12/13/90

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
General Electric Company,	)	Docket Nos. TSCA-III-520,
	)	TSCA-IV-89-0016,
	)	TSCA-V-C-93-90,
	)	TSCA-V-C-94-90,
	)	TSCA-V-C-95-90,
	)	TSCA-VI-477C, and
	)	TSCA-1090-02-14-2615
	)	
Respondent	)	

ORDER GRANTING IN PART MOTION
FOR CONSOLIDATION

Under date of October 18, 1990, General Electric Company (GE) filed a motion to consolidate the captioned proceedings pursuant to Rule 22.12 of the Consolidated Rules of Practice (40 CFR Part 22). The motion was filed with the Chief Administrative Law Judge and simultaneously with the appropriate Regional Hearing Clerks. Alternatively, GE requested that, pending a decision on the merits in the Region IV proceeding, Docket No. TSCA-IV-0016, the other six proceedings be stayed.

In support of the motion, GE states that the Region IV proceeding was initiated by a complaint issued by the Region on May 12, 1989. The complaint contained two counts, Count I charging GE with having improperly disposed of 10,126 gallons of PCB material from reclaimed solvents through a distillation method in violation of 40 CFR § 761.60(a) and Count II charging GE with

having processed for use a total of 10,126 gallons of solvent containing PCBs without a permit in violation of 40 CFR §§ 761.20(a) and 761.30. The proceeding was assigned to the undersigned on September 28, 1989. During the extended prehearing period, the parties have completed prehearing exchanges and their respective motions for an accelerated decision were denied by an order, dated August 30, 1989. [1/]

Six other complaints have been issued against GE alleging, inter alia, improper disposal of PCB material from reclaimed solvents through a distillation method in violation of 40 CFR § 761.60(a). The complaint in Docket No. 1090-02-14-2615 (Region X) was issued on February 13, 1990 [2/] and the complaint in Docket No. TSCA-VI-477C (Region VI) was issued on September 15, 1990. The complaint in Docket No. TSCA-III-520 (Region III) was issued on September 20, 1990 and the remaining three complaints, Docket Nos. TSCA-V-C-93-90, TSCA-V-C-94-90 and TSCA-V-C-95-90 (Region V) were filed on September 25, 1990.

GE alleges that its motion complies with all of the requirements of Rule 22.12, because the complaints arise out of the same factual situation and involve common parties and common

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[1/] Although the order stated that the matter would be scheduled for hearing in Atlanta, Georgia, in the near future, this intention was not realized, because of delay in approving the Agency's budget, during which period a stay on travel was in effect.

[2/] This proceeding was originally assigned to Chief Judge Frazier on March 19, 1990, and reassigned to me on November 1, 1990, after the motion for consolidation was filed.

questions of law and fact (Brief In Support Of Motion To Consolidate at 3). Specifically, GE points out that the central allegation in all seven complaints involves the averment that it operated a solvent distillation system without a permit or approval from EPA and improperly disposed of PCB material, i.e., freon solvent, in violation of 40 CFR § 761.60(a) or 761.60(e). The Region IV and VI complaints and the Region X complaint as amended also contain counts of improper use of PCBs during the operation of GE's solvent recovery system in violation of 40 CFR §§ 761.20(a) and 761.30. Additionally, several of the complaints contain other counts concerning improper record keeping, improper marking and dating, failure to register PCB transformers with the local fire department and improper disposal of PCBs by means of a spill. [3/] GE asserts that consolidation would expedite and simplify the proceedings and avoid the duplication and expense of hearings concerning the same factual issues. Claiming that the parties to these seven proceedings are identical, GE says that no party can reasonably contend that its rights would be adversely affected by consolidation.

Citing the Joint Motion To Enlarge Time To File Prehearing Exchange in Docket No. 1090-02-14-2615 (Region X), which motion refers to the complaints filed by the other Regions, and to a National Settlement Committee apparently formed at Headquarters

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[3/] GE says that to the extent a hearing on these non-freon flush allegations is necessary, it anticipates the hearing would be limited to the appropriateness of the proposed civil penalty (Brief at 5, note 2).

level to handle settlement negotiations, GE says that the parties have already recognized the similar nature of the counts in the seven complaints (Brief at 5). Alternative to consolidation, GE asks that the other six proceedings be stayed, pending a decision on the Region IV complaint, Docket No. TSCA-IV-89-0016, which as indicated, supra at note 1, is ready to be scheduled for hearing. Acknowledging that this alternative is considerably less desirable in terms of reaching an expeditious and efficient resolution of these closely related matters, GE asserts that a stay would at least assure that the judicial process [and the parties] would not be unduly burdened by multiple hearings on the same issues (Brief at 9). Moreover, GE says that a stay would be beneficial to the settlement process by allowing the parties ample time to conduct nationally coordinated settlement discussions and to resolve these matters without the necessity of further litigation.

COMPLAINANT'S OPPOSITION

All Regions except Region III have filed briefs or memoranda in opposition to the motion to consolidate. As might be expected, opposition to consolidation is predicated upon substantially similar arguments.

Basically, Complainants point out that, while there may well be common issues of law and fact, the existence of common issues does not, in and of itself, justify or require consolidation. [4/]

[4/] Regions IV and X do not deny that there are common issues of law and fact in the seven proceedings, while the opposition of Region V strives to demonstrate that the facts in its cases are different and only an issue of law remains. Region V has filed (continued...)

Decisions dealing with consolidation under Rule 42(a) of the Federal Rules of Civil Procedure are cited for the proposition that where cases are in substantially different stages of pretrial preparation, consolidation will ordinarily be denied because of the resulting delay in disposition of the cases ready for trial or more nearly so, even if other requirements for consolidation, such as common issues of law and fact, are met. See, among others, La Chemise La Coste v. Alligator Company, Inc., 60 F.R.D. 164 (D.Del. 1973) and Transeastern Shipping Corp. v. India Supply Mission, 53 F.R.D. 204 (S.D.N.Y. 1971). It is pointed out that only the Region IV proceeding is ready for hearing, that prehearing exchanges have not been completed in the Region X case [5/] and that the other cases are in their infancy, the complaints having been filed in the latter half of September 1990.

Complainants emphasize the requirements of Rule 22.12(a) of the Consolidated Rules that "(2) consolidation would expedite and simplify consideration of the issues" and argue that this requirement has not been met. Because of the differing stages of pretrial preparation, it is argued that consolidation can only result in delay. Moreover, it is pointed out that four of the

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[4/](...continued)
identical motions for accelerated decisions in the three proceedings it initiated. Region VI has indicated it intends to file a motion for an accelerated decision.

[5/] Because the parties have stated they are involved in settlement negotiations, the time for filing prehearing exchanges in the Region X proceeding has been extended to January 11, 1991.

complaints contain counts for violations in addition to the primary use and disposal violations associated with operation of GE's freon distillation system without a permit. Complainants further note that penalties in the Region IV and Region X complaints were computed in accordance with the 1980 Penalty Policy (45 Fed. Reg. 59770, September 10, 1980) while penalties in the other complaints were determined in accordance with the 1990 Penalty Policy. [6/]

Contrary to the implication in GE's brief, Complainants assert that formation of the National Settlement Committee was the result of requests made by GE to EPA Headquarters in May of 1990. The committee is composed of representatives from each Region involved in these proceedings and has reportedly made it clear to GE that each case is expected to proceed in litigation independently of the other cases.

Complainants oppose, as inappropriate for the same reasons as they oppose the motion to consolidate, GE's alternative motion for a stay of proceedings pending a decision in the Region IV case.

GE'S REPLY

Under date of December 4, 1990, GE filed a reply to the memorandum filed by Region V opposing the motion to consolidate. GE states that it is filing the reply in order to clarify the issues involved in the motion to consolidate.

[6/] The Region V complaints refer to the 1980 Penalty Policy and, in addition, to "Guidance for proposed penalties and settlements under PCB Penalty Policy," dated March 30, 1990. The Region VI and Region III complaints refer to the "Polychlorinated Biphenyls (PCB) Penalty Policy, dated April 9, 1990."

Pointing out that all seven complaints pertain to or arise out of the operation of its solvent distillation system at different locations, GE argues that there is no basis for Region V's attempted distinction between the issues on liability in the Region IV proceeding and the Region V cases (Reply at 2). To the extent that the Region V cases are based on alternative theories of liability, GE says there is no reason why these alternative theories cannot be advanced in a consolidated proceeding (Reply at 3). Moreover, GE says that it would be fundamentally unfair to require it to litigate the same set of facts in different geographic locations, merely because Complainant has developed a new theory of liability. GE notes that Complainant does not object to consolidating the three Region V proceedings at least for purposes of the motions for an accelerated decision [7/] and, accordingly, asks that the three Region V cases be consolidated, even if its motion to consolidate all the proceedings is denied.

D I S C U S S I O N

At the outset, it should be noted that, because the seven proceedings have been assigned to the undersigned ALJ, GE has achieved some of the relief sought in its motion for consolidation.

[7/] Complainant's Memorandum In Opposition To Respondent's Motion To Consolidate at 8. GE has moved for and been granted an extension until January 10, 1991, in which to respond to the motions.

The first requirement for consolidation under the applicable rule [8/] is that there be common parties or common questions of fact or law. While these requirements are in the alternative, it is concluded that both are met here. Because Rule 22.03 defines "complainant" as meaning any person authorized to issue a complaint on behalf of the Agency to persons alleged to be in violation of the Act, it is argued that the parties to the complaints issued by the various Regions are not identical. It is clear, however, that the complaints are issued in a representative capacity and notwithstanding that the "complainants" are literally officials in each Region authorized to issue complaints, the Agency is the real party in interest. Regions IV and X have in effect acknowledged that the seven proceedings involve common issues of law and fact and because the alleged violations in each proceeding primarily involve GE's operation of a solvent distillation system without a permit, this acknowledgement is accepted as accurate.

The second requirement, Rule 22.12(a)(2), is that consolidation would expedite and simplify consideration of the

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[8/] Rule 22.12(a) (40 CFR Part 22) provides:

(a) Consolidation. The Presiding Officer may, by motion or sua sponte, consolidate any or all matters at issue in two or more proceedings docketed under these rules of practice where (1) there exists common parties or common questions of fact or law, (2) consolidation would expedite and simplify consideration of the issues, and (3) consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings.

issues. Although the FRCP rule on consolidation [9/] is not identical to Rule 22.12(a) at issue here, federal court decisions interpreting the FRCP are nevertheless useful guides in applying the Consolidated Rules of Practice. [10/] La Chemise and Transeastern Shipping Corp., supra, emphasize that consolidation is discretionary with the court and that, where cases are in widely different stages of pretrial preparation, consolidation will be denied, because of the resulting delay in disposition of earlier filed actions. In the instant matter, the Region IV proceeding is ready to be set for hearing and there is no question but that consolidation will delay disposition of that case. While GE may be correct that consolidation would not prevent pending [and anticipated] motions for accelerated decisions from being briefed and decided, this can only exacerbate delay in bringing the proceedings to a hearing, even if only the amount of the penalty were to remain at issue. [11/] It is concluded that the motion to

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[9/] Rule 42(a) of the Federal Rules of Civil Procedure provides:

> (a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

[10/] See, e.g., Rockwell International Corp., TSCA Appeal No. 87-5 (Order On Interlocutory Appeal, October 23, 1987).

[11/] Delay in the Region IV proceeding is primarily due to the fact Complainant waited almost one year after the complaint had

(continued...)

consolidate all of the proceedings will be denied. This conclusion makes it necessary to decide whether the other grounds for consolidation have been established. GE's alternate motion for a stay pending disposition of the Region IV proceeding will also be denied.

A different conclusion is reached as to the three Region V proceedings. The complaints were filed on the same day and involve alleged improper disposal of PCBs through operation of GE's solvent distillation system. For all that appears, these alleged violations could easily have been incorporated in multiple counts in one complaint, and separate complaints were issued solely because the alleged violations occurred at GE installations in Chicago, Cincinnati and Cleveland. While the complaint in Docket No. TSCA-V-C-94-90 (Cleveland facility) contains additional counts for improper use and improper record keeping, the rule on consolidation does not require that all issues be identical. Complainant does not object to consolidation of the Region V proceedings for purposes of its motions for accelerated decision. The requirements for consolidation in Rule 22.12(a) having been met, an order will be issued consolidating the three Region V proceedings.

With the exception of the Region IV case, the Region X proceeding is in the more advanced stage of prehearing preparation

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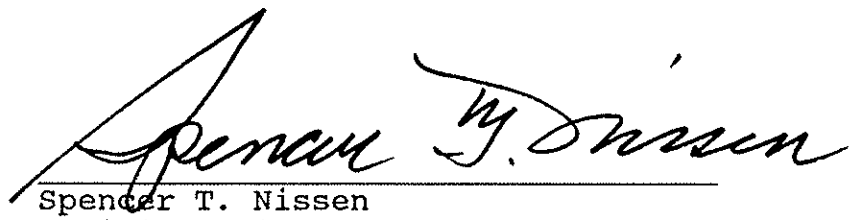
[11/](...continued)
been filed to file a motion for an accelerated decision. Benefiting from hindsight, the motion should have been denied for that reason alone.

and the Region X matter will not be consolidated. GE may renew its motion to consolidate the Region III and Region VI proceedings at a later date, if it desires to do so.

O R D E R

GE's motion to consolidate all of the captioned proceedings and its alternate motion for a stay pending a decision on the Region IV proceeding, Docket No. TSCA-IV-89-0016, are denied. Pursuant to Rule 22.12(a) (40 CFR Part 22) the three proceedings in Region V, Docket Nos. TSCA-V-C-93-90, -94-90 and -95-90, are consolidated. [12/]

Dated this 13th day of December 1990.



Spencer T. Nissen
Administrative Law Judge

[12/] Because the parties have stated that settlement negotiations are in progress, I will postpone setting a hearing date for the Region IV proceeding. The parties are ordered to file a report as to the status of settlement on or before January 11, 1991.

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER GRANTING IN PART MOTION FOR CONSOLIDATION**, dated December 13, 1990, in re: General Electric Co., Dkt. Nos. TSCA-III-520, IV-89-0016, -V-C-93-90, -V-C-94-90, -V-C-95-90, -VI-477C, and -1090-02-14-2615, was mailed to the Regional Hearing Clerks, Regs. III, IV, V, VI and X, and a copy was mailed to Respondent and Complainants (see list of addressees).

Helen F. Handon
Helen F. Handon
Secretary

DATE: December 13, 1990

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