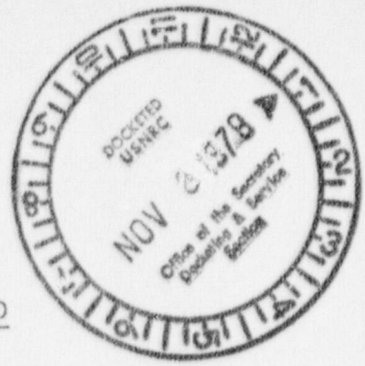

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

INTERVENORS' RESPONSE TO
GENERAL ELECTRIC COMPANY'S MOTION TO QUASH

Introductory Statement

On October 18, 1978, the Atomic Safety and Licensing Board ("Board"), by its Chairman, Sheldon J. Wolfe, issued on its own Motion as well as at the urging of Intervenors, a Subpoena Duces Tecum to the General Electric Company ("GE"), through A. Philip Bray, commanding that GE produce, under a protective order and agreement, the General Electric Nuclear Reactor Study ("Reed Report") for inspection by counsel and the expert witnesses for the Intervenors and the Board. Opposing this Subpoena, GE filed a Motion to Quash on October 30, 1978.

In support of its Motion to Quash, GE alleges lack of relevancy or necessity to the contentions at issue, as well as substantial adverse impact upon GE, the Applicants and the public. These allegations are unsupported in fact and the legal conclusions drawn by GE are actually unsupported in law. In the section of its

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Memorandum ("Memorandum") in Support of its Motion to Quash, entitled Statement of Facts, there is hardly a statement of facts, but rather an argumentative discourse. In this section, GE maintains that the Reed Report is nc a safety analysis of its Boiling Water Reactors ("BWR"), but a study in the marketability of its BWR product. Assuming that marketability of its product was the purpose and objective of the Reed Report, the Board should not be confused with such labels, but should focus on the content of this Report in determining relevancy to the issues in the instant case. Objectives of the study are irrelevant. Substance and content control. GE, in its Memorandum, states quite clearly that safety issues were identified, and that the Nuclear Regulatory Commission Staff ("Staff") believed that where safety factors were noted by GE, the latter did not analyze those factors from a safety standpoint.

The record of the hearings is clear that there is a foundation of relevance. By its own admis .on, GE cites 27 safety related items relating to BWRs like the ones proposed for installation and operation by the Applicants at the Black Fox site. The hearings are to determine the safety of such nuclear steam generators and their impact on the health of the inhabitants in the surrounding areas. Since GE has consistently refused to allow examination of this Report by those legitimately

concerned with building a sound record in the hearing process, it has not been possible for these Intervenors or Intervenors in other Board hearings throughout the country to be more specific in their requests for particular information in the Reed Report.

The record indicates this Board is concerned that not all questions regarding health and safety can be formulated and intelligently answered without review of the Reed Report and it further indicated that in light of the questions and concerns raised by the numerous limited appearances, this Report should be produced for inspection by Intervenors' counsel and experts so that meaningful cross-examination of the GE witnesses offered by the Applicant may be conducted.

At this juncture, Intervenors have no reason to question GE's claim that the Reed Report is proprietary in nature. That is why counsel and experts engaged by the Intervenors are prepared to sign a protective agreement and be subject to a protective order issued by the Board. Surely GE does not seriously contend that, in light of the unresolved safety items it has found, as well as the history of accidents experienced with BWRs and the degree and intensity of calamity that a mishap with a BWR portends, that it has a right to withhold relevant information going to the heart of the NRC mandate when no showing has been made that to comply with

the Board's Subpoena would lead to violation of the protective order and agreement. The health and safety of the public is paramount and cannot be compromised in the name of free economic enterprise and any suggestion to the contrary is an abomination.

While Intervenors do not guarrel with the fact that timeliness in carrying out duties in any litigation is necessary, there is no hard and fast rule as to what may or may not have been filed or requested in a timely fashion. One must look at the consequences of denying discovery, a motion, etc., and balance that against the consequences to the opposing party of allowing the untimely request. In the instant case, serious issues are at hand with wide ranging consequences for all the parties in this action, as well as the public. The Reed Report has been the subject of interest and controversy for some time and this controversy and some of the questions surrounding the BWR and Black Fox project may be laid to rest with the production and examination of this Report as delineated by the Board, in the context of cross-examination on those contentions to which the Report is relevant. In such a context, the Applicants and Staff are not burdened, for the scope of the hearing will not be enlarged. The Report will only be used for cross-examination of expert witnesses, as the Report relates to the relevant contentions. Such a request

for information is timely in light of the overwhelming public impact of the Applicant's project. After all, if the safety issues in the Reed Report are not resolved or resolveable at this time, it is in the interest of all the parties, the Board and the public to be aware of that fact.

It is astonishing that GE should accuse Intervenors of delaying the hearings because of the subject Subpoena. It is GE that is delaying the hearings by not complying with the Board's Subpoena. Had GE so complied, Intervenors' counsel and experts might have even concluded their review of the Report by now, but in any event would conclude its necessary review by the time of the next hearing session in December, 1978, and no delay would have resulted. Intervenors have neither sought, nor can they afford litigation on this issue and GE cannot escape the fact that this motion practice and any delay in the hearings or disorganization in presenting testimony on the contentions lies fully in the lap of GE.

Finally, we urge the Board to consider the representations made by GE and the Applicants, both to the Board during the hearings, and to others in letters, relating to the Reed Report. These representations have consistently been material misrepresentations. Intervenors have no intention of being flippant and will leave it to the Board members to determine in their minds

whether these misrepresentations have been intentional or negligent. For in light of the high level positions occupied by the GE employees making the representations, and the period of time in which these individuals were allotted by the Board to check up on their facts, the misrepresentations were either intentional or negligent. Even documents attached to GE's Motion, purporting to be supportive of their position, are rife with contradiction.

In the following few pages, Intervenors will tie in the above statement into an argument supported by authorities. Intervenors urge this Board to stand by its ruling -- a sound decision -- and deny GE's Motion to Quash, and order the Subpoena complied with immediately. And to enable the parties to proceed with the hearings in some semblance of order, we urge this Board to delay the hearings until the subpoenaed material has been produced for inspection as directed and examined by the Intervenors' counsel and experts.

Argument and Authorities

During the Atomic Safety and Licensing Board hearing on October 11, 1978, Dr. Gerald M. Gordan, Manager of Plant Materials Engineering in the Nuclear Energy Engineering Division of the General Electric Company, an expert witness called to testify by the Applicant, was testifying

about intergranular stress corrosion cracking ("IGSCC"). Mr. Farris, one of the Intervenors' three attorneys, in the midst of cross-examining Dr. Gordan, asked him if IGSCC was one of the twenty-seven safety related items identified in the Reed Report.[1] From this point, the relevancy of the Reed Report became obvious. For example, just one narrow question would be whether GE was "committed to . . . remedial measures where very recent or future experience indicates this may occur.[2] In May, 1978, prior to termination of discovery, former counsel for Intervenors, Andrew T. Dalton, Esq., had requested the Reed Report from the NRC Staff, according to Staff Counsel, L. Dow Davis, and the latter assured Mr. Dalton that the NRC did not have a copy of the document.[3] However, a letter dated March 22, 1978 was sent from Glenn G. Sherwood, Manager of Safety and Licensing of GE to Dr. Roger J. Mattson, Director of Systems Safety Division of the NRC, enclosing " . . . 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."[4] On May 26, 1978, Dr. Sherwood sent Dr. Mattson further materials on the Reed Report safety issues [5] Was Mr. Davis not thorough in his search

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1. Transcript, p. 4700.
2. Id., p. 4701.
3. Id., pp. 4704-4705.
4. Attachment D to GE's Memorandum in Support of Motion to Quash, filed October 30, 1978.
5. Id., Attachment E.

of NRC records[6] or did the NRC never receive the material sent or did Mr. Davis mislead Mr. Dalton?

The above is either just one episode in a comedy of errors directly regarding the Reed Report or one example of intentional or negligent misrepresentations. This Board, during the aforementioned day of hearings, extensively examined, on the record, the relevancy and necessity of access to and possible use of the Reed Report by Intervenors' counsel and experts.[7] The Board gave careful consideration to the issues and discussed

> it [the Reed Report] more particularly since we reviewed Mr. Hubbard's proposed written testimony wherein he alludes to the Reed Report.
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> Further, we have been alerted to this also -- not alerted, we were aware of it. But it was brought to our attention once again during the course of limited appearance statements and we think it's the proper thing to do . . ., that the portions of the Reed Report that will be subject to this inspection under this protective order will relate only to the 27 safety related items and no more.[8]

The Board directed the parties to draft a protective order and a protective agreement[9] and inquired of Mr. Gallo as to how long it would take to produce the report, whereupon Mr. Gallo correctly pointed out that he would have to contact GE and inform them of the Board's decision so GE could decide how it would proceed in light

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6. Transcript, p. 4705.
7. Id., pp. 4702-4726.
8. Id., pp. 4720-4721, emphasis added.
9. Id., p. 4722.

of the Board's order. It was with the indirect entry of GE into the hearing process that the Board and Intervenors were subjected to further (mis)representations by Mr. Gallo (unwittingly and without fault on his part, we are sure) and GE, either intentionally or negligently, for what transpired was this. Mr. Gallo represented to this Board that he spoke with Mr. T. Rognald Dankmeyer, Group Counsel for GE, and based on those discussions, he represented that the Reed Report was 1,000 pages in length[10] and that Mr. Dankmeyer told him, " . . . that the Reed Report is a comprehensive document which is not amenable to clear and concise extraction in terms of deleting or pulling out the pages that address the so-called matters related to safety."[11] Yet, GE would have this Board approve a summary of the Report; the Report which Mr. Dankmeyer says cannot be clearly and concisely extracted. Intervenors wish to elicit testimony which will be clear and concise so the Board can make an intelligent decision.

So, GE had from October 11th to October 16th to examine the Report and inform the Board of its position. Now, Mr. Dankmeyer was present[12] at the hearings when the Board was hearing argument on October 16th and he could have corrected the misrepresentations made.

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10. Id., p. 5553.
11. Id., p. 5549.
12. Id., p. 5555.

The Chairman of GE, Reginald Jones, in a December 17, 1975 address before the New York Society of Security Analysts (later reported in Nucleonics Week), said of the Reed Report, " . . . and when I say final report, it was overwhelming. It's a five-foot shelf, but we have had condensations of that, we have had reviews and presentations . . . "[13] So at this point, is the Report as Mr. Dankmeyer represents -- a 1,000-page document, or as the President of GE represented, as much as five shelf feet. Well, it turns out that it is neither, for in its Memorandum filed on October 30th, GE states that the information furnished to counsel for the Applicants two weeks before was not entirely accurate, for in reality, the " . . . Reed Report itself consists of a 21-page executive summary, and a main Report of some 140 pages . . . "[14] So what is the Reed Report? GE's credibility is non-existent on this matter. They have consistently misled this Board and their Memorandum consists entirely of self-serving statements. The Board should remain firm in its order so that we may see if GE has adequately resolved the safety issues we are concerned with in this hearing, identified in this "non-safety report". There is no indication that GE analyzed the significance of the safety issues they identified.[15]

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13. Id., p. 5558.
14. GE's Memorandum in Support of Motion to Quash, October 30, 1978, p. 8.
15. Id., p. 12.

Mr. Gallo has accused the Intervenors of embarking on a "general fishing expedition".[16] There is nothing general about our request or the Board's order for the Report. It is quite specific and particular. Furthermore, neither the courts nor the Appeal Board has taken the "fishing expedition" charge as a serious argument for many years. The Appeal Board in Boston Edison Co. (Pilgrim 2), 1 NRC 579, 582-83, (1975), detailed its view of the "fishing expedition charge by quoting the U.S. Supreme Court decision in Hickman vs. Taylor. The Appeal Board noted,

> In sum, the principles behind the discovery rules were succinctly articulated by the Supreme Court of the United States in the landmark case of Hickman vs. Taylor, 329 U.S. 495, 91 L.Ed. 451 (1947) in the following language:
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> > We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. But discovery, like all matters of procedure, has ultimate and necessary boundaries. As indicated by Rules 30(b) and (d) and 31(d), limitations inevitably arise when it can be shown that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the

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16. Transcript, p. 5567.

> person subject to the inquiry. And as Rule 26 provides, further limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege. (329 U.S. at pages 507-409).

The Applicants and GE should not be surprised by the Board's Subpoena, for there is nothing new about Intervenors' request for the Reed Report. In fact, this Report has been requested in other hearings in which other applicants and intervenors were involved. In In the Matter of Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), Docket No. 50-322, Mr. Richard K. Hoefling, Counsel for the NRC Staff, filed an Answer to County of Suffolk's Motion for Reconsideration, in which he reversed his position and urged the Licensing Board to admit the Reed Report as a contention for hearing and discovery of the Report itself. In addition, he stated that the Staff was seeking public release of the Reed Report or the 27 safety items identified in it.[17] In addition, Intervenors have heard that at least one NRC Commissioner, Commissioner Kennedy, has expressed his view that the Reed Report shall be examined in an adjudicatory framework.

It is the Board who must determine the safety of the proposed Black Fox plant, not the Staff. The Staff is no more than an adversary party in these hearings.

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17. Answer to Suffolk County's Motion for Reconsideration, March 2, 1978, p. 10.

10 C.F.R. §2.701(b). It would be improper for the Board to consult with, contact or give any weight to the Staff's findings regarding the Reed Report outside of the arena of this adversary hearing.[18] 10 C.F.R. §2.719. It would likewise be improper for the Board to conduct an in camera review of the entire Reed Report without such a review and input by Intervenors.[19] Furthermore, the Staff represents and protects the interests of the NRC in dealings with the public and to that extent, the Staff's position on the Reed Report may not be in accord with Intervenor's position in this hearing. 10 C.F.R. §1.32(c).

GE has made certain arguments which Intervenors believe lack merit, and cite certain cases which they allege support their arguments. Intervenors believe that GE's reliance on these cases is unfounded in light of the facts in the instant case, and regarding certain of the cases cited, GE has simply misstated the law of those cases. Since GE's lengthy argument in support of its Motion is repetitious, Intervenors will try to alleviate the burden this Board is under in reading all the motions in this matter by simply discussing those major cases underpinning GE's arguments and offering this

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18. Consumers Power Company (Midland 1 and 2) 6 AEC 331, 335 (1973), "But for the Board to duplicate the role of the staff, or for it to perform independent basic research, is inconsistent with its adjudicatory role and beyond the scope of its delegated authority."
19. Id.

Board the law of those cases and applying the facts in the instant matter to that law.

First of all, GE makes much ado of Chairman Wolfe's finding that in addition to a finding that the Reed Report was obviously generally relevant to the issues in contention as a result of argument before the Board at the hearings, the Chairman also stated on the record that GE itself thought the Report was generally relevant because of its offer to produce a summary of the Report.[20] GE states that such offers of compromise are not admissible as evidence, and cites some cases and McCormick on Evidence, §274 (2d Ed. 1972). §274 of McCormick on Evidence does sum up the law on offers of compromise and likens it to a privilege. Such offers may not be offered at trial by the opposing party because of the underlying public policy of fostering settlement. In the instant matter, the facts do not fit the law. The Intervenors did not offer GE's offer of the summary as evidence of relevance of the Reed Report to the contentions at hand. Counsel for the Applicants made the offer on the record at GE's direction with GE's Group Counsel present! Therefore, the privilege of excluding that offer was waived when it was made on the record.

The Toledo Edison Company, et al. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3) and The Cleveland

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20. Transcript, p. 6042.

Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), 3 NRC 199 (1976) dealt with a NRC action under the Antitrust Civil Process Act. In that case, the Licensing Board granted a Motion to Compel Discovery filed by the Department of Justice, directed to the Cleveland utility for certain documents desired by the Department of Justice, after the discovery period had expired. The Board in that case found that a request for documents after the cut-off date for discovery requires a showing of good cause which consists of showing relevancy to specific issues in controversy and no production burden or surprise to the other side. As was specifically found in the Toledo Edison Company case, 3 NRC at 203, in the instant case, there is no additional burden on the Applicants or GE since no file search is necessary and no surprise can be claimed since the Board has not enlarged or added any contentions. The Reed Report, coming from GE's own files, is obviously known to them and the parties knew well in advance that Intervenors wished to examine the Report; and therefore the spirit of the Board's cut-off date would not be violated if it was only the Intervenors seeking production of this document, rather than at the motion of the Board.

Illinois Power Company (Clinton 1 and 2), 4 NRC, 27, 31-32 (1976) is inapplicable to the facts in the

instant case. In that case, material was asked for which had never even been alluded to in the past and the request was far more extensive than necessary to provide the sought after answers and beyond the scope of inquiry. To allow the discovery would have unjustifiably delayed the hearings. In the instant case, the request for the Reed Report is specific, within the scope of inquiry and any delay which might occur will be attributable to the holder of the requested information, not the party that made the request.

The Board, in Allied-General Nuclear Services (Barnwell), 5 NRC 489, 492 (1977), delineated the qualifications for discovery. It said that that which is sought to be discovered must be " . . . relevant to the subject matter involved in the proceeding", and then defines "subject matter" as, " . . . the contentions admitted by the presiding officer in the proceeding." Clearly, the facts in the instant case fit the above holding.

Clearly, the Licensing Board may raise issues and inquire into areas sua sponte. The Appeal Board in Consumers Power Company (Midland 1 and 2), 6 AEC 331, 335 (1973), held, referring to the Licensing Board's powers, that it had the power and authority to, " . . . inquire further into areas where it may perceive problems or find a need for elaboration. If it finds itself not satisfied with the adequacy or completeness of the staff

review, or of the evidence presented in support of the license application, it may, for example, reject the application, or may require further development of the record to support such application."

In Commonwealth Edison Company (Zion Station, Units 1 and 2), 7 AEC 457 (1974), the Intervenors in that case sought testimony and documents from employees of Westinghouse Corporation, vendor of the nuclear steam generating system for the Zion station. The Board issued a Subpoena for the requested Westinghouse employee and the documents. Subsequently, the Board quashed its Subpoena citing: the requested documents are beyond the scope and subject matter of the contention and lack of timeliness, as well as other reasons not raised by the motion in the instant case. The Appeal Board in Commonwealth Edison Company reversed the Licensing Board's decision to quash the Subpoena. The Appeal Board in its decision cited numerous examples of case law, beginning with, " . . . modern instruments of discovery serve a useful purpose . . . . They together with pretrial procedures make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[21] " . . . only strong public policies weight against disclosure."[22]

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21. Appeal Board in Commonwealth citing United States vs. Proctor and Gamble Co., 356 U.S. 677, 682 (1958).
22. Id.

The Appeal Board held that the same "broad, liberal interpretation" given to the discovery rules under the Federal Rules of Civil Procedure should be given to the Commission's discovery rules, and that those same standards should be applied to issuance of a subpoena. Commonwealth Edison Company, supra at 461. The Appeal Board went on to say that the relevancy standard allowed discovery in response to a subpoena to be undertaken unless it was "palpable that the evidence sought can have no possible bearing on the issues".[23] Referring to 10 C.F.R. §2.720, the Appeal Board stated, " . . . the rules call for every relevant fact, however remote, to be brought out for the inspection not only of the opposing party but for the benefit of the [board] which in due course can eliminate those facts which are not to be considered in determining the ultimate issues."[24] " . . . it might be thought 'burdensome' to give testimony and to furnish documents relating to private or business matters -- 'the more so if the information sought redounds to the advantage of a legal or commercial opponent.' Such burden is not 'oppression' within the meaning of the rules."[25]

True, the Appeal Board did say,

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23. Id., at 462, citing Hercules Powder Co. vs. Rohm and Haas Co., 3 F.R.D., 302, 304 (D. Del. 1943).
24. Id.
25. Id.

> Unrestricted production of material such as trade secrets, secret processes, developments, or research may, however, be viewed as being "unreasonable and oppressive". Moreover, discovery which is pursued strictly for purposes of delay or harassment, is also "unreasonable". In this connection, subpoena or discovery requests filed outside the time period as prescribed by the Commission's rules . . . are to be regarded as prima facie unreasonable.[26]

Intervenors in the instant case believe it is obvious that they requested the Reed Report for legitimate reasons and certainly not for delay or harassment. The record reflects that this Report was sought in May, 1978, prior to the cut-off period for discovery, and the fact that the Board subpoenaed the Report on its own Motion shows that delay and harassment were not a factor in that order. "But quashing or denying discovery on hypothetical grounds is not favored."[27]

"In determining whether to quash a subpoena or to grant some other form of relief, a board should impose 'a particularly heavy burden' on a person seeking relief 'to make a substantial showing in support of a motion to quash as contrasted to some more limited protection'." Commonwealth Edison Company, 7 AEC at 463, citing Horizons Titanium Corp. vs. Norton Co., 290 F.2d 421, 425 (1 Cir. 1961), also Investment Properties International Limited vs. IOS, Ltd., 459 F.2d 705 (2 Cir. 1972). "This is particularly so where the matter to which discovery

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26. Id.
27. Id.

relates is a significant safety question." Commonwealth Edison Co. 7 AEC at 463, citing Virginia Electric & Power Co. (North Anna Power Station, Units 1 and 2) CLI-74-16, RAI-74-4 313 (April 12, 1974). "Absent such a substantial showing, a motion to quash should be denied." Commonwealth Edison, supra.; Horizons Titanium, supra. at 426.

Has GE met the "particularly heavy burden" with a "substantial showing" to support its Motion in the instant case? Definitely not! What GE has offered in its Motion are self-serving statements, arguments put forth as facts and contradictory statements designed to mislead this Board and the other parties to this hearing.[28] The Board should not countenance these delaying tactics by GE and should deny GE's Motion and order production forthwith. Ge has raised the question of its proprietary interest in the Reed Report, saying that a proprietary order and agreement is of no value since the Commission cannot effectively punish one who breaches such an order and agreement. Such an argument is patently ridiculous. The Board can deliver sanctions

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28. In Attachment G to GE's Motion, Affidavit of Glenn G. Sherwood, Dr. Sherwood admits the Reed Report dealt with safety issues, but that it would be very difficult to separate parts of the Report and to do so would require a significant amount of (subjective) judgment. "As a result, verbation excerpts from the report itself would not provide a clear, concise, comprehensive or useful view of the safety significance of the items discussed." Yet, that is precisely what GE proposes to this Board.

if the Intervenors violated its order and GE could seek damages in a civil court for violation of the protective agreement. In Consumer Power Co. (Midland Plant, Units 1 and 2), 6 AEC 322, 329 (1973), the Appeal Board felt that a protective order (no mention of a protective agreement) might be more theoretical than real as applied to corporate officials[29] charged with making crucial marketing judgments, having access to confidential information of a competitor, and the Appeal Board found no compelling need for the information requested. Of importance is what the Appeal Board went on to say in that case. It recognized that even where protected information was at issue, order for production of that information would be made after balancing the conflicting interests of the parties. In spite of its view of protective orders, the Appeal Board ordered production of some of the requested information, but limited access to outside counsel of the party requesting the information, persons associated with that outside counsel's law firm, independent consultants engaged for the case by the outside counsel or the requesting party, and any other persons agreeable to the party furnishing the information ordered produced.

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29. Emphasis added.

The above delineated ground rules reflect nothing more or less than what the Board in the instant case has ordered. The protective order and agreement are sufficient to protect GE. GE's fear of breach by the Intervenor's three experts is unfounded. If Messrs. Bridenbaugh, Hubbard and Minor were not men of honor and principle, they could have remained with GE, occupying comfortable positions, and subverted GE from within. GE is simply "crying wolf".

Commonwealth Edison, supra. at 469, provides a situation more like the instant case regarding the effectiveness of a protective order. In that case, the Appeal Board found that, "In Commission licensing proceedings, protective orders provide an effective means for safeguarding proprietary information where, as here, the party seeking discovery is not a competitor," and " . . . withholding from public inspection shall not affect the right, if any, of persons properly and directly concerned to inspect the document. They explicitly authorize the use in appropriate circumstances of a protective order and of in camera sessions of the hearing." Supra. See also 10 C.F.R. §2.751. Clearly, Intervenors are not competitors of GE, nor are Messrs. Minor, Hubbard or Bridenbaugh competitors of GE.

Despite what GE and Applicants may believe the scope of the hearings to be once the Reed Report is

examined, the Board, on more than one occasion, made it abundantly clear on the record what that scope would be to anyone conversant in the English language.[30] At page 5728 of the transcript of the hearings (October 17, 1978), Chairman Wolfe stated, "The Intervenors are specifically forewarned and cautioned that the purpose of this inspection is to permit them to utilize the information secured simply for cross-examination upon extant Board questions and contentions." The Intervenors do not share GE's difficulty in comprehending the Chairman's statement. It seems to mean what the Chairman said.

Again, directing the Board's attention to Commonwealth Edison, supra. at 470, the Appeal Board held,

> We have in the past acknowledged the right of intervenors to present their case "defensively, on the basis of cross-examination". Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-137, . . . RAI-73-7 at 504-05. The intervenors' discovery request was assertedly designed to further the exercise of this right -- i.e., to permit the intervenors to examine and possibly challenge the accuracy of Westinghouse's calculations (and hence of the calculations being utilized by the applicant).

This is no more than what the Intervenors in the instant case wish.

Applicants and GE would have this Board believe that they are proceeding in the public interest and

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30. Transcript, pp. 4721 and 5728.

that Intervenors are working against the public interest and that this litigation is costing the Applicants a great deal of money, an expense which will have to be borne by the public, and therefore contrary to the public good. The argument is of course, nonsense. In Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), 2 NRC 668 (1975), the Licensing Board cited the Barnwell Power Plant case.

> 3. Injury to the adverse party. The applicants claim that granting the requested stay will lead ineluctably to a delay in the operation of the Barnwell facility with consequent financial injury to them. At this point, of course, we cannot assume that the Barnwell facility should operate. It is precisely the purpose of the scheduled hearings to consider that question. But we can stress that the applicant is entitled to an answer to that question at the earliest practicable time. If a decision in its favor ultimately results, the applicant will indeed have been injured if there has been an unjustifiable delay in reaching that decision.
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> 4. The public interest. Our consideration of the fourth factor follows much the same lines. We need not subscribe to the applicants' claim that its facility is vitally needed -- that is an issue in the hearings -- to agree that there is a compelling public interest in having an early decision on the Barnwell facility, whether that decision is positive or negative. This point need not be belabored. If this plant is safe and environmentally sound, then there is every reason to have the facility approved promptly. If, on the other hand, the plant fails to pass muster, the public interest will be served if this fact is known sooner rather than later. For, in that event, there will be a need either to initiate corrective action to bring the facility into compliance (if possible) or to develop some alternative solution. Supra. at 684.

" . . . mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." Renegotiation Board vs. Bannercraft Co., 415 U.S. 1, 24 (1974).

In their argument, GE cites Consolidated Edison Company of New York, Inc. (Indian Point, Units 1, 2 and 3), 3 NRC 188 (1976). This case deals with a controversy at the operating license stage and due to the factual differences and procedural and substantive differences at that stage, bears no relevance to the instant case.

In conclusion, Intervenors note a comment made by Chairman Wolfe on October 11, 1978, after much debate on the record in the morning regarding production of the Reed Report and after the Board deliberated on the matter over the lunch recess. The Board had just ordered production of the Reed Report. Mr. Paton of the NRC had asked for reservation until the following morning to object to the Board's order. Chairman Wolfe responded, "Certainly you may make your objections known tomorrow. As I say, the Board has made this ruling. I don't know of any argument or objection that could be made that could persuade us otherwise, . . . "[31]

Clearly, GE's argument rings hollow and provides no justification for quashing the Subpoena. The Board's decision was based on the record. That decision was sound as to law, as to fact and as to public policy. It is an outrageous assertion that GE makes that compelled production of this document will cause industry to forego

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31. Transcript, p. 4726.

doing analyses of its products. The implication of such an argument and position is, rather than attempting to make safe products in the future, a business will simply produce an item to make a profit regardless of safety defects it might contain and hazards it might cause. Such an argument is preposterous and indicates that the moveant has stooped to scare tactics in its effort to avoid compliance with a legitimate order. A claimed proprietary document cannot be withheld from the hearing process when it is relevant to such monumental issues of health and safety which must be resolved and where a protective order is issued, a protective agreement is executed, and the proprietary document will be exposed in an in camera hearing only. Surely the public health and safety must prevail over narrow, parochial corporate economic interests. Intervenors urge this Board to deny GE's Motion to Quash the Subpoena issued by the Board.

Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I, Joseph R. Farris, one of the attorneys for Citizens Action for Safe Energy (C.A.S.E.), certify that copies of Intervenors' Response to General Electric Company's Motion to Quash have been served in the above captioned matter on the following by United States mail, postage prepaid, this 7th day of November, 1978.

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