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March 22, 1984

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Re: Public Service Co. of Oklahoma,
Associated Electric Cooperative,
Inc., and Western Farmers Elec-
tric Cooperative (Black Fox
Station Units 1 and 2), Docket
Nos. STN 50-556, STN 50-557

Gentlemen:

On behalf of the General Electric Company (GE) and pursuant to 10 C.F.R. §2.790(b)(5), I respectfully request that the Commission return to GE's custody the copy of the Reed Report and related Sub-Task Force Reports which were transmitted to the Licensing Board under cover of my letter dated January 5, 1979, for the Board's use pursuant to the provisions of the Board's Protective Order of

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the same date in the above-referenced proceeding. In addition, I respectfully request that the Commission reconsider its October 9, 1980 2-2 split vote in the above referenced proceeding which effectively resulted in a decision to release these Reports,* and afford GE the opportunity to appear before the Commission to be heard orally on the matter of reconsideration.

The Reed Report is a confidential internal GE product improvement study which was designed to determine the technical, personnel, and financial resources necessary to obtain improvements in the availability of GE's Boiling Water Reactor product. To the extent that issues with safety implications are discussed, the NRC staff reviews of the Report have concluded that the NRC is aware of those issues and has no need for the Report.

The Reed Report came into the possession of the NRC pursuant to a settlement of GE's Motion to Quash a subpoena for the Report issued by the Black Fox ASLB. The Report was received in confidence under a Protective Order and used for verification of the faithfulness of verbatim extractions from the Report that related to the issues in controversy in the proceeding. The Reed Report was not introduced into evidence, nor was it relied upon in decision-making. Public Service Company of Oklahoma has cancelled the Black Fox Station nuclear project, and by Order of March 7, 1983, the ASLB granted PSO's motion to terminate the proceeding and withdraw the license application. A Construction Permit decision was never rendered by the ASLB. Public Service Co. of Oklahoma (Black Fox Station Units 1 and 2), LBP-83-10, 17 NRC 410 (1983).

The original purpose for NRC's having possession of the Reed Report no longer exists, and it is no longer relevant or necessary to the performance of the Commission's functions. Consequently GE submits that it is entitled to return of the Reed Report under 10 C.F.R. §2.790(b)(5), which provides:

(5) If the Commission determines, pursuant to paragraph (b)(4) of this section, that the records or document contains trade secrets or privileged or confidential commercial or financial information, the Commission will then determine (i) whether the right to the public to be fully apprised as to the basis for and effects of the proposed

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Public Service Co. of Oklahoma (Black Fox Station Units 1 and 2), CLI-80-35, 12 NRC 409 (1980).

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action outweighs the demonstrated concern for protection of competitive position and (ii) whether the information should be withheld from public disclosure pursuant to this paragraph. If the record or document for which withholding is sought is deemed by the Commission to be irrelevant or unnecessary to the performance of its functions, it shall be returned to the applicant. (Emphasis added)

In sum, withholding has been requested; the Reed Report contains no information relating to safety not otherwise available and known to the Commission; the Black Fox proceeding constituted the only basis for the Commission's limited and conditional possession of the Report; and that proceeding has been terminated. GE therefore submits that there can be no basis to find that the Reed Report is necessary to the performance of the Commission's functions. Consequently the Commission's own regulations require that it be returned to GE.

This Commission has never addressed the matter of whether GE's Reed Report should be released to the public, and whether the Commission's October, 1980 2-2 split vote, which effectively resulted in a decision to release the Report, is reflective of current Commission and Administrative policy. The matter has, for some years, been the subject of litigation before the United States District Court for the Central District of Illinois, and to date, attempts to arrive at a settlement have been unsuccessful. Absent reexamination of its position by the Commission, it appears inevitable that further protracted litigation will continue -- litigation which in our view involves unjustified and wasteful diversion of the time and energies of all parties.

The attached quotation of Commissioner Hendrie's dissent succinctly highlights the reasons why the October, 1980 decision was ill-advised when it was issued. Since that decision was issued, the following additional developments have occurred:

- a. 10 C.F.R. §2.790(c) provides that upon denial of a request for withholding from public disclosure, the submitter of a document has the right to its return. In the pending litigation, the government has argued, based upon an unpublished "policy" stated in a letter from the General Counsel to the United States Court of Appeals for the Third Circuit in the Westinghouse litigation,^{*} that

^{*}/ Westinghouse Electric Co. v. NRC, 555 F.2d 82 (3dCir. 1977).

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this provision becomes inoperative once a Freedom of Information Act (FOIA) request is filed. If the government's argument is accepted, then NRC's regulations concerning the protection of proprietary information in its licensing proceedings are meaningless and a trap for the unwary.

- b. The Black Fox proceedings have been dismissed. Section 103 of the Atomic Energy Act expressly limits Commission disclosure of technical information and data concerning activities under licenses "only for the purposes of the common defense and security and to protect the health and safety of the public". The Commission has never made the finding that disclosure of the Reed Report is necessary for such purposes, and, in light of the dismissal of the Black Fox proceedings, the only possible basis for such a finding no longer exists.
- c. Prior to its October, 1980 split vote the Commission voted 4-1 that the Reed Report was not an "agency record" and thus not subject to public disclosure under the FOIA. Under the last administration, the Justice Department's refusal to defend that position lead to the October, 1980 2-2 split vote and the consequent decision to release. In 1981, the Justice Department took the opposite position in the Western Union^{*} case on facts and circumstances less favorable than those associated with the Reed Report. Further, the District of Columbia Circuit's 1983 decision in Paisley v. CIA^{**} accepted a Justice Department view of the agency record "control test" which is directly contrary to that reflected in the Commission's October, 1980 decision.

GE submits that simple fairness and sound regulatory policy compel reconsideration of the October, 1980 split vote. By that action and through the positions it has taken in the pending litigation, the Commission has sanctioned the breach of a duly authorized protective order, relied upon an unpublished "policy" which

^{*}/ RCA Global Communications v. FCC, Civil Action No. 81-74, U.S.D.C. Del.

^{**}/ Paisley v. CIA, 712 F.2d 686 (1983).

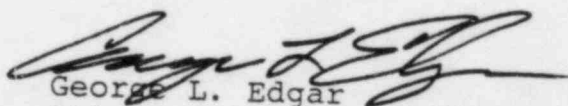
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would render its regulations meaningless, and sent a signal to the industry which discourages self-critical studies and voluntary co-operation with the Commission.

Accordingly, pursuant to 10 C.F.R. §2.790(b)(5) GE respectfully requests that the Commission return the Reed Report and the related Sub-Task Reports to the undersigned as soon as possible. In addition, GE respectfully requests that the Commission reconsider its October, 1980 split vote, and afford GE the opportunity to appear before the Commission and be heard orally on the matter of reconsideration.

Respectfully submitted,



George L. Edgar
Attorney for General Electric Co.

Enclosure

cc: All on attached Service List

SEPARATE VIEWS OF COMMISSIONER HENDRIE,
CONCURRING IN PART AND DISSENTING IN PART

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

For this we can thank not only the Commissioners who have voted for release but the Department of Justice as well. Urged by one of its members the Commission decided to solicit the Department's advice on whether the Reed Report was an agency record for purposes of the Freedom of Information Act. The Department advised that it was an agency record and that the Department would refuse to defend in court the contrary position. It is well to recall at

this point that the Reed Report is a product improvement study intended by GE to study the marketing and economic aspects of the availability and performance of GE's boiling water reactors. NRC had no involvement in the creation or core planning and execution of the document, and it was created without regard to any NRC regulatory program. When it was completed in 1975 GE reviewed the Report to determine whether it contained any safety-related information reportable to the NRC under Section 206 of the Energy Reorganization Act. GE concluded that it did not since NRC was aware of all safety issues mentioned in the Report, but nevertheless reported the results of its review to the NRC Chairman. The NRC senior staff thereupon reviewed the Reed Report in GE offices in 1976, concluded that the focus of the Report was marketing rather than safety, and that the NRC did not need a copy of the Report for its work. The matter was thoroughly explored by Congress 4-1/2 years ago. See Hearings on "Investigation of Charges Related to Nuclear Reactor Safety," before the Joint Committee on Atomic Energy, 94th Cong., 2d Sess., Vol. 1 (Feb.-March 1976).

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

information that might have a bearing on nuclear safety issues. The NRC regulatory program has always relied on voluntary industry cooperation, especially in providing access to information that might otherwise not have been required to be submitted to the NRC. Disclosure of such information, provided in confidence to assist the NRC, will undermine that important aspect of the agency program. Groups, such as GE, will be less likely to produce such documents for NRC's use, and the Commission will become mired in subpoena enforcement proceedings to procure the information it wants. Even if NRC were to prevail in such proceedings, the cost to the agency in time, resources, and lack of prompt information would be high.

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

CERTIFICATE OF SERVICE

DOCKETED
UNITED STATES

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I hereby certify that the foregoing letter was sent by
first-class mail, postage prepaid, on March 22, 1984, to the SERVICE
following:

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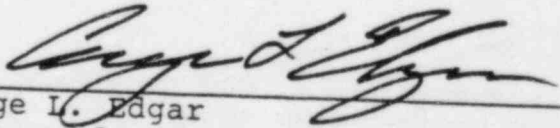
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George L. Edgar
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

IN THE MATTER OF)	
)	
PUBLIC SERVICE COMPANY OF)	Docket Nos.
OKLAHOMA and)	STN 50-556
WESTERN FARMERS ELECTRIC)	STN 50-557
COOPERATIVE, INC.)	
)	
(Black Fox Station,)	
Units 1 and 2))	

CERTIFICATE OF SERVICE

I hereby certify that service of the attached letter of March 22, 1984, addressed to each Commissioner of the Nuclear Regulatory Commission, has on this day been effected by first class mail, postage prepaid, on the following:

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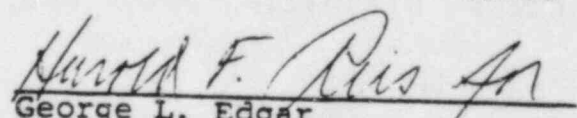
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Dated: March 22, 1984