

BEFORE THE
UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

5-12-72.

In the Matter of

CONSOLIDATED EDISON CO.
OF NEW YORK (Indian
Point, Unit No. 2)

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Docket No. 50-247

CITIZENS COMMITTEE FOR
THE PROTECTION
OF THE ENVIRONMENT
SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF MOTION FOR
PRODUCTS OF DOCUMENTS

In the letter of May 9, 1972, the Board requested citation of case authority with respect "to the necessity of an initial discovery procedure in order to render reasonably specific documents sought to be produced". If the Board decides that such a procedure is required we will be prepared to begin that discovery on the morning of May 17, 1972, with questions to Applicant's witnesses to specifically identify all documents. Of course, as we explained to Applicant's counsel on several occasion, the use of formal discovery while clearly permissible was also likely to be time consuming. The two step discovery process of deposition and then production of documents will make it virtually impossible for us to fully conduct the cross-examination on the Brill charges at the May 17-19 hearing because it will be extremely unlikely that we will have sufficient time to study the documents produced during the hearing days scheduled.

hearing

Applicant seems intent upon delaying resolution of the Brill charges. We shall endeavor to prevent the Applicant from being successful in substantially delaying the Board's decision on the pending license application.

It is our belief that the motion for Production of documents is sufficiently specific to meet the requirements of 10 CFR Part Section 2.741. That section closely tracks Rule 34 of the Federal Rules of Civil Procedure (with the exception that Section 2.741 still requires "good cause" which is not at issue here) and in particular both provisions refer to a request for "designated documents". The modern interpretation of Rule 34 and the one favored by the leading commentators is that "designated documents" means designation of well-defined categories of documents and not designation of particular documents. See Moore's Federal Practice, Vol. 4A, ¶34.07; Advisory Committee Note to the 1946 Amendment to Rule 34 cited in Moore's *supra*, on page 34-55. The test is whether a reasonable man would know what documents or things are called for. See Cooper v. Dasher 290 U.S. 106, 109-110 (1933).

The leading case is Brown v. United States 276 U.S. 134, 143 (1928). In Brown the Court held that a request in a subpoena duces tecum which discloses a reasonable period of time and sufficiently definite subject matter is adequate. The request approved was (276 U.S. at 138-9):

"All letters or copies of letters, telegrams or copies of telegrams, incoming and outgoing, passing between the National Alliance of Furniture Manufacturers and its predecessor, the National Alliance of Case Goods Associations, their officers and agents, and the several members of said National Alliance of Furniture Manufacturers and its predecessor, the National Alliance of Case Goods Associations (including corporations, partnerships, and individuals, and their respective officers and agents) during the period from January 1, 1922, to June 15, 1925, relating to the manufacture and sale of case goods, and particularly with reference to -

- "(a) general meetings of Alliance
- "(b) zone meetings of Alliance members
- "(c) costs of manufacture
- "(d) grading of various types of case goods
- "(e) issuing new price lists
- "(f) discounts allowed on price lists
- "(g) exchanging price lists
- "(h) maintaining prices
- "(i) advancing prices
- "(j) reducing prices
- "(k) rumors of charges of price cutting
- "(l) discounts, terms and conditions of sale, etc.
- "(m) curtailment of production
- "(n) the pricing of certain articles or suits of furniture by W. H. Coye
- "(o) cost bulletins
- "(p) intention of W. H. Coye and A. C. Brown to attend furniture markets or expositions at Jamestown, N. Y., Grand Rapids, Mich., Chicago, Ill., and New York City, N. Y., and meetings of members held prior to and during said furniture markets or expositions
- [139] "(q) conditions obtaining at various furniture markets or expositions at Jamestown, N. Y., Grand Rapids, Mich., Chicago, Ill. and New York City, N. Y.,
- "(r) manufacturers maintaining a fair margin of profit between cost prices and selling prices."

In Roebling v. Anderson 257 F 2d 615 (C.A. D.C., 1958) the Court held that the following designation of categories of documents was sufficient under Rule 34 (257 F 2d at 618-19:

"1. Loan docket file, showing all transactions, collections and disbursements.

"2. Files showing the transactions relating to (a) transfers or other disposition of all shares of Preferred Stock "A" of Trenton Trust Company held by defendant at any time during the period aforesaid /May 23, 1934, to June 29, 1954/ and (b) the disposition of the additional collateral securing the first loan (all of which was foreclosed on February 23, 1940 and is itemized as Exhibit A to the Amended Complaint) during the period from February 23, 1940 to June 29, 1954.

"3. Correspondence file.

"4. Legal file.

"5. Loan agreement or agreements.

"6. Minutes of meetings of, and the transcript of all material remarks before, the Board of Directors of the defendant, Reconstruction Finance Corporation, concerning (1) said loans, (2) the authority of Messrs. McGrath, Scott, Boggs, MacArthur and others to act in connection with said loan accounts, (3) the release of shares of said Preferred Stock "A" to plaintiff and other Directors of said Trust Company and (4) the repayment by Reconstruction Finance Corporation of the foreclosure expenses to plaintiff and other said directors of the Trust Company.

"7. Basic memoranda to appropriate division chiefs relating to all matters set forth in 6(1) through 6(4) above and memoranda based on such basic memoranda and prepared for the Board of Directors of the Reconstruction Finance Corporation by the examining and legal divisions of that Corporation or members of the staffs thereof.

"8. Records relating to the duties, responsibilities and authority of all officers and employees of the Reconstruction Finance Corporation charged with the responsibility for the Trenton Trust Company and/or the Trentrusco Corporation loan account or accounts, including all records relating to the duties, responsibilities, and authority of Messrs. McGrath, Boggs, Ralston, Scott and MacArthur in connection therewith."

The CCPE request for production of documents is clearly within the standard of specificity of categories of documents. The time period is bounded by the commencement of the PECOR-PB&I contract and the present. The subject categories are those related to two well defined components of the reactor which are not only specified in the PECOR contracts but have been further sharpened by the Brill deposition. The Board has already ruled that a request even less specific than the CCPE request is sufficiently specific to require production of documents. In granting Applicant's request for a subpeona duces tecum the Board granted Applicant's request that Mr. Brill produce various documents identified only "as related to the subject matter of the letter of H. K. Brill dated March 14, 1972". Similar language appears in paragraph 6 of CCPE's Motion for Production of Documents and in addition paragraphs 1-5 of that Motion further specify the categories of documents requested.

In United States v. United Shoe Machinery Corporation 76 F. Supp. 315, 316-317 (Mass., 1948) the Court in adopting the majority rule urged here that document requests need only be related to categories of documents, stated in language particularly pertinent to this Motion (315 F. Supp. at p. 317):

The documents prompt assembly and production would expedite this. And an attempt to state more specifically each document requested would primarily serve dilatory purposes.

Applicant is well aware of the documents requested. Its refusal to produce them is clearly dilatory tactic. The Motion to Produce should be granted.

Respectfully submitted.



Anthony Z. Roisman
Counsel for Citizen Committee for
the Protection of the Environment

Dated: May 12, 1972