

7/18/80

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)	
GENERAL ELECTRIC COMPANY)	Docket No. 70-1308
(GE Morris Operation Spent Fuel)	(Renewal of SNM-1265)
Storage Facility))	

NRC STAFF OBJECTION TO NOTICES OF DEPOSITION
AND REQUESTS FOR PRODUCTION OF DOCUMENTS

INTRODUCTION

On July 11, 1980, the State of Illinois filed two notices of deposition and requests for production of documents. In these notices, Illinois states that, pursuant to 10 CFR § 2.740, Illinois requests to depose "Mr. A. B. Davis, Chief [sic], Fuel Facility and Materials Safety Branch, NRC, Region III" and "Mr. W. L. Fisher, Chief, Fuel Facility Projects and Radiation Support Section, NRC, Region III", on July 21 and 22, 1980, respectively.^{1/} In each

^{1/} In an effort to determine why Illinois seeks to depose these particular Staff members, NRC Staff counsel contacted Susan Sekuler, counsel for Illinois, by telephone on July 16, 1980. In that conversation, counsel for Illinois informed Staff counsel that Illinois filed additional notices of deposition and requests for production of documents, relating to NRC and GE personnel. However, Staff Counsel received only the two notices mentioned above and one notice of deposition and request for production of documents relating to GE personnel. By means of these additional notices, Illinois seeks to depose the following NRC personnel on July 21, 1980: R. E. Cunningham, Director, Division of Fuel Cycle and Material Safety, Office of Nuclear Material Safety and Safeguards; the NRC project manager for the GE Morris license renewal, and C. C. Peck of Region III. On July 23, 1980, Illinois seeks to depose each expert witness to be relied upon by the NRC Staff. Counsel for Illinois stated that copies of the notices not received by the Staff will be sent to the Staff via express mail.

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notice, Illinois also requests that the named Staff members "bring to the deposition copies of all documents and tangible things related to the contentions" adopted in this proceeding.

For the reasons set forth below, the Staff objects to Illinois' notice of deposition and requests for production of documents.

DISCUSSION

Illinois' Notices of Deposition of Named Staff Members Are Improper and Defective Under NRC Rules of Practice

Illinois seeks to depose the above-named Staff members, citing 10 CFR § 2.740, "General Provisions Governing Discovery". However, 10 CFR § 2.740 does not apply to discovery against the NRC Staff, except for paragraphs (c) and (e), 10 CFR § 2.740(f)(3). The applicable section, 10 CFR § 2.720(h)(2)(i), provides that:

(2)(i) In a proceeding in which the NRC is a party, the NRC Staff will make available one or more witnesses designated by the Executive Director for Operations, for oral examination at the hearing or on deposition regarding any matter, not privileged, which is relevant to the issues in the proceeding. The attendance and testimony of the Commissioners and named NRC personnel at a hearing or on deposition may not be required by the presiding officer, by subpoena or otherwise: PROVIDED, That the presiding officer may,

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In the conversation with Ms. Sekuler and in a subsequent conversation on July 17, 1980, with John Van Vranken, also counsel for Illinois, Staff counsel stated its objections to these depositions and that in view of these objections, the Staff members Illinois seeks to depose will not be available for deposition on the dates specified by Illinois. However, as explained, infra, Staff counsel will attempt to reach an informal agreement with Illinois concerning appropriate Staff members to be made available for deposition.

upon a showing of exceptional circumstances, such as a case in which a particular named NRC employee has direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations require the attendance and testimony of named NRC personnel.

It is thus evident that Illinois' attempt to depose, pursuant to 10 CFR § 2.740, named Staff members, is improper under NRC rules of practice. Illinois has made no showing of exceptional circumstances pursuant to which the presiding officer may require the testimony of named NRC personnel under 10 CFR § 2.720(h)(2)(i).

In addition, the notices of deposition are not reasonable in that there is no description of the matters upon which each person named in the deposition will be examined.^{2/} Although 10 CFR §2.720(h)(2)(i), concerning deposition of NRC personnel, does not provide for notice of deposition, the NRC rules of practice regarding deposition of other parties in 10 CFR §2.740a and the Federal Rules of Civil Procedure, Rule 30, require that a party seeking to take the deposition of another party give reasonable notice of the deposition. Under 10 CFR §2.740a:

(a) Any party desiring to take the testimony of any party or other person by deposition on oral examination or written interrogatories shall, without leave of the Commission or the presiding officer, give reasonable notice in writing to every other party, to the person to be examined and to the presiding officer of the proposed time and place of taking the deposition; the name and address of each person to be examined,

^{2/} In addition, although the notice of deposition of Mr. Davis contains a certificate of service providing notice of the deposition to the other parties and the Licensing Board, the notice for Mr. Fisher does not contain a certificate of service and there is no indication that the notice was provided to the other parties and the Licensing Board.

if known, or if, the name is not known, a general description sufficient to identify him or the class or group to which he belongs; the matters upon which each person will be examined and the name or descriptive title and address of the officer before whom the deposition is to be taken. (emphasis added).

Neither of Illinois' notices of deposition describes the matters upon which each person named in the notice will be examined, as required by 10 CFR §2.740a.^{3/} NRC regulations clearly do not contemplate notices of deposition as broad and unbounded as those filed by Illinois. Absent a description of the matters Illinois seeks to explore in these depositions, it is impossible for the Staff to determine whether the named Staff personnel have any direct personal knowledge of issues in controversy in this proceeding.

In these circumstances, the Staff objects to Illinois' request to depose Staff members and does not intend to provide the requested personnel on the requested dates for the requested deposition. Nevertheless, the Staff is willing to discuss reasonable arrangements to make available one or more Staff member for oral examination on deposition regarding any matter, not privileged, which is relevant to the issues in the proceeding. Accordingly, the Staff will attempt to reach an informal agreement with Illinois concerning particular Staff members to be made available for oral deposition who may have specialized knowledge of matters to be identified by Illinois. To this end, in the July 16, 1980 conversation, Staff counsel discussed these notices of deposition with counsel for Illinois in an effort to determine the subject matter

^{3/} Although the testimony of NRC Staff personnel is not subject to 10 CFR §2.740a, in the Staff's view, the concept of reasonable notice, including notice of the matters which will be examined, is as applicable to depositions of NRC Staff as it is to depositions of other parties.

which Illinois seeks to examine in these depositions. As Staff counsel stated in that conversation, it is necessary for Illinois to specify the subject matter of the deposition, so that the Staff can determine the appropriate personnel to be examined upon oral deposition. Illinois was not able to describe with any particularity the subject matter to be explored in the depositions noticed on July 11, 1980, but the Staff contemplates further informal discussions in an effort to reach an agreement on depositions of Staff personnel.^{4/}

Illinois' Requests For Production of Documents Are Improper

Both of the notices of deposition contain requests that pursuant to 10 CFR §2.740, each named individual bring to the deposition "copies of all documents and tangible things related to the contentions" in this proceeding. As previously stated, 10 CFR §2.740 does not apply to the NRC Staff, except for paragraphs (c) and (e). The applicable sections are 10 CFR §2.790 - "Public Inspections, exemptions, requests for withholding" and §2.744 - "Production of NRC records and documents." However, neither of these sections provide for the type of overly broad requests for the production of documents and tangible things made by Illinois. Accordingly, the Staff objects to Illinois' requests for the production of documents and tangible things. The Staff is, however, willing to consider reasonable requests for the production of specifically identified documents or tangible things and

^{4/} If these further discussions contemplated by the Staff do not result in any agreement, and Illinois therefore determines to file motions to compel, the Staff will not object to such motions to compel filed during the discovery phase of this proceeding on the grounds of untimeliness.

is willing to provide them informally without the need for Illinois to resort to the formal procedures provided under NRC Rules of Practice.

CONCLUSION

For the reasons stated above, the NRC Staff opposes Illinois' notices of deposition and requests for the production of documents and tangible things.

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