

BEFORE THE UNITED STATES
ATOMIC ENERGY COMMISSION

In the Matter of)
)
Consolidated Edison Company) Docket No. 50-247
of New York, Inc.)
(Indian Point Station, Unit No. 2))

5-15-72.

APPLICANT'S SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF ANSWER
TO CITIZENS COMMITTEE FOR
THE PROTECTION OF THE ENVIRONMENT
MOTION FOR PRODUCTION OF DOCUMENTS

In its letter of May 9, 1972 the Atomic Safety and Licensing Board requested Applicant and CCPE to provide "statements of citations of legal authority" pertaining to CCPE's discovery motion of May 2, 1972. Particular attention was directed to the issue of specificity, raised by Applicant in its May 4 answer. That issue will be addressed below, following a discussion of the legal basis, if any, for CCPE's motion for discovery.

I. The Good Cause Requirement of 10 CFR 2.741

Good cause, the requirement that a "genuine need"

must be shown for each item sought, 4A Moore's Federal Practice, 34.08, involves two principal aspects: (1) Good cause for discovery must be shown affirmatively by the party seeking to compel discovery; and (2) the extent of the burden depends upon the context involved, and the test for granting discovery is more stringent under some circumstances than in others.

In overturning a discovery order under former Rule 34 of the Federal Rules of Civil Procedure, which required a good cause showing, the court in Hauger v. Chicago, R.I. & P. R.R. Co., 216 F.2d 501 (7th Cir. 1954), stated, at page 505:

A court is not justified in ordering production of documents simply on the theory that the facts sought are material and not privileged. Hickman v. Taylor, 329 U.S. 495, at page 509, 67 S. Ct. 385, 91 L Ed. 451. Production of documents will not be ordered merely to help counsel to prepare himself to examine witnesses and to make sure he has overlooked nothing. Hickman v. Taylor, supra, 329 U.S. at page 513. (emphasis added).

In Boeing Airplane Co. v. Cogheshall, 280 F.2d 654 (1960) the court stated, at page 659, that ". . . the burden of showing good cause is an affirmative one . . ." and that "'Good cause' may ordinarily be sustained by a claim that the requested documents are necessary to establishment of the moving party's claim" or that denial of production would cause the moving party "undue hardship or

injustice." (emphasis added). See also the majority opinion, per Justice Goldberg, in Schlagenhauf v. Holder, 379 U.S. 104 (1964) at page 117 et seq; Margeson v. Boston & M. R.R., 16 F.R.D. 200 (D. Mass. 1954); Alltmont v. U.S., 177 F.2d 971 (3rd Cir. 1949); Guilford Nat. Bank of Greensboro v. Southern Ry. Co., 297 F.2d 921 (4th Cir. 1962).

Whether the moving party's burden is met depends upon a practical analysis of the circumstances of the particular case. The burden is increased where there exist factors tending to make discovery undesirable. See 4A Moore's Federal Practice, §34.08.

The AEC's newly proposed rules eliminate the prehearing good cause requirement but, significantly, retain it for discovery desired once the hearing stage is underway.* The policy of carefully scrutinizing discovery requests which may be untimely, cause delay, or which may not have a proper legal basis is thereby emphasized.

* §2.741 of the proposed rules provides, in pertinent part, that in an operating license proceeding "no request shall be served after the beginning of the prehearing conference held pursuant to 2.752, except upon leave of the Commission or the presiding officer for good cause shown." Federal Register, vol. 37 No. 90, May 9, 1972, p. 9338.

Counsel for CCPE has not shown any reason why he should be permitted to put in evidence pertaining to the allegations of Mr. Brill. He has brought no specific contentions to the attention of the Board. He has not demonstrated the basis for his claim that CCPE should be permitted to present an analysis "coextensive with the Staff and Applicant review." He does not need the broadly categorized documents requested in order to engage in cross-examination of Applicant's witnesses. As explained in Applicant's answer to CCPE's discovery motion, Applicant has supplied to CCPE numerous documents and drawings to CCPE's counsel to aid him in cross-examination.

II. The Scope and Specificity Issue

Although Applicant maintains that the foregoing demonstrates that CCPE should not be granted discovery some comments as to the scope and specificity of documents requested should be made. First, counsel for CCPE in his supplemental memorandum of May 12 correctly cites the proposition that specific categories of materials may be listed rather than specific individual documents, but makes no showing concerning the specificity of each category of documents he has listed.

Questions of specificity are generally to be decided in the sound discretion of tribunal exercising common sense, although such a determination should not be confused with the good cause requirement for "an affirmative showing by the movant of his specific need for each item sought." "Bender's Forms of Discovery 304[1] (emphasis added). See also Hauger v. Chicago, R.I. & P. R.R. Co., supra.

Appropriate specificity is lacking in Category 6 relating to documents which "in any wise" may be related to the subject matter of H. K. Brill's letter of March 14, 1972 or his deposition of April 20, 1972. In CCPE's supplemental memorandum in support of the discovery motion it is argued that Category 6 ought to be considered reasonably specific because its form bears similarities to Applicant's subpoena addressed to Mr. Brill. The analogy has no merit or precedential value. First, the form of the subpoena was not contested. Mr. Brill made no attempt to quash, limit, or clarify the order. Secondly, it is more reasonable to address such a request to the individual making the allegations, who already would be aware of those documents upon which he relied in his letter.

Finally, CCPE's reliance in Category 6 on the "subject matter of H. K. Brill's letter" is totally lacking in specificity at this time. Mr. Brill's deposition of April 20, 1972 has limited the scope of the upcoming hearing to two specific issues. Therefore, any documents pertinent to those issues are adequately covered within categories 1 through 5.

Moreover, objection is made to requests in categories 1, 3, 4 and 5 for documents pertaining to the generators, which are beyond the scope of the safety questions identified by Mr. Brill.

Conclusion

Applicant has voluntarily supplied CCPE with documents to which CCPE is entitled for purposes of cross-examination. It is disturbing that counsel for CCPE asserts that his burden of showing good cause for discovery of all items sought is "not an issue." He had ample opportunity in his memorandum supporting discovery to discuss the question, but he chose to ignore it. He received a second chance when the Board requested a memorandum of legal authority, but he chose to cite no legal authority pertinent to whether CCPE is entitled to discovery under the circumstances presented. The sole subject he discusses in his

memorandum is why one is permitted to list categories of documents rather than individually identified documents, neither a novel proposition nor an issue here.

At this late stage in the proceedings, the Board should deny forthwith this discovery motion which is not supported by any attempt to demonstrate good cause.

Very truly yours,

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