

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

GENERAL ELECTRIC COMPANY

(GE Morris Operation Spent Fuel
Storage Facility)

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Docket No. 70-1308
(Renewal of SNM-1265)

NRC STAFF ANSWER TO
1) MOTION OF THE STATE OF ILLINOIS TO STAY PROCEEDINGS
AND 2) MOTIONS OF GENERAL ELECTRIC COMPANY FOR SANCTIONS AGAINST
ROREM, ET AL. AND THE STATE OF ILLINOIS
FOR FAILURE TO COMPLY WITH DISCOVERY

INTRODUCTION

On October 15, 1980, the State of Illinois filed a "Motion to Stay Proceedings" (hereafter "Motion to Stay"). In its Motion to Stay, Illinois seeks from the Atomic Safety and Licensing Board (the Board) an order staying "all proceedings, including discovery, until 30 days past the effective date of 10 CFR Part 72".

On October 9, 1980, the General Electric Company ("General Electric") filed a "Motion For Sanctions Against Rorem, et al. for Failure to Comply With Discovery" (hereafter "Motion for Sanctions Against Rorem, et al."). On October 13, 1980, General Electric filed a "Motion for Sanctions Against the State of Illinois For Failure to Comply with Discovery" (hereafter "Motion for Sanctions Against Illinois"). In its Motion for Sanctions Against Rorem,

et al., General Electric requests that the Board enter an order, pursuant to 10 CFR § 2.707, dismissing Intervenors Rorem, et al. from this proceeding for their failure to comply with discovery. General Electric requests in its Motion for Sanctions Against Illinois that the Board enter an order pursuant to 10 CFR § 2.707 imposing sanctions against Illinois for failure to comply with discovery. Specifically, General Electric requests that Contentions 1, 2, 3, 4, and 5, as admitted by the Board, which were originally proposed by Illinois, be dismissed.

As stated below, the Staff supports 1) a stay of these proceedings until thirty (30) days after the effective date of 10 CFR Part 72 and 2) a Board order requiring intervenors to file within thirty (30) days after the effective date of 10 CFR Part 72, any proposed amendments of contentions to retain, modify, withdraw or add contentions. The Staff opposes General Electric's motions for sanctions against Rorem, et al. and Illinois. However, the Staff urges that the Board require both intervenors to comply with any outstanding discovery requests relating to any retained contentions.

DISCUSSION

A. The Board Should Grant Illinois' Motion to Stay Proceedings

In its motion to stay proceedings, Illinois requests that the Board stay the proceedings until thirty (30) days after the effective date of 10 CFR

Part 72^{1/} -"in order to allow all parties to familiarize themselves with the rule and take any necessary action dictated thereby". Motion to Stay, at 4. Illinois notes that in promulgating the new rule, the Commission provided that Part 72 would apply to the GE Morris license renewal proceeding.^{2/} Id., at 2. According to Illinois, since the admitted contentions in this proceeding "do not reflect the new Rule, time is needed by the Board, the Applicant, the Staff and the parties to receive and analyze the Rule and to determine how it applies to the proceeding as a whole." Id., at 3. Finally, Illinois maintains that until the issues in this proceeding are "redefined", discovery cannot progress. Id., at 4.

The NRC Staff agrees with Illinois that at this juncture, a stay of these proceedings is appropriate. Since the Commission has specifically directed that this license renewal action proceed pursuant to 10 CFR Part 72, and

^{1/} As noted by the Staff in its September 25, 1980, letter to the Board and in its October 3, 1980, "Motion to Set Aside Summary Disposition Schedule," on September 19, 1980, in an affirmation session, the Commission approved the new Part 72 to Title 10 of the Code of Federal Regulations, entitled "Licensing Requirements for the Storage of Spent Fuel in An Independent Spent Fuel Storage Installation".

^{2/} Illinois quotes the following portion of the Supplementary Information accompanying the new regulation:

An application for renewal of the license for the G.E. Morris facility under 10 CFR Part 70 was received on February 27, 1979 and has been under review since that time. As 10 CFR Part 72 has become effective prior to completion of this licensing action, such licensing action will proceed pursuant to 10 CFR Part 72 which is specifically designed to cover spent fuel storage in an ISFSI. This is expected to result in some procedural delays in the GE Morris proceedings (emphasis added).

since that regulation has not been published as of this date,^{3/} the only effective regulation which could apply to the case at hand, 10 CFR Part 70, will no longer be controlling as to the license renewal which is the subject of this proceeding. In addition, the Commission itself recognizes that some procedural delays may occur as a result of the application of 10 CFR Part 72 to this proceeding. Furthermore, due to the Commission approval of Part 72, the Staff has informed the Board that it anticipates a delay in issuing the Safety Evaluation Report for the GE Morris operation.^{4/} Finally, the Board, at the Staff's request, has set aside the schedule for summary disposition of contentions,^{5/} which was established by the Board in its orders of September 9, 1980. In these circumstances, there is no benefit in proceeding further until the regulation which will govern the GE Morris license renewal becomes effective and the parties have had sufficient time to review and analyze the new regulation and its effects on this proceeding.

The contentions admitted into this proceeding were based on 10 CFR Part 70. Certain provisions in the new governing regulations in 10 CFR Part 72, which differ from those in 10 CFR Part 70, will require General Electric to supplement the information submitted to the Staff. In light of the new governing

^{3/} It is the Staff's understanding that 10 CFR Part 72 will be published in the Federal Register within approximately two weeks and that 10 CFR Part 72 will become effective 15 days after publication in the Federal Register.

^{4/} See letter to Board members from Counsel for NRC Staff, dated September 26, 1980.

^{5/} See "Order Granting NRC Staff Motion to Set Aside Schedule for Summary Disposition," October 21, 1980.

regulations and the supplemental information General Electric will be required to file in support of its application for renewal of its license to store fuel at the Morris facility, it is likely that the intervenors will review their previously-filed contentions and may seek to supplement them by modification, amendment or withdrawal.^{6/}

Based on the foregoing, the Staff supports Illinois' motion for a stay of the proceedings. The Staff believes that the proceedings should be suspended until thirty (30) days after the effective date of 10 CFR Part 72,^{7/} in order to allow the parties to evaluate the new regulation and to determine its impact on their participation in this proceeding. Within this period, the intervenors should be able to determine which contentions they wish to retain, modify or withdraw or whether they wish to add new contentions. The intervenors should be required to file any proposed amendments of contentions no later than thirty (30) days after the effective date of 10 CFR Part 72. With respect to those contentions that are retained, intervenors should be required to respond to the outstanding discovery requests of the other parties relating to those contentions.

^{6/} Should the intervenors seek to amend their contentions, they will have to file a motion requesting permission from the Board pursuant to 10 CFR § 2.714(a)(3) which requires that the factors in 10 CFR § 2.714(a)(1) be addressed.

^{7/} Since 10 CFR Part 72 does not become effective until 15 days after publication in the Federal Register, this will allow a total period of 45 days after publication for the parties to review and analyze the new regulation. Further, the Staff has provided the Board and parties, under cover of its letter dated October 28, 1980, an advance copy of 10 CFR Part 72. This affords the intervenors additional time to study and review Part 72 of the Commission's regulations.

B. The Board Should Deny General Electric's Motions For Sanctions Against Rorem, Et Al. and the State of Illinois

General Electric seeks orders from the Board which would 1) dismiss Intervenor Rorem, et al. from this proceeding and 2) impose sanctions against the State of Illinois by dismissing Contentions 1, 2, 3, 4, and 5.^{8/} For the reasons stated below, the Staff opposes both motions.

1. Rorem, Et Al.

In support of its motion to dismiss Intervenor Rorem, et al., General Electric cites the repeated failure of Intervenor Rorem, et al. to comply with legitimate discovery requests and Board orders. In particular, General Electric notes that on September 9, 1980, the Board entered an order compelling Intervenor Rorem et al. to respond to General Electric's Request for Production and Interrogatories, filed on July 15, 1980.^{9/} Motion for Sanctions Against Rorem, et al., at 1. As General Electric states, that order in effect gave Intervenor Rorem, et al. an additional 8 weeks, to and including September 30, 1980, to comply with General Electric's discovery requests, which the Board had previously ruled, in an order of June 23,

^{8/} Although General Electric "also objects to Illinois' refusal to respond to discovery requests regarding Contention 7, General Electric, at this time, does not believe that its ability to refute that contention has been sufficiently hampered by Illinois' silence to request that the contention be stricken." See Motion for Sanctions Against Illinois, at 1.

^{9/} See "Order Ruling on Motions to Compel Discovery Against Rorem, Et Al. Filed by the Applicant and the Nuclear Regulatory Commission Staff and Setting Time for Filing Motion for Summary Disposition". As the title of this order indicates, the Board also compelled Intervenor Rorem, et al. to respond to the Staff's discovery requests ("NRC Staff Interrogatories to, and Request For the Production of Documents From, Intervenor Rorem, Et Al., July 15, 1980).

1980,^{10/} should have been answered by August 4, 1980. Id., at 1. According to General Electric, as of the date of its Motion for Sanctions, it has not received any response to its discovery requests.^{11/} Id., at 2. In view of the total failure of Intervenors Rorem, et al. to respond to its discovery requests and the Board's orders or to participate at all in discovery by filing their own discovery requests, General Electric asserts that the appropriate sanction is to dismiss them as parties to the proceeding. Id., at 2-4.

The NRC Staff agrees with General Electric that Intervenors Rorem, et al. have flagrantly disregarded the legitimate discovery requests of the other parties and the Board's orders. Not only have Intervenors Rorem, et al. failed to comply with the discovery requests of other parties, but since filing amended contentions following the prehearing conference held on February 29, 1980, they have been silent until their response of October 24, 1980. See footnote 12, infra. Thus, the Board could conclude Intervenors Rorem, et al. have failed to assume a significant participational role in this proceeding and weigh this factor in their consideration of General Electric's Motion for Sanctions against Rorem, et al. Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-358, 4 NRC 558 (1976). The failure of Rorem, et al. to yield information about their positions on the issues in controversy, coupled with their failure to make a useful contribution to the proceeding would ordinarily be sufficient grounds for

^{10/} See "Order Extending Schedule For Discovery", June 23, 1980.

^{11/} As of the date of this pleading, the Staff also has not received any response from Rorem, et al. to its discovery requests.

granting General Electric's motion to dismiss them as a party to this proceeding. See Northern States Power Company, (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298, 1300-01 (1977); Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813, 817 (1975); and Public Service Electric and Gas Company (Atlantic Nuclear Generating Station, Units 1 and 2), LBP-75-62, 2 NRC 702, 705-706 (1975). In these circumstances, the Board is empowered, pursuant to 10 CFR § 2.707, to dismiss Rorem, et al. Id.^{12/}

However, the Staff does not believe that dismissal of Rorem, et al. is appropriate at this time, in view of the unique posture of this particular proceeding. In view of the recent promulgation of 10 CFR Part 72, the Staff has supported Illinois' Motion to Stay these proceedings, to allow the parties to evaluate the new regulations and to provide the intervenors with the opportunity to determine whether they wish to amend their contentions (for good cause shown). Dismissal of Rorem, et al. from the proceeding at this time, on the basis of their failure to comply with discovery requests and Board orders relating to the admitted contentions, would be inappropriate,

^{12/} The Staff notes that Rorem, et al. have recently filed their response to General Electric's motion for sanctions, which indicates that they wish to remain a party to this proceeding and that they are attempting to answer the interrogatories propounded to them by General Electric and the NRC Staff. See "Response of Rorem, Et Al. to Motion of GE to Dismiss Rorem, Et Al. As Intervenors", dated October 24, 1980, at 1. Although the Staff is dismayed that Rorem, et al. have chosen to remain silent until now and have not requested extensions of time for filing responses to other parties' discovery requests nor responded to motions seeking to compel them to respond, the Staff recognizes that as pro se intervenors, Rorem, et al. may not have realized the importance of taking these actions.

since those contentions might never be the subject of adjudication.^{13/}

Accordingly, the Staff urges that the Board deny General Electric's motion to dismiss Rorem, et al.

2. The State of Illinois

In support of its motion for sanctions dismissing certain contentions originally proposed by Illinois, General Electric states that it would be unfair to General Electric to require it to answer these contentions since Illinois has refused to answer General Electric's legitimate discovery requests concerning them. See Motion for Sanctions Against Illinois, at 1. General Electric notes that on September 9, 1980, the Board entered an order granting General Electric's motion to compel Illinois to respond more fully to General Electric's Interrogatories, which had been filed on July 15,

^{13/} Imposition of sanctions for failure to comply with discovery requests relating to contentions is justified when such a failure can hamper the ability of the other parties to present evidence regarding contentions. Where an intervenor refuses to respond to discovery requests, the intervenor improperly frustrates their adversaries' legitimate efforts to present affirmative evidence on the intervenor's contentions and to prepare for cross-examination. Tyrone, LBP-77-37, supra. As the Licensing Board in Tyrone, LBP-77-37, supra, observed, "to permit a party to make skeletal contentions, keep the bases for them secret, then require its adversaries to meet any conceivable thrust at hearing would be patently unfair, and inconsistent with a sound record". Id., 5 NRC at 1301. Where, however, there appears to be a substantial likelihood that the contentions which are the subject of unanswered discovery requests may be significantly changed and not litigated at hearing, it is not clear that the party whose discovery requests have not been answered will be prejudiced by the failure to answer.

1980.^{14/} Id., at 2. As General Electric states, that order in effect, gave Illinois an additional 8 weeks, to and including September 30, 1980, to comply with General Electric's discovery requests regarding all interrogatories specified in General Electric's Motion to Compel. Id., at 2. On the basis of Illinois' failure to file further responses to the interrogatories as of the date of its Motion for Sanctions against Illinois, General Electric seeks an order from the Board dismissing Contentions 1, 2, 3, 4, and 5. Id., at 2. According to General Electric, Illinois' failure to respond further to these interrogatories has prevented General Electric from discovering the bases, if any, for these contentions. Id., at 2.

The factors previously noted by the Staff which weigh against dismissing Roem, et al. as a party to this proceeding also weigh against dismissal of the contentions specified by General Electric in its Motion for Sanctions Against Illinois. It is true that Illinois, like Roem, et al. has failed to comply with discovery requests and Board orders. However, unlike Roem, et al., Illinois has played a significant role in this proceeding and can be expected to do so in the future. In the Staff's view, there is inadequate justification for dismissal of certain contentions derived from contentions originally proposed by Illinois. General Electric is justified in asserting

^{14/} See "Order Ruling on Motions to Compel Discovery Against the State of Illinois Filed by the Applicant and the Nuclear Regulatory Commission Staff and Setting Time for Filing Motion for Summary Disposition." As the title of the order indicates, the Board also compelled the State to respond more fully to the Staff's discovery requests. ("NRC Staff Interrogatories to, and Request For the Production of Documents From, The State of Illinois," July 15, 1980).

that it is unfair to General Electric to attempt to refute these contentions since Illinois has refused to fully answer General Electric's legitimate discovery requests concerning them. See Motion for Sanctions Against Illinois, at 1. However, in all likelihood, General Electric may not have to refute these particular contentions, since Illinois, on the basis of its analysis of 10 CFR Part 72, may seek to modify or withdraw the previously admitted contentions or add new contentions. Thus, General Electric would not be prejudiced by Illinois' past failure to respond fully to General Electric's discovery requests, assuming of course, that Illinois responds to outstanding discovery requests relating to any contentions that are retained. For these reasons, the Staff opposes General Electric's Motion For Sanctions against Illinois.^{15/} However, the Staff believes that Illinois should be required to fully respond to all outstanding discovery requests (including those of the Staff) that relate to any previously admitted contentions which it wishes to retain.

CONCLUSION

Based on the foregoing, the Staff supports 1) a stay of these proceedings until thirty (30) days after the effective date of 10 CFR Part 72 and 2) a Board order requiring intervenors to file within thirty (30) days after the

^{15/} Illinois has recently filed a response opposing General Electric's motion on the grounds that General Electric is, in reality, seeking summary disposition of certain contentions. See "Response in Opposition to Motion for Sanctions," dated October 24, 1980. The Staff does not agree with Illinois' analysis, but rather, believes that General Electric is seeking sanctions against Illinois for failing to respond to the Board's order. Illinois' response does not address its failure to respond to the Board's order.

effective date of 10 CFR Part 72, any proposed amendments of contentions to retain, modify, withdraw or add new contentions. The Staff opposes General Electric's motions for sanctions against Rorem, et al. and Illinois. However, the Staff urges that the Board require both intervenors to comply with any outstanding discovery requests relating to any retained contentions.

Respectfully submitted,

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Dated at Bethesda, Maryland
this 29th day of October, 1980

