

11/28/75

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

| | | |
|-----------------------------|---|------------------|
| In the Matter of |) | |
| |) | |
| CONSOLIDATED EDISON COMPANY |) | Docket Nos. 50-3 |
| OF NEW YORK, INC. |) | 50-247 |
| |) | 50-286 |
| (Indian Point Station, Unit |) | |
| Nos. 1, 2 and 3) |) | |

MOTION TO COMPEL DISCOVERY

Pursuant to 10 C.F.R. §2.740(f), Citizens' Committee for Protection of the Environment (CCPE) requests the Appeal Board to issue an order compelling Con Edison to respond in accordance with the requests contained in CCPE's Interrogatories to Con Edison, dated November 28, 1975.

I.

Set out below are the instructions or questions to which CCPE received either an unsatisfactory answer or objection from Con Edison and to which CCPE requests the Appeal Board to issue an order compelling a response: 1/

1/ Con Edison objected to other instructions and questions contained in CCPE set of interrogatories dated November 28, 1975. CCPE chooses not to request this Appeal Board to issue an order compelling a response from Con Edison regarding these other questions. However, CCPE does not admit to the correctness of Con Edison's position on these questions. In particular, Con Edison objected to Question 26 on the basis that the information sought is not relevant to the issues in this hearing; CCPE disagrees. Information obtained in the investigation of the on-site faults, and specifically information contained in "Supplemental Geological Investigations of the Indian Point Generating Station" and "Supplement No. 2 to the Safety Evaluation Report" is directly relevant to issues #2 and #3, set forth in the Board Order of October 17, 1975. Con Edison's argument that the information relating to the on-site faulting is "out of bounds" because a finding that the faults are not capable has been made by the Commission,

[Footnote 1 continued on p.2]

A. General Instructions

In its general instructions preceding the interrogatories, CCPE requested that the following information be given:

"If the interrogatories are answered by more than one person, whether or not he or she is an officer of, employee of, or consultant to Consolidated Edison, such person's name and title should be set forth together with an identification of which interrogatories he or she is responsible for answering."

Con Edison's response was the following:

"Nothing in either §2.740b of the Commission's Rules, 10 C.F.R. §2.740b (1975) or Federal Rule of Civil Procedure 33, the principles of which are applicable to this proceeding, supports CCPE's request. In fact, 4A Moore, Federal Practice, ¶33.07 (1975), states that only one corporate agent need answer. Moore continues: "... [I]nterrogatories must be served on the party, and the party [emphasis supplied] may select the officer or agent who is to answer them and verify the answers." Id. at 33-47; see also id. n. 17. Accordingly, Licensee's answers are verified by Mr. Carl L. Newman, Vice President of Licensee."

fn. 1 continued:

is misguided. First, assuming that such a finding had been made, nevertheless, information gathered in course of study is relevant to the issue of the capability of the Ramapo fault, and therefore, also to the issue of the appropriate ground acceleration for the site. Second, as the Board is aware, CCPE submits that the requisite findings required under 10 C.F.R. Part 100 (Appendix A) have not been made. (See Citizens' Committee for Protection of the Environment's Motion To Request A Stay of the Issuance of A Full-Term, Full-Power Operating License For Indian Point, Unit #3, dated January 23, 1976.)

Finally, in response to Con Edison's assertion that it "should not be forced to spoon-feed the contents [of the Dames and Moore Report] to CCPE," CCPE notes that the interrogatories were delivered to Con Edison on November 28, 1975; CCPE did not receive the Dames and Moore report until December 5, 1975. Thus, on November 28th, when the interrogatories were put to Con Edison, the request was not for "spoon-feeding" from the Dames and Moore report -- a report unavailable to, whose existence was unknown to, CCPE -- the request was to "fork over" information relevant to the issues before this Board pursuant to 10 C.F.R. §2.740.

B. Questions

CCPE Question 9,

Con Edison Answer 9;

CCPE Question 14,^{2/} parts (d), (e), (g), (h), (i), (j),
(k), (l), (m), (n),

Con Edison Answer 14;

CCPE Question 15,

Con Edison Answer 15;

CCPE Question 16,

Con Edison Answer 16;

CCPE Question 22,

Con Edison Answer 22;

CCPE Question 25,

Con Edison Answer 25;

^{2/} CCPE requests a response only to the sections listed above,
and does not request responses to the other sections.

IF

ARGUMENTA. General Instructions

Con Edison objects to CCPE's request to identify specifically each person or persons responsible for answering the individual interrogatory. Con Edison asserts that nothing in either §2.740b of the Commission Rules, or the Federal Rule of Civil Procedure 33 supports this request.

To the contrary, both the NRC rules of practice and the Federal Rules of Civil Procedure recognize that discovery of Con Edison's contentions and opinions is proper. See 4A Moore, Federal Practice §§33.17 and 33.26 (1975) at pp. 33-87, 33-143 and n. 12; 10 C.F.R. Part 2, App. A ¶IV (1975). Proper pre-hearing preparations require that CCPE know the author of those contentions and opinions in order to research the author's background, prior publications, etc. In addition, both the rules of practice and Federal Rules of Civil Procedure recognize that the use of interrogatories for impeachment purposes is proper. §2.740 (b) states that interrogatories "may be used in the same manner as depositions." Depositions, of course, may be used for the purpose of impeachment. Likewise, interrogatories filed pursuant to Rule 33 may be used for impeachment purposes. See 4A

Moore, Federal Practice, ¶33.29 (1975) at p. 33-165.

As matters stand, response to CCPE's interrogatories cannot be attributed to any individual. When Con Edison experts take the stand, they will be able to avoid responsibility for the information and opinions contained in the answers to interrogatories. Allowing Con Edison to avoid giving the requested information will effectively preclude an appropriate use of interrogatories by CCPE.

CCPE does not contest Con Edison's assertion that it may select the officer or agent who is to answer the interrogatories, citing 4A Moore, Federal Practice, ¶33.07 (1975). However, the question of who verifies Con Edison's answers is not the issue. The issue is whether Con Edison can hide the identity of experts who formulated the response to CCPE interrogatories. For the reasons stated, the answer is that it cannot.

B. Questions

10 C.F.R. §2.740 provides that "[P]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding...." Consistent with Supreme Court decisions interpreting the Federal Rules of Civil Procedure, this Board has adopted the guiding principle that "a broad liberal interpretation" be accorded the Commission's discovery rules. Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-196, RAI-74-4, 461 (April 25, 1974), citing Hickman v. Taylor, 329 U.S. 495 (1947).

Clearly there are limits upon discovery. One such limit is the showing of general relevance required under Section 2.740 mentioned above. However, application of the guiding principles of "a broad liberal interpretation" requires "every relevant fact, however remote to be brought out for the inspection not only of the opposing party but for the benefit of the [board] which in due course can eliminate those facts which are not to be considered in determining the ultimate issues." ALAB-196, supra, citing Hercules Powder Co. v. Rohm & Haas Co., 3 F.R.D. 302, 304 (D.Del. 1943).

Furthermore, a Board may take action where a discovery request is "unreasonable." For example, action is appropriate to protect a party from "annoyance, embarrassment, oppression, and undue burden or expense." ALAB-196, supra. Here again, however, this Board has noted that in resolving the question of whether discovery is unreasonable, it must keep in mind that "the general purpose of the discovery rules is to afford a party broad access to relevant information. ALAB-196, supra.

With these general principles in mind we turn to consider the specific interrogatories at issue.

Question 9.

The information sought is relevant; it is not privileged. The information falls within the well-accepted rule that parties are required to answer questions which attempt to ascertain the bases for its opinions and contentions. Boston Edison Company, et al. (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30,

NRCI-75/6, 582 (June 6, 1975). See Moore, supra, §26.56[3] at p. 26-167.

Con Edison objects to the question on the basis that it requires Con Edison to "go to work for" CCPE. Clearly, there are limits to the extent to which a party should be required to expend resources to seek out information for an opposing party. See Moore, supra, §33.20. However, Con Edison is not being asked to engage in a search of documents, investigation, etc. Rather, the request here relates to the basis of Con Edison's position. It would appear that an answer would require only a marginal expenditure of resources.

Con Edison's second objection, that CCPE should not require Con Edison to impeach itself, is totally without merit. Considerations of the integrity of Con Edison's case are irrelevant to resolving questions of what information is discoverable.

Questions 14, 15, 16, 22, 25

The information sought is relevant; it is not privileged. Con Edison objects on the basis that CCPE's interrogatories do not seek to discover Con Edison's "position" or "contentions" but, rather, its expert testimony. Con Edison thereby invokes the provisions of Fed. R. Civ. P. 26(b)(4)(A)(i) which allows a party, through interrogatories, to discover "the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion."

CCPE submits that the distinction drawn between "positions," "contention," and "expert testimony" are not helpful in

determining whether the information sought is discoverable. The determinative questions are 1) is the information sought relevant; 2) is its request for production an "unreasonable" request - i.e. will it cause undue burden and expense. ALAB -196, supra. Viewed from this proper perspective, it is evident that CCPE's interrogatories are proper.

In addition, while discovery before the NRC should proceed "in line with" the Federal Rules of Civil Procedure, 10 C.F.R. Part 2 App, A ¶IV(c) (1975), recognition must be given to the fact that the proceedings before the NRC are different from the average civil case. First, most of the testimony in NRC proceedings is expert testimony. Second, it is often the case that meaningful information is obtained in response to precise, technical questions.³ Such a proceeding puts a premium on expert opinion expressed in precise technical terms. Thus in proceedings before the NRC it is particularly important the the rules of discovery be interpreted in a manner that allows the parties to fully explore these areas.

Finally, with respect to Questions 14, 22, and 25, Con Edison asserts that it is improper for CCPE to utilize

3/ In this regard, we note that Con Edison stated that it was unable to respond to certain CCPE interrogatories that were too "vague" and "ambiguous." (Con Edison response to Questions 8, 11, 23, 24) Con Edison would thus deny information on the basis that the questions were not sufficiently precise, while at the same time, deny information because of specificity.

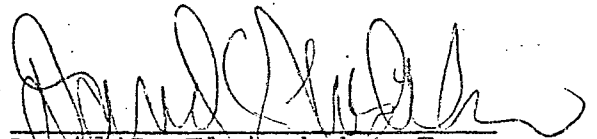
statements of Dr. Davis or from the SER to establish
Con Edison's position.⁴ We disagree.

Ceratinly the information is relevant. Indeed, in requiring
Con Edison to address itself to specific statements, these
questions serve to focus the areas of agreement and disagreement
between the parties, a proper and important function of discovery.

III

For the above reasons CCPE respectfully requests this Board
to issue an order compelling Con Edison to repond to the questions
set out above.

Respectfully submitted



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