July 10, 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
GENERAL ELECTRIC COMPANY	)	Docket No. 70-1308
	)	(Renewal of SNM1265)
(GE Morris Operation Spent Fuel Storage Facility)	)	
	)	

NRC STAFF'S RESPONSE TO STATE OF ILLINOIS' MOTION FOR RECONSIDERATION OF ORDER RULING ON CONTENTIONS AND STAFF'S CONDITIONAL REQUEST FOR ADDITIONAL DISCOVERY

A. INTRODUCTION

On June 20, 1980, the State of Illinois (State or Illinois) filed a "Motion for Reconsideration" and an accompanying "Memorandum in Support of Motion for Reconsideration" (Supporting Memorandum) directed to certain rulings of the Atomic Safety and Licensing Board (Licensing Board or Board) set forth in the Board's "Order Ruling on Contentions of the Parties" (Order) of June 4, 1980. Specifically, the State requested that the Licensing Board:

(1) reconsider its ruling on Illinois contention 1(a) and admit that contention in light of the Commission's recent Statement of Interim Policy on Class 9 accidents;[1/]

1/ Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969, Statement of Interim Policy, June 9, 1980, 45 Fed. Reg. 40101 (June 13, 1980) (Class 9 Policy Statement).

(2) reconsider its ruling on Illinois contention 9 and admit that contention on the ground that the ongoing rulemaking that formed the basis for the Board's rejection of contention 9 is different in scope than the contention;

(3) reconsider its ruling on Illinois contention 11(a)-(h) and admit subsections (a)-(h) of that contention in light of the Commission's Class 9 Policy Statement;

(4)(a) clarify its ruling on discovery and the presentation of evidence with regard to Illinois contention 11 on the need for an environmental impact statement; and

(b) clarify its ruling on the consolidation of contentions.

For the reasons set forth below, the NRC Staff (Staff) opposes the State's motion with regard to Illinois contentions 9, and 11 but supports the motion with regard to Illinois contention 1(a) and the requests for clarification. In addition, the Staff requests the opportunity for additional discovery in the event that Illinois' Motion for Reconsideration is granted with regard to contentions 1(a), 9 or 11.

B. NRC STAFF'S POSITION ON MOTION FOR RECONSIDERATION

1. Illinois Contention 1(a)

Illinois contention 1(a) states, in pertinent part:

> The CSAR does not adequately describe and analyze the risk of all credible accidents and the consequences thereof including:
>
> (a) the effect on the Morris facility of a Class 9 accident at the adjacent Dresden Nuclear Reactor.

In its Order of June 4, 1980, the Licensing Board ruled that Class 9 accidents, particularly those at another facility, were beyond the scope of the instant proceeding, relying on Public Service Company of Oklahoma, et al. (Black Fox Station, Units 1&2), CLI-80-8, 11 NRC 433 (1980), and ALAB-587, 11 NRC 474 (1980) wherein the Commission, following then-existing policy on Class 9 accidents, indicated that, absent Commission direction to the contrary in exceptional circumstances, Class 9 accidents were not to be considered in individual licensing proceedings. Thus, the Board eliminated reference to Class 9 accidents at Dresden in Illinois' contention 1(a) and admitted the contention in modified form to read:

> The Consolidated Safety Analysis Report (CSAR) does not adequately describe the following:
>
> (a) The consequences of simultaneous accidental radioactive releases from the Dresden Nuclear Power Station and the Morris Spent Fuel Storage Facility.[2/]

In its Motion for Reconsideration, the State asks that the Board reconsider its rejection of Illinois contention 1(a) as originally framed on the ground

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2/ Order, p.4.

that the Commission's Statement of Interim Policy on Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969, issued subsequent to the Licensing Board's Order of June 4, 1980, removes any bar from the consideration of Class 9 accidents at Dresden in the instant proceeding and confers upon the Board the jurisdiction to undertake such a consideration.

The Commission, in its Class 9 Policy Statement, withdrew the proposed Annex to Appendix D to 10 CFR Part 50, suspended the rulemaking proceeding that began with the publication of the proposed Annex on December 1, 1971, and directed that, henceforth, environmental impact statements on nuclear power plant licensing actions are to include a reasoned consideration of the environmental risks attributable to serious accidents at the facility which is the subject of each such statement and removed the legal bar from consideration of Class 9 accidents in proposed licensing actions involving nuclear power plants.[3/] Thus, consideration of Class 9 accidents for nuclear power plants is no longer precluded at the outset as a matter of Commission policy and, as noted by the State in its Supporting Memorandum, this Licensing Board has the authority to consider a Class 9 accident sequence at a power reactor which reasonably could be expected to substantially affect the Morris facility, to the extent that such consideration is encompassed within other generally applicable legal standards such as the "rule of reason."[4/]

3/ Class 9 Policy Statement, pp. 1, 7, 9.

4/ A determination that the occurrence of a Class 9 accident at Dresden and the consideration of its effects on GE Morris comport with the "rule of reason" and other generally applicable legal standards would entail some factual determinations which are not appropriate at this stage of the proceeding. See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC ___ (April 22, 1980), Slip Op. pp. 14-16.

In sum, the Commission's Class 9 Policy Statement has removed the prohibition against the consideration of Class 9 accidents at nuclear power reactors, and, therefore, it has eliminated the basis upon which the Licensing Board rejected Illinois contention 1(a) in the instant case. Accordingly, the Staff supports the State's Motion for Reconsideration of contention 1(a) and is of the view that contention 1(a), as originally proposed by the State, should now be admitted in lieu of the contention designated as 1(a) as reworded and accepted by the Licensing Board in its June 4, 1980 Order.[5/] Thus, it is the Staff's view that contention 1(a) should be admitted to read as follows:

> "The Consolidated Safety Analysis Report (CSAR) does not adequately describe the following:
>
> (a) The effect on the Morris facility of a Class 9 accident at the adjacent Dresden Nuclear Reactor."

5/ In the "NRC Staff's Statement of Position on Amended Contentions of the State of Illinois," February 28, 1980, at pp. 3, 8-9, the Staff objected to the admission of Illinois contention 1(a) not only on the basis of the then-existing policy on Class 9 accidents but also on the grounds that the contention did not meet the basis and specificity requirements of 10 CFR § 2.714(b). In its June 4, 1980 Order, the Licensing Board grounded its rejection of the State's proposed contention 1(a) on then-existing Class 9 policy and did not explicitly address the question as to whether that contention was set forth with adequate basis and specificity. However, in rewording and admitting the contention in modified form, the Board stated that "[t]he contention as accepted by the Board does not materially change the substance of the contentions as proposed by the intervenors, except that Class 9 accidents are beyond the scope of this proceeding...." (June 4, 1980 Order, p. 4). This implies that the Board did not find Illinois contention 1(a) (or the modified contention 1(a) which is "not materially" different except for the deletion of reference to a Class 9 accident at Dresden) to be defective for lack of basis and specificity. Thus, if, in fact, the Board has not found contention 1(a) to lack basis and specificity, the Staff will not renew its basis and specificity objection to contention 1(a) since there is nothing new to offer in this regard.

2. Illinois Contention 9

Illinois Contention 9 states:

> The Applicant has failed to analyze the relevant safety and health issues from the perspective of long term storage. Although the license application foresees a licensing period of 20 years, there is no assurance that fuel will not, of necessity, be left for a longer period at Morris. Prior to a finding of the Commission that storage at Morris beyond 20 years will be unnecessary because government facilities, other than Morris, will then be available for the existing fuel, the license application is incomplete without a long term analysis.

The Licensing Board rejected this contention in its Order of June 4, 1980 on the ground that the matter raised by the contention is the subject of an ongoing generic rulemaking proceeding.[6/] In its Motion for Reconsideration, the State seeks to distinguish the rulemaking proceeding from the issues raised by contention 9. Specifically, Illinois claims that its contention 9 "requests a site specific evaluation of Morris facility's ability to continue to store fuel in the year 2000."[7/] The State asserts that, in contrast, the rulemaking does not involve a site specific determination of whether individual pools will be capable of storing fuel and that the rulemaking "looks to an early date [for offsite waste disposal] of 2007."[8/] Thus, it is argued that the subject matter of contention 9 does not address the issues being considered in the rulemaking.

6/ Order, p.17. The rulemaking in question is "Storage and Disposal of Nuclear Waste", notice of which was published at 44 Fed. Reg. 61372.

7/ Supporting Memorandum, p.4.

8/ Id.

These arguments are without merit for several reasons. First, while the rulemaking is, of course, generic in nature and is not site-specific, there is no indication of any sort that the rulemaking will only address waste storage and disposal after the year 2007. In its notice of proposed rulemaking, the Commission stated that it:

> is conducting a generic proceeding to reassess its degree of confidence that radioactive wastes produced by nuclear facilities will be safely disposed of, to determine when any such disposal will be available, and whether such wastes can be safely stored until they are safely disposed of. 44 Fed. Reg. 61372-73.
>
> * * *
>
> The purpose of this proceeding is solely to assess generically the degree of assurance now available that radioactive waste can be safely disposed of, to determine when such disposal or off-site storage will be available, and to determine whether radioactive wastes can be safely stored on-site past the expiration of existing facility licenses until off-site disposal or storage is available. 44 Fed. Reg. 61373.

These Commission statements on the scope of the rulemaking set no time limits before which waste disposal availability will not be considered and are clearly contrary to the implication in the State's argument that there is a time period for waste storage and disposal (between the year 2000, when the GE Morris license, if renewed, would expire, and the year 2007) not covered by the rulemaking which can and should be considered in the instant proceeding.

Secondly, while the State now claims that contention 9 only seeks an evaluation of the Morris facility's ability to continue to store fuel in the year 2000, this is contrary to the plain language of contention 9 which refers to

storage beyond the 20 years for which license renewal is sought and asserts that long term storage must be analyzed. Thus, Illinois contention 9 seeks, on its face, an evaluation of long term waste storage at GE Morris beyond the expiration of the period for which license renewal is sought. While the safety implications and environmental impacts of onsite waste storage for the duration of the proposed license for GE Morris can be considered in this proceeding, what is sought by Illinois in contention 9 has been expressly prohibited by the Commission. Specifically, the Commission stated in its Notice of Rulemaking that:

> during this [rulemaking] proceeding the safety implications and environmental impacts of radioactive waste storage on-site for the duration of a license will continue to be subjects for adjudication in individual facility licensing proceedings. The Commission has decided, however, that during this proceeding the issues being considered in the rulemaking should not be addressed in individual licensing proceedings. These issues are most appropriately addressed in a generic proceeding of the character here envisaged. 44 Fed. Reg. 61373.

This Commission statement is no less applicable today in light of Illinois' Motion for Reconsideration than it was at the time the Licensing Board rejected Illinois contention 9 in its Order of June 4, 1980. It precludes a consideration in the instant proceeding of the matters raised in contention 9 and that contention was properly rejected by the Licensing Board. Accordingly, Illinois' Motion for Reconsideration with regard to contention 9 should be denied.

3. Contention 11(a)-(h)

Illinois contention 11 states:

> The Nuclear Regulatory Commission has an obligation under the National Environmental Policy Act, (NEPA) 42 USC 4332, (1969) to issue an environmental impact statement which will account for normal operation of the Morris facility and for the environmental impacts of:
>
> a. emergency evacuation and its consequences
>
> b. decommissioning and/or residual contamination probabilities
>
> c. testing of fuel in the spent fuel pool
>
> d. dry storage of fuel in the canyon
>
> e. expansion of the spent fuel pool
>
> f. contraction of fuel assemblies for compact storage
>
> g. storage of waste products or tools from decontamination of the Dresden reactor
>
> h. any other proposed activity, other than simple storage of spent fuel in water.

In its Order of June 4, 1980, the Licensing Board ruled that subparagraphs (a) through (h) of this contention are either so vague or speculative as to present no litigable issues. Thus, the Board deleted subparagraphs (a) through (h) and admitted the contention in modified form to read:

> The Nuclear Regulatory Commission has an obligation under the National Environmental Policy Act (NEPA) 42 U.S.C. 4332 (1969) to issue an environmental impact statement which will account for environmental impact of normal operation of the Morris facility.[9/]

In its Motion for Reconsideration, the State asks that the Board reconsider its rejection of subparagraphs (a) through (h) of Illinois contention 11 as

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9/ Order, p. 19.

originally framed on the ground that the Commission's Class 9 Policy Statement requires the Staff to consider in environmental evaluations operational safety, siting and emergency planning and that such considerations are reflected in the proposed subparagraphs (a) through (h).10/

First, it should be noted that the Commission's Class 9 Policy Statement explicitly applies, by its own terms, to nuclear power reactors.11/ Similarly, the Annex to Appendix D to 10 CFR Part 50 which originally established the accident classification system was expressly applicable only to nuclear power reactors.12/ Thus, the Commission's Class 9 Policy Statement does not dictate what accidents must be considered in any environmental impact statement that might be found to be necessary for the GE Morris facility (which, of course, is not a nuclear power reactor). Consequently, contrary to Illinois' argument, the issuance of the Class 9 Policy Statement provides no basis on which to change the Board's previous ruling rejecting subparagraphs (a) through (h) of Illinois' proposed contention 11.

10/ Supporting Memorandum, pp. 4-5.

11/ The title of the Commission's Class 9 Policy Statement, "Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969" (emphasis added) defines the scope of applicability of the Policy Statement. An examination of the Policy Statement itself reveals that the requirements set forth therein are applicable to nuclear power reactors. See pp. 3, 9, 11, 12 of the Policy Statement.

12/ See "Consideration of Accidents in Implementation of the National Environmental Policy Act of 1969," 36 Fed. Reg. 22851 (December 1, 1971), where it is stated:

> This Annex requires certain assumptions to be made in discussion of accidents in Environmental Reports submitted pursuant to Appendix D by applicants for construction permits or operating licenses for nuclear power reactors. (emphasis added, footnote omitted).

Second, subparagraphs (a) through (h) of contention 11 were rejected by the Licensing Board because they are vague and speculative and do not present litigable issues. Illinois has presented nothing in its Motion for reconsideration that cures these infirmities and subparagraphs (a) through (h) remain as vague and speculative now as at the time of the Licensing Board's original ruling. Accordingly, it is the Staff's view that the State's motion with regard to proposed contention 11(a)-(h) should be denied.

The State also suggests that as an alternative to admitting subparagraphs (a) through (h) of proposed contention 11, the Board could append to that contention as modified and admitted a paragraph as follows:

> The EIS shall include consideration of site specific environmental impacts attributable to accidents that lead to releases of radiation and/or radioactive materials. Analysis of both probability of occurrence of such releases and environmental consequences of such releases are required. Events arising from causes external to the facility which are considered possible contributors to risk shall be analyzed, as well as facility accident sequences. Consequence analysis shall include potential radiological exposures to individuals and population groups and biota. Socioeconomic impacts that might be associated with emergency measures and/or evacuation should also be discussed.[13/]

This proposed addition to Illinois contention 11 as modified, renumbered (as Contention 7) and admitted by the Licensing Board appears to be a summary of the Commission's requirements, as set forth in the Class 9 Policy Statement, that the risks of serious accidents be discussed and evaluated in environmental impact statements (EIS) prepared in conjunction with NRC licensing actions

13/ Supporting Memorandum, p.5.

on nuclear power reactors. As previously indicated, the Commission's Class 9 Policy Statement is expressly applicable to nuclear power reactors and does not govern the requirements for an EIS for a facility such as GE Morris. The State's suggestion that the quoted paragraph be added to the contention is, in essence, an attempt by the State to amend its contention to add specificity originally found to be lacking without the required showing by the State of good cause for the untimely amendment. 10 CFR § 2.714(a). The State's Motion for Reconsideration in this regard should be denied.

4. Requests for Clarification

a. Deferral of Discovery and Presentation of Evidence on Potential Environmental Impacts

Illinois expresses some confusion as to when evidence on environmental impacts will be presented and requests clarification as to this matter and as to when discovery on environmental issues may take place.

The State's confusion in this regard apparently arises from that portion of the June 4, 1980 Order in which the Board ruled on, and admitted in modified form, Illinois contention 11. In its statement of position on that contention, the Staff suggested that the Licensing Board defer ruling on whether an EIS need be prepared in this proceeding until it had heard all of the evidence on the potential environmental impacts of the proposed licensing action since the issue of whether an EIS is required is both a legal and a factual question.[14/] In its June 4, 1980 Order, the Board stated that:

14/ NRC Staff's Statement of Position on Amended Contentions of the State of Illinois, February 28, 1980, p.27.

> [it] believes that the Staff position on this contention is sound. The request that the environmental impact statement should be required can best be heard after evidence of potential environmental impacts are shown on the evidentiary record. The Board will defer hearing evidence on this contention until all the other evidence is substantially in the record. Order, p.19.

It is clear from the Board's statement that it will defer its decision on the need for an EIS until after evidence on potential environmental impacts is presented. Thus, the Licensee, the State and the Staff all will be afforded the opportunity to present evidence on environmental impacts and the State's concern that it might not be heard in this regard appears to be unfounded. Similarly, there is no indication in the Order of June 4, 1980 or in the "Order Extending Schedule for Discovery" issued on June 23, 1980 that discovery on environmental issues has been deferred or otherwise limited. In this regard, the Staff fully intends to submit discovery requests on environmental issues on or before the July 15, 1980 deadline for discovery set by the Licensing Board.

The foregoing represents the Staff's understanding of the import of the Licensing Board's June 4, 1980 Order with regard to the presentation of evidence on environmental impacts and discovery on environmental issues. While it is the Staff's view that the June 4 Order is clear in this regard and that further clarification is unnecessary, the Staff does not object to the State's request for clarification and, if the Staff's understanding of the Board's June 4 Order, as set forth above, is wrong, we would urge clarification by the Board.

b. Consolidation of Parties

Illinois requests clarification of the Licensing Board's ruling in which certain contentions of the State were combined with contentions of individual intervenors. Specifically, Illinois objects to the Board's action in this regard if the Licensing Board's intent in combining contentions was to consolidate the State and the individual intervenors with regard to the contentions in question.

This same matter was raised by the Staff in the "NRC Staff Motion for Reconsideration of Order Ruling on the Contentions of the Parties", filed on June 16, 1980, wherein the Staff requests precisely the same clarification as to consolidation as is now sought by the State. For the reasons set forth in the Staff's June 16, 1980 Motion for Reconsideration, the Staff supports the State's current request for clarification regarding consolidation of the State with the individual intervenors in this proceeding.

C. CONCLUSION ON MOTION FOR RECONSIDERATION

Based on the foregoing, the Staff opposes Illinois' Motion for Reconsideration with regard to Illinois contentions 9 and 11 but supports Illinois' Motion with regard to contention 1(a) and requests for clarification as to the presentation of evidence and the conduct of discovery on environmental issues and as to the consolidation of parties.

D. STAFF'S REQUEST FOR ADDITIONAL DISCOVERY

In its "Order Extending Schedule for Discovery" issued on June 23, 1980, the Licensing Board established July 15, 1980 as the last date on which discovery requests may be filed. To meet this deadline for discovery, discovery requests related to contentions must necessarily be directed to those contentions as framed and admitted in the Licensing Board's "Order Ruling on Contentions of the Parties" of June 4, 1980. In the event that Illinois' Motion for Reconsideration is granted, in whole or in part, with regard to Illinois contentions 1(a), 9 and 11, and those contentions are admitted in a modified form relative to the form of the contentions admitted by the Board in its June 4, 1980 Order, it is not clear that opportunity for discovery on such modified contentions will be available. Accordingly, the Staff herewith requests that, in the event that Illinois' Motion for Reconsideration is granted, in whole or in part, with regard to Illinois contentions 1(a), 9 and 11 and one or more of those contentions are admitted in modified form relative to the form of the contentions admitted in the Board's June 4, 1980 Order, all parties be given the opportunity to file, within 14 days of receipt of the Licensing Board's Order on Illinois' Motion for Reconsideration, additional discovery requests necessitated by the modified language of the contentions.

Respectfully submitted,

Stuart A Treby

for Joseph R. Gray
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 10th day of July, 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with §2.713(a), 10 CFR Part 2, the following information is provided:

Name	-	Joseph R. Gray
Address	-	U.S. Nuclear Regulatory Commission Office of the Executive Legal Director Washington, DC 20555
Telephone Number	-	Area Code 301 - 492-8660
Admission	-	Supreme Court of the State of Pennsylvania
Name of Party	-	NRC Staff U.S. Nuclear Regulatory Commission Washington, D. C. 20555

Joseph R. Gray
Joseph R. Gray
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 8th day of July, 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
GENERAL ELECTRIC COMPANY	)	Docket No. 70-1308
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO STATE OF ILLINOIS' MOTION FOR RECONSIDERATION OF ORDER RULING ON CONTENTIONS AND STAFF'S CONDITIONAL REQUEST FOR ADDITIONAL DISCOVERY" and "NOTICE OF APPEARANCE" for Joseph R. Gray in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 10th day of July, 1980:

Andrew C. Goodhope, Esq., Chairman
Atomic Safety and Licensing Board
3320 Estelle Terrace
Wheaton, MD 20906

Dr. Linda W. Little
5000 Hermitage Drive
Raleigh, NC 27612

Dr. Forrest J. Remick
305 East Hamilton Avenue
State College, PA 16801

Susan N. Sekuler, Esq.
Dean Hansell, Esq.
Office of the Attorney General
188 West Randolph Street
Suite 2315
Chicago, IL 60601

Ronald Szwajkowski, Esq.
Matthew A. Rooney, Esq.
Mayer, Brown & Platt
231 South LaSalle Street
Chicago, IL 60604

Ms. Bridget Little Rorem
Essex, IL 60935

Edward Firestone, Esq.
Legal Operation
General Electric Company
175 Curtner Avenue
Mail Code 822
San Jose, CA 95125

Mr. Everett Jay Quigley
R.R. 1 Box 378
Kankakee, IL 60901

Atomic Safety and Licensing Board Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Atomic Safety and Licensing Appeal Panel (5)*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Docketing and Service Section (7)*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Stuart A. Treby

Stuart A. Treby
Assistant Chief Hearing Counsel
for NRC Staff