UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

ORDER ON MOTIONS

This order disposes of the remaining three of eight pending motions (five motions were decided by an order, dated August 30, 1994).

VI. GE's Motion In Limine to Prevent Disclosure of Privileged Communications

This motion arises from the fact that Complainants in the Region V and Region VI proceedings have indicated an intention to call as an adverse witness Mr. William P. Thornton, Jr., house counsel for GE and one of the attorneys representing GE in these proceedings.

A letter from GE, dated July 9, 1987, signed by Mr. Thornton, states that, prior to GE's action in placing its freon-flush system in operation in Cleveland, the matter had been discussed with EPA personnel in Region V and that, as a result of that discussion, there was an agreement that physical separation [of PCBs] was an alternate disposal method only when

used as an alternate to incineration or other approved disposal methods. In an affidavit submitted in connection with pre-trial motions in the Region IV proceeding, Mr. Thornton identified the Region V employee spoken to as Ms. Trish Poulton (Polston). GE's motion that Complainant be compelled to supply her current address and daytime telephone number so that she could be subpoenaed to appear at the hearing was denied in the mentioned order, dated August 30, 1994, on Privacy Act grounds.

In the present motion, GE quotes from the Region V initial and amended pre-hearing exchanges and from the Region VI pre-hearing exchange:

> Region V (First Prehearing Exchange)
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> Mr. Thornton will be called to testify by Complainant as an adverse witness. He is expected to testify with regard to his knowledge of TSCA, U.S. EPA Regulations and his communications with U.S. EPA and others as to the requirements of the PCB Rule.
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> Region V (Amended Prehearing Exchange)
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> Mr. Thornton may also be questioned concerning Respondent's PCB transformer disposal process prior to its operation of the solvent distillation system, as well as his role in Respondent's decision to go forward with the operation of the solvent distillation systems that is the subject of these actions.
>
> Region VI
>
> Mr. Thornton is considered an adverse or hostile witness; Mr. Thornton will be called to testify as to his contacts with federal, state, and local authorities (as well as others to the extent that such information is not claimed privileged) concerning the alleged violations.

GE says that certain conversations with "others" are likely to pertain to legal advice given by Mr. Thornton to his clients

at GE in the performance of his duties as "in-house" counsel and that such information is strictly protected by the attorney-client privilege (Motion at 2). Moreover, GE asserts that the privilege applies to a communication between the attorney and client where the communication relates to a fact of which the attorney was informed by the client for the primary purpose of securing a legal opinion, legal services, or assistance in a legal proceeding, and the privilege has not been waived by the disclosure of the information. Broadly, GE asserts that the attorney-client privilege applies as a bar to eliciting information about the communication where the witness' knowledge is solely derived from the communication, and may be asserted to prevent either direct questions about the communication, or indirect questions about facts which the witness has learned solely because of the confidential communication (Motion at 3).

Accordingly, GE says that it intends to assert the attorney-client privilege, if Complainant questions Mr. Thornton about communications pertaining to legal advice given by Mr. Thornton to his clients at GE where the privilege has not been waived by prior disclosure. GE seeks an order in limine precluding the testimony of Mr. Thornton concerning any communication subject to the attorney-client privilege.

Opposing the motion, Complainant points out that, although Mr. Thornton was not listed as a prospective witness by GE, GE is claiming,, as it did in the Region IV proceeding, to have relied upon advice allegedly received by Mr. Thornton in a

telephone conversation with Region V (Response, dated August 12, 1994). Complainant further points out that, if this advice was not passed along to the managers and operators of GE's solvent distillation systems, it could not have been relied upon by GE and, consequently, would be immaterial (Response at 4). In short, Complainant says that by claiming to have received and relied upon the alleged advice, GE cannot now invoke the attorney-client privilege to avoid cross-examination on the matter.

D I S C U S S I O N

This motion may readily be decided. The fact of the advice allegedly received by Mr. Thornton from Region V and the extent to which this advice was considered or incorporated into any opinion or legal advice which Mr. Thornton may have rendered to GE personnel have been placed in issue by GE. Accordingly, as to these issues, the attorney-client privilege, which applies to the client rather than the attorney, has been waived.*

In the mentioned order, dated August 30, 1994, GE was given the opportunity to reconsider its decision not to call Mr. Thornton as a witness. If Mr. Thornton does appear as a

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* It is noted that in responding to the Agency's subpoena in Region III, GE stated "(t)he reason for terminating the use of the system was a weighing of the risk of continuing the use in view of legal advice on one hand that no permit was required to operate the system as against the position . . . of EPA on the other hand that a permit was required to operate the still" (Response to TSCA Subpoena No. 246, undated, at 1).

witness, his testimony may be limited to the fact of the telephone conversation allegedly conducted with Region V (Ms. Polston) prior to placing the freon-flush systems in operation and the extent to which this advice was relied upon by Mr. Thornton in counseling or advising his GE clients. GE obviously hasn't waived the attorney-client privilege as to other communications to, or advice received from, Mr. Thornton. Moreover, a wide ranging inquiry into Mr. Thornton's knowledge of PCB regulations appears designed more to harass and embarrass rather than to elicit useful information and will not be allowed. These constraints may be implemented through appropriate objections at the hearing.

GE's motion for an order precluding Mr. Thornton's testimony as to any communication subject to the attorney-client privilege is denied in part and granted in part as indicated.

VII. GE's Motion to Amend Its Answer

Under date of August 5, 1994, GE submitted a motion to amend its answer in the Region III proceeding, TSCA-III-520, so as to deny that it drained and flushed transformers on the dates and in the amounts alleged in para. 16 of the complaint. Paragraph 16 of the complaint alleged that between May 16, 1987, and October 29, 1987, GE on 32 separate days disposed of PCB transformers which had been flushed with freon. The days upon which the draining and flushing occurred and the number of gallons processed were listed. This allegation was apparently

based on data supplied by GE in response to a subpoena (GE's undated response to TSCA Subpoena No. 246).

In its answer, dated October 17, 1990, GE stated: "Respondent admits that the days and the amounts of gallons processed on those days are as alleged in Paragraph 16" (Id at 4).

In its motion to amend its answer, GE asserts that the 32 days upon which the complaint alleged "draining and flushing" occurred correspond to "out-of-service" dates for the transformers listed in the tally sheet provided by GE. The motion asserted that these days do not represent: "(1) the days on which GE "desposed" of the transformers; (2) the days on which draining or flushing occurred; or (3) the days on which GE operated its solvent distillation system." Therefore, GE says that it is moving to amend its answer to correct this "misunderstanding." The mentioned "tally sheet" is attached to the motion.

Complainant vehemently opposes the motion (Response, dated August 12, 1994). Recognizing the rule that leave to amend a pleading "shall be freely given when justice so requires," Complainant contends that this case represents the exception. Complainant points out that the schedule in para. 16 of the complaint was based on information provided by GE in response to a subpoena; that GE's response to the subpoena was signed by William P. Thornton, Jr., one of the attorneys representing GE in these proceedings; that GE admitted the specific dates of

operation of the solvent distillation system in its answer to the complaint; that GE identified no factual issues for trial when Complainant moved for an accelerated decision on liability thus enabling the ALJ to find GE liable for violations of 40 CFR § 761.60(a) as "alleged in the complaint;" and that GE has offered no explanation or reason for seeking to repudiate "judicial admissions," which have stood for over four years, [some] four weeks prior to trial (Opposition at 4-6). Complainant asserts that any misunderstanding was GE's, not Complainant's and argues that, because the motion is untimely and, if granted, would severely prejudice Complainant, the motion must be denied (Response at 13).

D I S C U S S I O N

The general rule is that administrative pleadings are "liberally construed and easily amended." In re Port of Oakland and Great Lakes Dredge and Dock Company, MSPRA Appeal No. 91-1 (EAB, August 5, 1992), slip opinion at 41). Moreover, mere delay is seldom, if ever, a sufficient reason for denying a motion to amend. See, e.g., In re Asbestos Specialists, Inc., TSCA Appeal No. 92-3 (EAB, October 6, 1993) and In re Spang and Company, Inc., Docket Nos. EPCRA-III-037 and -048 (Order Granting Motion to Amend Complaint, April 9, 1992).

Motions to amend pleadings, offered on the eve of trial, which would substantially expand the scope of the trial or alter the nature of defenses, have, however, been denied. In re

Everwood Treatment Co., Inc. and Carry W. Thigpen, Docket No. RCRA-IV-92-15-R (Order Denying Motion to Amend Complaint, July 28, 1993). Because of GE's failure to offer any reason or explanation for moving to amend its answer so near the trial date, this rule could be applied here. It is my conclusion, however, that it is inappropriate to assess a penalty based on processing dates which may have no relation to reality. GE's motion to amend its answer will be granted. Complainant may, however, move for a continuance which would have the effect of severing the Region III proceeding from the remaining proceedings.

VIII. Complainant's Motion to Consolidate Regional Complainant's Pre-hearing Exchanges

By this motion, Complainant seeks consolidation of the pre-hearing exchanges filed by Regions III, V, VI and X. The purpose of the motion is to enable Complainant to offer at trial evidence in any of the four consolidated cases any evidence identified in the Region III, V, VI or X pre-hearing exchanges.

GE has not responded to the motion and it will be granted.

O R D E R

VI. GE's motion for an order precluding Mr. Thornton's testimony as to any communication subject to the attorney-client privilege is denied in part and granted in part as indicated.

VII. GE's motion to amend its answer in Docket No. TSCA-III-520 is granted. Complainant, in that proceeding, however, may move for a continuance. Such a motion will have the effect of severing the Region III proceeding from the remaining proceedings.

VIII. Complainant's motion to consolidate pre-hearing exchanges is granted.

Dated this 1st day of September 1994.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER ON MOTIONS**, dated September 1, 1994, in re: General Electric Company, Dkt. Nos. TSCA-III-520, TSCA-V-C-93-90, 94-90 & 95-90, TSCA-VI-477C and TSCA-1090-02-14-2615, was mailed to the Regional Hearing Clerk, Reg. III, and a copy was mailed to the Complainants and Regional Hearing Clerks, Regs. V, VI & X, and to Respondent (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: September 1, 1994

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