hearings at 315. NRC's General Counsel recognized the commercial sentitivity 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.

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 Subcommitte 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

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17/ JCAE Hearings at 883-4.

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

19/ Id.

20/ Id.

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

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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

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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.

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 diclose 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 Intervenors' 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 Intervenors' 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 Intervenors 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 Intervenors 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/

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 protrate 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

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34/ Tr. 4962.

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 existance 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. 5727.

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. 5556.

44/ Tr. 5549-50.

45/ Id.

without regard for the more topical adversary interests of the Intervenors. 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 Intervenors' 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

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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

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 Intervenors

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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 Intervenors' contentions. In short, the scope of the subpoena patently exceeds the scope of the Intervenors' 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 invaribly 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 Intervenors 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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50/ cont.

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).

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

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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/

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. Nederlondsche-Amerikaansche Stoomvaart-Maatschappy, 15 F.R.D. 32 (S.D. N.Y. 1953); Commonwealth Edison Co. (Zion 1 and 2), ALAB-196, 7 AEC 457, 467 (1974).

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 Intervenors' 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 Intervenors' 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/ Intervenors 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 Intervenors 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).

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

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

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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 materialtiy 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 Intervenors' "Reed Report" contention, no information has been advanced by the Intervenors 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 Intervenors 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

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

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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.

that GE perceives a real risk associated with disclosure of the Reed Report to the Intervenors' 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 Intervenors 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).

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 Intervenors 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).

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.

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 Intervenors' 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

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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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68/ cont.

> 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 Intervenors unless and until the Intervenors specifically demonstrate such relevance.

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 Intervenors' 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

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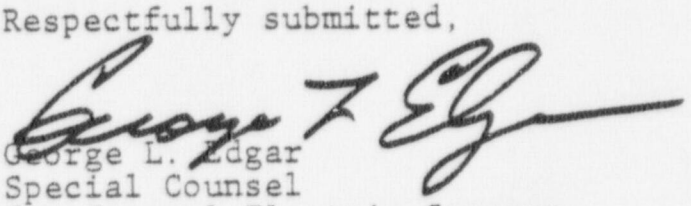
69/ It is by now well-settled that there is a compelling public interest in arriving at an early decision in nuclear licensing proceedings. Allied-General Nuclear Services (Barnwell), ALAB-296, 2 NRC 671, 684-85 (1975); Potomac Electric Power Co. (Douglas Point 1 and 2), ALAB-277, 1 NRC 539, 552 (1975).

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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for General Electric Company

OF COUNSEL

Kevin P. Gallen

Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D. C. 20036

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 (Read 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 206 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.

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 206 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

ATTACHMENT B

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.

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

Robert M. Ketchel

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

Notary Public

My Commission Expires March 31, 1982

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, lates 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 reaain 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

MAR 6 1978

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

NRR:DSS	NRR:DSS	ONRR	NRR:DSS
WMinners:ks	FSchroeder	EGCase	RJMattson
3/2/78	3/ /78	3/ /78	3/ /78

ATTACHMENT D

GENERAL ELECTRIC

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.

GENERAL ELECTRIC

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 Sherwood

Glenn G. Sherwood, Manager
Safety and Licensing Operation

GGS:daj/77-78

Attachment

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

bcc: AP Bray
TR Dankmeyer -
WR Morgan

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;

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 chnical content, competitive e: ct 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
General Electric Company

STATE OF CALIFORNIA)
COUNTY OF SANTA CLARA) ss:

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

OFFICIAL SEAL
J. PATRICIA MASTERS
NOTARY PUBLIC - CALIFORNIA
SANTA CLARA COUNTY
My comm. expires DEC 2, 1978

NOTARY PUBLIC IN AND FOR SAID COUNTY AND STATE

daj/38-40

ATTACHMENT E

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.

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

GGS:csc/260

Attachments

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

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 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 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 reliabilty 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:

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

OFFICIAL SEAL
J. PATRICIA MASTERS
NOTARY PUBLIC - CALIFORNIA
SANTA CLARA COUNTY
My comm. expires DEC 2, 1979

NOTARY PUBLIC IN AND FOR SAID
COUNTY AND STATE

ATTACHMENT F

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

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. Mattson

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

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

GENERAL ELECTRIC COMPANY

AFFIDAVIT OF

GLENN 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 is 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.

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."

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 being met for operating BWR plants or will not be met for future BWR plants."

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 judgement 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 organi-

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. Sherwood, 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.

Glenn G. Sherwood
General Electric Company

STATE OF CALIFORNIA)
COUNTY OF SANTA CLARA) ss:

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

Merridy Wallace
NOTARY PUBLIC IN AND FOR
SAID COUNTY AND STATE

OFFICIAL SEAL
MERRIDY WALLACE
NOTARY PUBLIC - CALIFORNIA
SANTA CLARA COUNTY
My comm. expires APR 22 1981

ATTACHMENT I

NUCLEAR REACTOR STUDY

TABLE OF CONTENTS