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October 14, 1992

Martin Malsch, Esq.  
Deputy General Counsel  
Nuclear Regulatory Commission/OGC  
11555 Rockville Pike  
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Dear Marty:

Bob Bishop has asked that I furnish you with a copy of the enclosed paper addressing the treatment of proprietary information in design certification rulemaking and subsequent Part 52 licensing proceedings. The paper, as explained therein, is supplementary to the views on this matter contained in the NUMARC comment letter of August 19, 1992 on SECY-92-170, and elaborates on an alternative approach we discussed at the September 18 meeting of NUMARC representatives with senior NRC Staff.

As stated at the aforementioned meeting, we remain of the view that the incorporation-by-reference course supported in NUMARC's comments on SECY-92-170 is both legally permissible and sound from a policy standpoint and that the acceptability of that course should be further pursued with the Office of Federal Register. We believe, however, that the practicability of the approach discussed in the enclosed paper merits exploration with the Staff on a vendor-by-vendor basis.

Sincerely,

*Marc*  
Marcus A. Rowden

MAR:fa  
Enclosure

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Proprietary Information in  
Design Certification Rulemaking: An Alternative Approach

I. OGC Preliminary Recommendations and Industry Disagreement

Among the preliminary recommendations of the Office of the General Counsel in SECY-92-170 was the following: Tier 2 as well as Tier 1 of a design certification rule should contain no proprietary information, either directly or through incorporation by reference. The same recommendation was made in SECY-92-287 for the newly-proposed Design Control Document. OGC's position is apparently driven by "informal advice" from the Office of the Federal Register (OFR) that a rule will not be published in the Federal Register unless the rule's entire content, including material incorporated by reference, is publicly available. As explained by OGC, OFR's informal advice is based upon its application of provisions of the Administrative Procedure Act (APA) regarding Federal Register publication of agency rules and the preconditions therefor (5 U.S.C. 552(a)).

NUMARC's comments on SECY-92-170 stated strong disagreement with this preliminary OGC recommendation and its ostensible legal underpinning. The industry believes that proprietary information can be incorporated by reference in a design certification rule, since it later would be "reasonably available to the class of persons affected thereby" (i.e., COL proceeding parties) and thus qualify for incorporation by reference under an exception contained in the cited APA provisions.

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Nonetheless, the NUMARC comments proposed a more restrictive course to meet OGC/OFR concerns. Under that NUMARC proposal, there would be no proprietary information in Tier 1 of the rule; and proprietary information would not be used in Tier 2 to establish generically applicable requirements. Proprietary information would only be referenced as SSAR, i.e., Tier 2, source documents (similar to references of non-proprietary documents in the SSAR), and for establishing methods -- approved in the design certification rulemaking -- for meeting the rule's non-proprietary generically applicable requirements. The latter is based on treatment accorded such proprietary methods in the ECCS rulemaking, which culminated in a published Commission rule that expressly incorporated by reference approved proprietary methods for meeting generically applicable ECCS requirements.

Despite the ECCS precedent, we are advised by NRC-OGC that OFR will likely take the position that it will not publish a rule incorporating proprietary information by reference even if such information relates only to approved methods for meeting non-proprietary generically applicable requirements. In light thereof, the industry has explored an alternative approach to this matter which would obviate the legal concerns raised in SECY-92-170. The constituent elements of that approach are set forth below.

## II. Alternative Industry Approach

1. Treatment of Proprietary Information in the Course of NRC Staff Technical Review of a Design Proposed for Certification.

The NRC Staff would review all information contained in an application for design certification, including proprietary information submitted in connection therewith. The Staff's SER would contain only non-proprietary information; and there would be no proprietary information contained in what SECY-92-287 calls the Design Control Document.<sup>1/</sup>

In implementation of the foregoing:

- Each design certification applicant would reduce the proprietary information contained in its SSAR submission to what the applicant believes is a commercially irreducible minimum.

- The certification applicant would thereafter submit non-proprietary descriptions in substitution for the residual proprietary information, where needed for design control purposes. The Staff would review such non-proprietary descriptions and accept them for inclusion in the Design Control Document if they were adequate for design control purposes.

- Proprietary information, including that which comprised the basis for non-proprietary descriptions in the Design Control Document, would not be unrestrictedly available in the Public Document Room. Such proprietary information would, however, be made available to qualifying party-requesters in the design

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<sup>1/</sup> NUMARC will be submitting separate comments on the Design Control Document proposal of SECY-92-287.

certification rulemaking hearing, and it would also be made available to qualifying party-requesters in COL proceedings wherein the certified design was referenced, as described in 3, below.

○ Approval of proprietary methods for meeting generically applicable requirements would be obtained through Staff approval of Topical Reports rather than through NRC approval in the certification rulemaking. While Topical Report approval would not confer issue finality in subsequent COL proceedings (i.e., it would not preclude the Commission or its licensing boards from reaching different conclusions as respect methods acceptability), it would commit the Staff to accept the safety adequacy of the methods it had approved. Such Staff acceptance should be modifiable only if there later exists significant new information which substantially affects the earlier Staff determinations.<sup>2/</sup>

Implementation of this approach would be discussed with the NRC staff on a vendor-by-vendor basis, with the practicability of implementation tested by formulation of non-proprietary substitutes for proprietary descriptions in two design areas identified in industry/Staff discussions: I & C architecture; and fuel design.

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<sup>2/</sup> The proposed use of Topical Reports is based upon Part 50 licensing practice. Where, however, the Staff has reviewed and approved the methods information as part of its SER on the FDA, such review and approval need not be duplicated; rather, it could be reflected in the SER for the FDA but not be incorporated in the proposed design certification rule.

2. Treatment of Proprietary Information in the Design Certification Rule

All information in Tier 1 and Tier 2 of the design certification rule (i.e., the contents of the so-called Design Control Document) would be non-proprietary, published and generally available to the public. Tier 1 of the rule (the certified design) would be published in Chapter 1 of 10 C.F.R. If too lengthy for publication, Tier 1 would be incorporated by reference, in whole or in part, in the Federal Register issuance. Tier 2 of the rule would be incorporated by reference in Chapter 1 of 10 C.F.R. and would be generally available to the public.

3. Treatment of Proprietary Information in Subsequent COL Proceedings Referencing the Design Certification Rule

A COL applicant and the parties to a COL proceeding would be entitled to access to relevant proprietary information contained in the Docket of the subject design certification rulemaking upon meeting the access requirements and complying with the protective arrangements specified in 10 C.F.R. Sections 2.740, 2.744 and 2.790. Such access would give parties to the COL proceeding the same hearing use rights as respects that proprietary information as they would have with respect to non-proprietary information which is not contained in the design certification rule. To wit: There would be COL finality for an application that meets the requirements of the referenced design certification, whether or not particular issues or information (proprietary or non-proprietary) had been specifically considered in the design certification rulemaking; and any exception to such finality would require

Commission approval in response to a Section 2.758 petition, as specified in Section 52.63(a)(4).

The industry believes that the approach outlined above appropriately accommodates both the public policy considerations supporting the protection of proprietary information and effective participation by interested persons in design certification rulemaking and combined license proceedings.