

the Licensing Board has retained jurisdiction over certain environmental questions, it seems preferable that we defer our review of the partial initial decision until the Board has issued an initial decision on the remaining issues in the case.<sup>2</sup>

Review deferred.  
It is so ORDERED.

FOR THE ATOMIC SAFETY AND  
LICENSING APPEAL BOARD

Margaret E. DuFlo  
Secretary to the Appeal Board

<sup>2</sup>Had exceptions to the partial initial decision been filed, we most likely would have considered them at this juncture. In this connection, parties who desire appellate review of a decision such as that here-involved must file exceptions without awaiting the disposition by the licensing board of the remainder of the proceeding. See Section II(c) of Appendix A to 10 CFR Part 2, as amended. Obviously, of course, if the licensing board should thereafter modify findings or conclusions contained in the partial initial decision, exceptions to such modifications may then be filed.

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman  
William C. Parler, Member  
Dr. Lawrence R. Quarles, Member

In the Matter of  
COMMONWEALTH EDISON COMPANY  
(Zion Station, Units 1 and 2)

Docket Nos. 50-295  
50-304

Messrs. Michael I. Miller and John W. Rowe, Chicago, Illinois, for the applicant, Commonwealth Edison Company

Mr. Robert J. Vollen, Chicago, Illinois, for the intervenors, BPI, David Dinsmore Comey, Sierra Club, and Metropolitan Sanitary District of Greater Chicago

Messrs. Joseph Gallo and Frederic S. Gray (Messrs. A. Grey Staples, Jr. and Robert H. Culp on the brief), for the AEC Regulatory Staff

MEMORANDUM

April 25, 1974

By our memorandum and order of March 19, 1974 (ALAB-185, RAI-74-3 240), we reversed two orders of the Licensing Board relating to a discovery request by the intervenors, and remanded the case to the Board with directions to conduct further proceedings. Since prompt corrective action was required, a detailed statement of the reasons for the reversal was deferred to this further memorandum.

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The two discovery orders were the Licensing Board's "Ruling on Motion to Quash Subpoena", dated March 27, 1973, and its subsequent oral denial of the

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Intervenors' petition for reconsideration of that ruling (Tr. 603). These rulings stemmed from the March 2, 1973 application of the intervenors for a subpoena directed to the Westinghouse Electric Corporation, "by E. T. Murphy, Containment Systems Analyst, or such other representative . . . who has custody and knowledge of the documents and things [sought by the subpoena] and knowledge of the application thereof to Zion Station, Units 1 and 2". The subpoena sought the "attendance and testimony" in Chicago on March 16, 1973 of the specified Westinghouse representative, as well as the production at the same time and place of certain documents, the description of which is transcribed in the margin hereof.<sup>1</sup> Accompanying the subpoena request was a notice of deposition directed to the same Westinghouse representative. Westinghouse is the vendor of the nuclear steam supply system for the Zion facility.

In a statement purporting to establish general relevance of the information and documents sought, the intervenors specified that their Contention 1 asserts generally that the Applicant has not correctly calculated the containment pressure transient in the event of a postulated loss of coolant accident and that the calculations should be redone properly.<sup>2</sup>

Intervenors then cited the applicant's Final Safety Analysis Report as establishing that the calculations had been done by Westinghouse, and represented that the "computer codes and related documents which Westinghouse . . . used in making those calculations, and testimony with regard to them" are "clearly" relevant to their contention.<sup>3</sup>

On March 6, 1973, the Board issued the requested subpoena.<sup>4</sup> It found that the application included "a showing of general relevance to the matters in controversy in this proceeding".<sup>5</sup> The return of service indicates that on March 12, 1973 the subpoena was personally served on the Assistant Secretary

<sup>1</sup>(1) All computer program listings, computer program cards, and the program instructions for each computer code (mathematical model) used in making the containment pressure transient analyses set forth in the Zion Station Final Safety Analysis Report in Section 14.3 and the Amendment 24 Answer to Question 14.28, including, but not limited to, the containment pressure transient code and any code used to model the energy released during the blowdown and reflood phases of the accident and the heat removal by the emergency safeguards systems. (2) For the double-ended pump suction break, all tables of mass release (pounds/sec.), the enthalpy of the mass (BTU/lb.) released from the core, and the mass and enthalpy released to the containment throughout the blowdown and reflood phases of the first 400 seconds of the accident. (3) All documents containing the numerical values and equations for all assumptions used to specify the input parameters for the above codes, and all documents containing the engineering justifications for these assumptions.

<sup>2</sup>Intervenors' Application for Issuance of a Subpoena, dated March 2, 1973, p. 2.

<sup>3</sup>*Ibid.*

<sup>4</sup>The subpoena was modified to include a statement that the person named was to be tendered "the fees for one day's attendance and the mileage allowed by law", as well as a reference to the provisions of the Commission's Rules of Practice governing reimbursement of subpoenaed witnesses. See 10 CFR § 2.720(e), (d).

<sup>5</sup>Issuance of Subpoena on Application of Intervenor[s], dated March 6, 1973, p. 1.

of Westinghouse (not the individual named in the subpoena) at the headquarters of the company in Pittsburgh.

On March 15, 1973, Westinghouse filed a motion to quash the subpoena (including a supporting affidavit). After receiving briefs from Westinghouse and the intervenors, and a memorandum from the applicant,<sup>6</sup> the Licensing Board on March 27, 1973 granted the motion. It assigned five reasons for doing so:

1. The Board was not convinced that the "scope and subject matter of the requested list of documents . . . [was] reasonably necessary for [intervenors'] presentation of evidence on Contention 1, when compared with all the materials already made available to Intervenors by both Staff and Applicant".

2. The Board was not convinced that the information and documents could not have been requested and obtained "much earlier"; it concluded that there was "an inadequate showing by Intervenors that the subject wide-ranging subpoena . . . was not applied for for purposes of delay".

3. The Board was not convinced that the place named for the witness to report for examination was "reasonable".

4. The time allotted for the witness to respond to the subpoena also did not appear to the Board to be "reasonable".

5. Finally, and somewhat overlapping the fourth reason, the Board noted that the Commission's rules provide 30 days for a party to respond or object to a request for production of documents, and it expressed the opinion that the "fact that Westinghouse is not even a party to this proceeding does not give them fewer rights when it comes to a determination of the reasonableness of time to respond".

The Board's order thereafter discussed the "value" of or need for the requested documents in evaluating or proving the allegations of intervenors' Contention 1. It stated that it was not convinced of the "relevance and materiality of most of what is being requested", and it concluded that the "list of documents [was] unreasonable". It added that the intervenors did not come close to meeting the requirement that items to be produced be specified "with reasonable particularity".

In denying on April 3, 1973 the intervenors' motion for reconsideration of the ruling quashing the subpoena, the Board assigned no reason other than that it had "not heard anything new in the arguments of counsel that would cause it to reconsider its original decision" (Tr. 603). In oral argument below, the intervenors for the most part had reiterated their previous assertions. In addition, however, they had stressed the disparity between the Board's characterization and treatment of their discovery request as an attempt to delay

<sup>6</sup>The regulatory staff filed no papers with the Licensing Board in connection with the motion to quash. The staff made a brief statement to the Licensing Board at the oral argument on the motion for reconsideration, in large part to respond to certain questions which the Board had asked (Tr. 486-88).

the proceeding, and its action granting the request of the applicant and the staff (filed after intervenors had filed their discovery request) to depose Mr. Comey, one of the intervenors. (See Tr. 452, 478). At one point, during a discourse with intervenors' counsel, one Board member strongly suggested that it would be "preferable for the Intervenor to use their own calculational techniques instead of fishing through Westinghouse's figures for mistakes" (Tr. 480). That member later alluded to the existence of the staff's calculational techniques (Tr. 495-96).

In ALAB-185, *supra*, RAI-74-3 at 241, we held that none of the grounds advanced by the Licensing Board was "legally sufficient, in the circumstances of this proceeding, to warrant or support the result which it reached"—i.e., the quashing of the subpoena.

## II

Before turning to our reasons for disagreement with the Licensing Board, it is desirable to review briefly the scope and thrust of the Commission's pre-trial discovery rules.

A. The applicable Commission discovery rules<sup>7</sup> are strikingly parallel to the analogous provisions of the Federal Rules of Civil Procedure. *Northern States Power Co.* (Monticello Nuclear Generating Plant, Unit 1), ALAB-10, WASH-1218 43, 49 (August 20, 1970). See also, Statement of Considerations for restructured rules, 37 *F.R.* 15127-28 (July 28, 1972).

The Commission's rules, as do the Federal Rules, provide for several different modes of discovery. Section 2.720 permits parties to obtain subpoenas and is comparable to the authority appearing in Rule 45 of the Federal Rules. Other forms of discovery (such as depositions and interrogatories) are authorized by Sections 2.740, 2.740a, 2.740b, 2.741 and 2.742 of the Commission's rules (comparable to Rules 26, 30, 31, 33, 34 and 36 of the Federal Rules).<sup>8</sup> The intervenors made their subpoena application under the authority of Section

<sup>7</sup>The notice of opportunity for hearing in this proceeding (37 *F.R.* 12982, June 30, 1972) predated the effective date of the Commission's restructured rules of practice (August 27, 1972), but the notice of hearing was not issued until after that effective date (37 *F.R.* 20995, October 5, 1972). In its Memorandum and Order of September 29, 1972, in this proceeding, the Commission indicated that, while petitions for intervention would not be required to meet the mandates of the new rules, the Board and the parties would be expected to make "maximum use of the amended procedures" in the conduct of the proceedings. Accordingly, we are reviewing the Licensing Board's disposition of the intervenors' discovery request on the basis of its conformance to the new rules.

<sup>8</sup>Requirements relating to the production of AEC documents and records, and to the depositions of AEC personnel, are set forth separately, and appear in Sections 2.744 and 2.720(h), respectively. These provisions involve different legal and policy considerations from those applicable to nongovernmental parties or persons which are here under consideration.

2.720, whereas their notice of deposition cited this section, as well as Sections 2.740 and 2.740a.

B. The Supreme Court long ago made it clear that the deposition-discovery portions of the Federal Rules "are to be accorded a broad and liberal treatment"; and that civil trials in the federal courts "no longer need be carried on in the dark". Rather, "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession". *Hickman v. Taylor*, 329 U.S. 495, 501, 507 (1947).

This philosophy was carried forward by the Court in subsequent rulings. Thus, in *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), the Court stated, citing *Hickman*,

[m]odern instruments of discovery serve a useful purpose . . . They together with pretrial procedures make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent. [*Id.* at 682].

It added that "[o]nly strong public policies weigh against disclosure" (*ibid.*). See also *Schlagenhauf v. Holder*, 379 U.S. 104, 114-15 (1964).

Licensing boards are afforded considerable discretion and latitude as to the manner in which they will apply the discovery rules. See, e.g., 10 CFR § 2.718; *Northern States Power Co.* (Monticello Nuclear Generating Plant, Unit 1), ALAB-10, *supra*, WASH-1218 at 48-53, 63-65. But despite this discretion and latitude, we think that the "broad, liberal interpretation" given to the Federal Rules<sup>9</sup> must similarly be accorded the Commission's discovery rules.

We might add that we believe that the same general standards should apply to the issuance of subpoenas for discovery purposes as are employed in connection with other means of obtaining discovery. In the application of the comparable provisions of the Federal Rules, the existence of such equivalent standards has been recognized. *Boeing Airplane Co. v. Coggeshall*, 280 F. 2d 654, 658 (D.C. Cir. 1960); *Dart Industries, Inc. v. Liquid Nitrogen Proc. Corp. of Cal.*, 50 F.R.D. 286, 292 (D. Del. 1970).

C. The foregoing does not mean, however, that there are no limits upon discovery. For the rules do not require, and the public interest does not warrant, an application which would make *all* documents and information possessed by a person (whether or not a party) available to a discoverer. "[D]iscovery, like all matters of procedure, has ultimate and necessary boundaries". *Hickman v. Taylor, supra*, 329 U.S. at 507.

1. The rule governing subpoenas (10 CFR § 2.720), upon which intervenors rely for their discovery, provides that a showing of "general relevance" may be required. This standard is derived from the language of Section 6(c) of the Administrative Procedure Act, 5 U.S.C. 555(d). While the words differ

<sup>9</sup>*Edgar v. Finley*, 312 F. 2d 533, 535 (8th Cir. 1963).

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somewhat from the "relevance" standard appearing in Rule 45 of the Federal Rules, courts do not appear to have accorded a different scope to the discovery which they encompass. See, e.g., *F.T.C. v. United States Pipe and Foundry Co.*, 304 F. Supp. 1254 (D.D.C. 1969), where the court, in construing a discovery request subject to the "general relevance" standard, evaluated documents in terms of whether they were "reasonably relevant to the proceeding". *Id.* at 1259. In any event, in according a broad and liberal treatment to the rules, courts have long construed the relevancy standard as allowing discovery in response to a subpoena to be undertaken unless it is "palpable that the evidence sought can have no possible bearing upon the issues". *Hercules Powder Co. v. Rohm & Haas Co.*, 3 F.R.D. 302, 304 (D. Del. 1943).<sup>9a</sup> Discovery may be had "not merely for the purpose of producing evidence to be used at the [hearing], but also for discovery of evidence, indeed, for leads as to where evidence may be located". *Engl v. Aetna Life Ins. Co.*, 139 F. 2d 469 (2d Cir. 1943). 10 CFR §2.720 specifically precludes consideration of whether the material sought will be admissible in evidence. In short, the rules call for

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.

*Hercules Powder Co. v. Rohm & Haas Co.*, *supra*, 3 F.R.D. at 304; see also *Dart Industries, Inc. v. Liquid Nitrogen Proc. Corp. of Cal.*, *supra*; *Enger-Kress Co. v. Amity Leather Products Co.*, 18 F.R.D. 347 (E.D. Wis. 1955); *Broadway & Ninety-sixth St. Realty Co. v. Loew's Inc.*, 21 F.R.D. 347 (S.D. N.Y. 1958).

2. Assuming that information and documents requested by subpoena satisfy the "general relevance" criterion, a person against whom discovery is directed may move to quash or modify the subpoena if it is "unreasonable", 10 CFR §2.720(f)(1), or if it "requires evidence not relevant to any matter in issue" (*ibid.*, see discussion *supra*). Unreasonableness can encompass a number of widely disparate considerations, but the general discovery rules authorize a board at least to take action to protect a person "from annoyance, embarrassment, oppression, or undue burden or expense". 10 CFR §2.740(c). But in exercising that authority, the Board must keep in mind the general purpose of the discovery rules to afford a party broad access to relevant information. For example, it might be thought "burdensome" to give testimony and to furnish documents relating to private or business matters—"the more so if the information sought redounds to the advantage of a legal or commercial opponent". Such burden is not "oppression" within the meaning of the rules. See, e.g., *Horizons Titanium Corp. v. Norton Co.*, 290 F. 2d 421, 426 (1st Cir. 1961).

<sup>9a</sup>See also *Metal Foil Prod. Mfg. Co. v. Reynolds Metals Co.*, 55 F.R.D. 491, 493 (E.D. Va. 1972).

Unrestricted production of material such as trade secrets, secret processes, developments, or research may, however, be viewed as being "unreasonable and oppressive". *Ibid.* Moreover, discovery which is pursued strictly for purposes of delay or harassment, is also "unreasonable". In this connection, subpoena or discovery requests filed outside the time period prescribed by the Commission's rules (or such different time period as may be specified by the licensing board for pretrial discovery) are to be regarded as *prima facie* unreasonable.

3. The Commission's discovery rules include a number of specific requirements which apply to some or all of the methods available for discovery. These requirements include such matters as the specification of the time and place for discovery, and the manner in which the person or persons from whom discovery is sought (as well as other parties) are to be notified. Failure to comply with any specific requirement may, in appropriate circumstances, be a valid ground for quashing a subpoena or denying a discovery request. But quashing or denying discovery on hypertechnical grounds is not favored. There is a presumption not only that modification of the discovery request is possible but also that it will be adequate to obviate any prejudice to other parties.

4. Finally, the Commission's discovery rules sanction a variety of corrective actions which a licensing board may order if it finds that objections to discovery have merit. The subpoena rule permits a board to "quash or modify" a subpoena, as well as to condition denial of a motion to quash or modify "on just and reasonable terms". 10 CFR §2.720(f). The general rule applicable to other forms of discovery sets forth with specificity a broader panoply of corrective actions which a board may order—all, however, falling within the broad scope of the remedies applicable to subpoenas. In short, we read the corrective actions applicable to subpoenas and other forms of discovery to be coextensive.

In determining whether to quash a subpoena or to grant some other form of relief, a board should impose "a particularly heavy burden" on a person seeking relief "to make a substantial showing in support of a motion to quash as contrasted to some more limited protection". *Horizons Titanium Corp. v. Norton Co.*, *supra*, 290 F. 2d at 425; see also *Investment Properties Int'l Ltd. v. IOS, Ltd.*, 459 F. 2d 705 (2d Cir. 1972). This is particularly so where the matter to which discovery relates is a significant safety question. *Cf. Virginia Electric & Power Co. (North Anna Power Station, Units 1 and 2)*, CLI-74-16, RAI-74-4 313 (April 12, 1974). Absent such a substantial showing, a motion to quash should be denied. *Horizons Titanium*, *supra*, at 426. See also *Hadnott v. Amos*, 291 F. Supp. 309 (M.D. Ala. 1968), *reversed on other grounds*, 394 U.S. 358 (1969).

### III

We now turn to an evaluation of the particular reasons advanced by the Licensing Board in support of its orders denying discovery. In defending the Licensing Board's ruling, the applicant concentrated on one of the reasons that

the Board had assigned: the potential for delay (App. Bd. Tr. 81). For its part, the staff candidly conceded that "four of the five reasons really are not a valid basis for quashing the subpoena" (App. Bd. Tr. 114) and it, too, attempted to justify the Board's orders in terms of the potential for delay which the discovery entailed. We shall therefore first treat the soundness of that reason.

A. In its March 27, 1973 ruling, the Licensing Board stated that it was "not convinced" that the discovery could not have been sought "much earlier" in the proceeding "based on the information in the FSAR or voluminous other documents already provided to intervenors by both Applicant and AEC Staff". In that regard, the Board indicated that informal discovery and Freedom of Information Act requests by the intervenors had been in progress "over the past eight months", and that "thousands of pages" of the applicant's documents and 8,000-10,000 pages of the staff's documents had already been made available to the intervenors. It went on to state that "Intervenors have been parties to this proceeding since July, 1972" and, indeed, with the acquiescence of the applicant, had been given access to the applicant's documents "for several months prior to that time". The Board thereupon concluded

that there has been an inadequate showing by *Intervenors* that the subject wide-ranging subpoena, with a return date two weeks from the scheduled start of the Hearing, was not applied for for purposes of delay.<sup>10</sup>

B. We cannot accept this analysis.

1. In the first place, one of the stated premises upon which the Board based its conclusion is factually incorrect: the intervenors did not become parties in July, 1972. While their petition for intervention was filed on July 31, 1972, they were not admitted as parties to the proceeding until the Commission issued its Memorandum and Order of September 29, 1972 (unpublished).<sup>11</sup>

2. Secondly, the Licensing Board's ruling misconceives the showing required by the rules as a condition precedent to obtaining discovery by subpoena. The Board's original issuance of the subpoena reflected its belief that intervenors had made the threshold showing of "general relevance", and none of the parties appears to disagree. Thereafter, the burden shifted to Westinghouse to establish any grounds it might have for the quashing or modification of the subpoena.

Westinghouse argued that the discovery was untimely and could have been undertaken earlier, and that, by virtue of the subpoena application being filed on the "eve of the hearing", it must be regarded as "an ill-timed request to unreasonably burden a non-party to the proceeding, on penalty of delaying the hearing".<sup>12</sup> But this claim is a far cry from a demonstration that the subpoena

<sup>10</sup> March 27, 1973 Ruling on Motion to Quash Subpoena, p. 4, emphasis supplied.

<sup>11</sup> The Licensing Board may have derived its statement concerning intervenors' admission to the proceeding as parties from a similar statement advanced by Westinghouse in its motion to quash.

<sup>12</sup> Brief of Westinghouse in Support of Motion to Quash Subpoena, dated March 26, 1973, at 57-58.

was sought by intervenors "for purposes of delay". Thus, the Board erroneously held that the intervenors were required to demonstrate affirmatively that they did not have an improper motive.

3. More importantly, under the restructured rules, discovery relating to a particular contention does not commence until that contention has not only been identified but, as well, admitted to the proceeding by the Board. See 10 CFR § 2.740(b)(1). This normally occurs at the "special" prehearing conference provided for in 10 CFR § 2.751a.

a. In this case, the "special" prehearing conference was held on November 17, 1972. Prior thereto, intervenors had submitted two contentions (3.4.1-CZ and 3.5.1-CZ in their petition for intervention) which alleged in general terms that certain of the Commission's general design criteria relating to containment pressure would not be satisfied. Despite the fact that the applicant had put in issue the acceptability of these contentions, the Board did not rule on them at the conference.

Indeed, the Special Prehearing Conference Order, dated December 5, 1972 which recorded the events of the conference, explicitly recited that

*The Board made no rulings regarding the contentions of the Joint Intervenors as outlined in their petition to intervene. The Board, however, was advised by the parties that progress was being made in narrowing the scope of the issues. (Emphasis supplied).*

The order also reflected that

*The parties were advised by the Board that rulings on requests for discovery are dependent on the Board first making determinations as to the issues in controversy. Discovery requests must be relevant to the issues in the proceeding. (Emphasis supplied).*

The order also indicated that the parties had agreed, and the Board had ruled, that the evidentiary hearing was to commence on April 2, 1973.

b. The next prehearing conference took place on February 1, 1973, and the matters which were considered at that conference were reflected in the Prehearing Conference Order of February 8, 1973.<sup>13</sup> That order did not delineate any specific contentions which were acceptable; indeed, it admonished the parties for not having reduced "the number or bulk of intervenors' filed contentions", and it added that it "still awaits the joint stipulation of contentions that was so near-at-hand as of the November 17, 1972 Special Prehearing Conference".

<sup>13</sup> This conference was not contemplated as being the final prehearing conference authorized by 10 CFR § 2.752, which under the rules (absent some differing Board order) is the cut-off point for discovery. The February 8 conference order specified that the final conference was to be held on March 23. Later that date was changed to March 12. The conference was held on that date. See Final Prehearing Conference Order dated March 15, 1973.

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To assist the parties in the course of their "remaining discovery", the order set forth what the Board believed to be the "key issues" of the proceeding, one of which encompassed the containment pressure issues appearing in contentions 3.4.1-CZ and 3.5.1-CZ. Significantly, the Board made it clear that, by spelling out such key issues, it was not accepting contentions as such but only attempting to assist the parties in narrowing the issues in contention. As modified by the Board's supplemental order of February 28, 1973, the February 8 order required, *inter alia*, that a list of all remaining contentions (whether agreed-upon or in dispute), be filed by March 7; and that March 15 be the "[f]inal day for initiation of discovery".

c. Intervenor's Contention 1, which incorporated and made considerably more specific the rather generalized allegations of their original contentions 3.4.1-CZ and 3.5.1-CZ, was timely filed on March 2, 1973. On March 7, 1973, the parties filed a stipulation with regard to contentions which indicated, *inter alia*, that Contention 1 "should be placed in issue" as a matter in controversy in the proceeding. In its Final Prehearing Conference Order, dated March 15, 1973, the Board accepted this contention "as stated".

d. This sequence of events effectively undercuts the claim of both the applicant and Westinghouse that the March 2 discovery request was untimely. The request was filed not only within the period for initiation of discovery which was authorized by the Licensing Board but also (since it preceded the final prehearing conference) within the period for discovery sanctioned by the restructured rules. Indeed, there is at least some justification to intervenors' assertion that their discovery request might have been rejected if filed earlier, since there would have been no accepted contention to which the request would have related.<sup>14</sup>

Furthermore, there was no warrant for any speculation by the Licensing Board that granting the discovery would inevitably have led to delay. As intervenors point out, they never sought, nor intimated they would seek, a delay

<sup>14</sup> Westinghouse asserted before the Licensing Board that the subpoena was "untimely" in that it was "requested and issued ... prior to the identification of any matters in controversy in a prehearing order or otherwise at the conclusion of the prehearing conference provided for in Section 2.751a of the Rules of Practice ... thereby violating the requirements of Section 2.740(b)(1) ... whereby discovery shall only relate to matters in controversy which have been identified in the prehearing order entered at the conclusion of the prehearing conference provided for in Section 2.751a ...". While technically accurate, this assertion ignores the obvious negotiations in which the parties were engaged at the time when both the revised contention and the discovery request were simultaneously filed, leading to a stipulation on this contention only five days thereafter.

Westinghouse also advanced an apparently contradictory, and equally unwarranted, position that the subpoena should be rejected since it was filed after the final Section 2.752 prehearing conference and was not accompanied by a showing of good cause. As reflected *supra*, p. 465, fn. 13, the subpoena request was filed 10 days prior to the final prehearing conference.

in the April 2, 1973 starting date for the hearing. Rather, they had agreed to the April 2 date and if, because of discovery initiated by them, they had sought to postpone the date, it would then have been their obligation to convince the Board that postponement was appropriate. (App. B.J. Tr. 17.) We need add only that the Licensing Board had ample authority to "[r]egulate the course of the hearing" and, thereby, "to take appropriate action to avoid delay" (see 10 CFR § 2.718). If faced with a postponement request, it could and should have struck a balance between whatever justification was advanced for the postponement, and the reasons for avoiding delay.

C. Our ruling on the timeliness of the instant discovery request should not be taken as denigrating the significance of requiring that parties' discovery requests be filed in a manner consistent with the goal of carrying on and completing licensing proceedings expeditiously. The restructured rules explicitly reflect "the Commission's intent that [licensing] proceedings be conducted expeditiously and its concern that its procedures maintain sufficient flexibility to accommodate that objective". (10 CFR Part 2, Appendix A.) As stated in the rules, this position recognizes that

fairness to all the parties ... and the obligation of administrative agencies to conduct their functions with efficiency and economy, require that Commission adjudications be conducted without unnecessary delays.

(*ibid.*) But the key word is *flexibility*. For just as tactics which necessarily result in delay-for-delay's sake are not to be tolerated, so too are rulings which preclude adequate access to information without a clear and convincing showing that unwarranted delay is unavoidable.

This view is consistent with that adopted by many courts in the interpretation of the Federal Rules. In making discovery rulings, courts consistently have taken into account whether the requested discovery would, in fact, delay the trial; and where it was not shown that delay would result, the discovery has been permitted—even where it was recognized that the discovery could have been requested earlier. *Frasier v. Twentieth Century-Fox Film Corp.*, 22 F.R.D. 194 (D. Neb. 1958); *Bernstein v. N.V. Nederlandsche-Amerikaansche, Etc.*, 15 F.R.D. 32 (S.D. N.Y. 1953); *Thomas v. Pennsylvania R.R.*, 7 F.R.D. 610 (E.D. N.Y. 1947); *Norton v. Cooper-Jarrett, Inc.*, 27 F. Supp. 806 (N.D. N.Y. 1939).<sup>15</sup>

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<sup>15</sup> The availability of a period in advance of a hearing or trial for parties to engage in orderly, final preparation, without a flurry of "midnight" discovery on the eve of the hearing, has been recognized as worthwhile. *King v. Georgia Power Co.*, 50 F.R.D. 134, 135-36 (N.D. Ga. 1970). But that consideration cannot here justify quashing intervenors' subpoena, inasmuch as it was filed within the period permitted by Board order (which itself presumably took this factor into account). In addition, the Board declined to quash a request by the applicant and staff, filed after intervenors' discovery request, to depose one of the intervenors with regard to the entire scope of the intervenors' case.

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The decisions cited to us by the applicant are not to the contrary. They involve the situation in which the discovery was sought after the commencement of a trial and related to issues which the court found were apparent from the time the litigation began. *United States v. E. I. du Pont de Nemours & Co.*, 14 F.R.D. 341 (N.D. Ill. 1953); *United States v. Watchmakers of Switzerland Information Center Inc.*, 27 F.R.D. 513 (S.D. N.Y. 1961). In each case, discovery had been sought by the government for the purpose of presenting its rebuttal case. But the court found that the discovery could and should have been undertaken at pre-trial stages, that delay of the trial would necessarily have resulted from a grant of the discovery, and that the relationship of the discovery to the government's rebuttal case was questionable. As the court in *du Pont* noted:

The right of the government to show inaccuracy or to verify the accuracy and to present definite statistics on alleged indefinite statements made in defense should not be construed to open to the government an entire field of exploration on issues which were present from the inception of this litigation

14 F.R.D. at 345. See also *Associated Metals & Minerals Corp. v. S. S. Geert Howaldt*, 348 F.2d 457 (5th Cir. 1965).

On the other hand, where, as here, the request for discovery is not untimely under the rules, and where there has been no showing that delay will necessarily or even probably result, it is an abuse of discretion to deny discovery on timeliness grounds.

#### IV

In its March 27 ruling, the Licensing Board also found that the intervenors had failed to show that the requested documents were "reasonably necessary" for the presentation of evidence on their Contention I. That finding reflects a basic misconception by the Board of the standards governing discovery in Commission licensing proceedings. In order to obtain discovery, all that need be shown is that the material requested is generally relevant to a matter in issue. See 10 CFR § 2.720. And, as we have previously pointed out, the relevance standard is satisfied unless the "evidence sought can have no possible bearing upon the issues". (See p. 462, *supra*). Thus, the reasonable necessity concept plays no part in relevance determinations.

A. I. As the cases cited in the applicant's brief on appeal indicate, the standard of reasonable necessity adopted by the Licensing Board has been applied in situations in which documents or information sought to be produced involved trade secrets or other business confidential information. And, Westinghouse asserted before the Licensing Board that "many" of the documents and things sought to be produced contain proprietary information; for that

proposition, it relied on an affidavit of a Westinghouse employee, who described the procedures employed by Westinghouse for classifying documents as proprietary.

The Licensing Board failed to deal with the proprietary status of the Westinghouse documents. It never indicated whether or not it considered the documents to be entitled to proprietary protection. The Commission's rules include procedures for resolving questions of this type. 10 CFR § 2.790(b); see also *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 2), ALAB-137, RAI-73-7 491, 509-14 (July 17, 1973). The Board, however, never attempted to resort to those procedures.

2. Even if a determination had been made that some or all of the documents were entitled to proprietary protection, it scarcely follows that the Licensing Board would have been justified in barring discovery on the basis of a reasonable necessity standard. In Commission licensing proceedings, protective orders provide an effective means for safeguarding proprietary information where, as here, the party seeking the discovery is not a competitor. Further, the rules differentiate between the release of information to the public and to interested parties, and provide that "[w]ithholding from public inspection shall not affect the right, if any, of persons properly and directly concerned to inspect the document". They explicitly authorize the use in appropriate circumstances of a protective order and of *in camera* sessions of the hearing. 10 CFR § 2.790(b)(2). We have previously directed the use of such procedures. *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-122, RAI-73-5 322 (Mar. 16, 1973). Furthermore, while the policy of disclosure comes into play whether a safety or an environmental issue is involved, there is an especially strong reason for making available to parties such as the intervenors information which may enable them in the safety area to become "fully apprised as to the bases for and effects of proposed licensing actions". 10 CFR § 2.790(b)(1). See also *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), CLI-74-16, *supra*.

The Licensing Board in fact made use of protective devices in this proceeding; and we think it should have done so in this particular instance if it thought that proprietary protection was warranted with respect to the Westinghouse information.<sup>16</sup>

B. While the foregoing considerations are dispositive, we add our view that, in any event, the Board's analysis would appear to be defective for still another reason.

<sup>16</sup>In ALAB-185, we specifically authorized the Board, if it found it appropriate, to impose a protective order to assure the continued protection of information or documents which are proprietary in nature. We stated that "[a]ny protective order should permit access to proprietary information of such reasonable number of specifically designated representatives of the intervenors as is necessary for them to conduct a meaningful examination of that information." RAI-74-3 at 243.

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The Board correctly viewed the essential basis of Contention I as a challenge to the containment pressure calculations submitted by the applicant and the staff. But it also expressed its belief that intervenors could prove their contention through use of their own calculations, or through examination of the staff's calculations which led to a result roughly similar to that reached by the applicant. (Tr. 480-83; 495-97).

AEC rules do not confine a party to any particular method of proving a contention. We have in the past acknowledged the right of intervenors to present their case "defensively, on the basis of cross-examination". *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 2), ALAB-137, *supra*, RAI-73-7 at 504-05. The intervenors' discovery request was assertedly designed to further the exercise of this right—i.e., to permit the intervenors to examine and possibly challenge the accuracy of Westinghouse's calculations (and hence of the calculations being utilized by the applicant).<sup>17</sup>

## V

In its brief on appeal, the applicant has stressed the broad, far-reaching scope of the subpoena request. It asserts that the broad and sweeping categories of "all" documents specified in the subpoena "are unreasonable on their face". It adds that "tens of thousands of documents and things were responsive to the subpoena". (Brief, p. 38). At the oral argument, this point was developed still further by the applicant (App. Bd. Tr. 82):

Good faith compliance with that sort of request does require that you go to perhaps such matters as the strength of the concrete used in the containment building, the piping sizes and so on; because all of [them] provide engineering justification for an aspect of the containment pressure transient.

The intervenor asserts that the "all documents" formulation is a "necessary technique where the lawyer requesting documents does not know what documents the person has". (Brief, pp. 55-56). We agree, at least in the situation where, as here, the formulation is further limited by a reasonably defined subject matter category. The requested documents, viewed in the context of the intervenors' contention, were sufficiently defined so as to be ascertainable.

The Board did not in fact hold that the document request was too broad, although certain comments in its ruling suggest that to be its belief. See also the comments on the record by one board member (Tr. 483). Assuming that the Board chose to read the request in its broadest possible sense—as, for example, seeking documents which support the basic equation  $F = MA$  (*ibid.*)—it

<sup>17</sup>Interestingly, it is clear from the record that the staff's analysis was not wholly self-contained but was premised in part on conclusions supplied by the applicant the basis of which was not verified. See, e.g., Tr. 4263-65, 4279-80.

nevertheless should not have quashed this subpoena. It should have taken steps to narrow the request to documents relevant to the particular contention under consideration. Not to do so was an abuse of discretion in the circumstances of the present case. *Freeman v. Seligson*, 405 F. 2d 1326 (D.C. Cir. 1968); *Westinghouse Electric Corp. v. City of Burlington, Vt.*, 351 F. 2d 762 (D.C. Cir. 1965); *Horizons Titanium Corp. v. Norton Co.*, *supra*; *Boeing Airplane Co. v. Coggeshall*, *supra*.

The Board itself referred to one method of narrowing the scope of the subpoena request. In its March 27 ruling, it recognized, as do we, that certain of the information encompassed in the third paragraph of the document request represented "relevant areas of inquiry". But it commented that the paragraph was "too overly general and nondescriptive" for the Board to compel Westinghouse to produce "all" documents relevant thereto. It added that, to the extent the information was relevant,

the proper approach would seem to be oral testimony of appropriate witnesses, either by way of deposition or at the Hearing [at p. 7].

The intervenors claim that they in fact had attempted to take a deposition but were precluded from doing so by the Board's order. That assessment appears to be accurate, since the subpoena called not only for documents but also testimony, and sought not the document custodian as such but rather, as well, someone with "knowledge" of the contents of the documents and their application to Zion. In any event, in ALAB-185 we explicitly encouraged the Licensing Board to require, if it finds it appropriate, use of that technique in connection with the remand proceedings which we there ordered (RAI-74-3 at 243, fn. 4).<sup>18</sup>

## VI

The remaining reasons assigned by the Licensing Board for quashing the subpoena do not require extended discussion.

A. The Board viewed as unreasonable the demand for the Westinghouse witness to be examined in Chicago rather than in Pittsburgh. It did not explicitly take into account, however, the fact that the Commission's rules—unlike the Federal Rules of Civil Procedure—do not specify where a deposition should be taken or documents produced. *Cf.* FRCP 45(d)(2).

Since Commission rules do not require a deposition to be taken or documents produced in a witness' home territory, the subpoena should not have been quashed as unreasonable for not so providing. The intervenors complied with the rule requiring the tendering of witness fees and mileage. If the Board

<sup>18</sup>It goes without saying, of course, that the Board may also take into account the testimony already given by various Westinghouse and staff witnesses at the hearing (both direct and cross-examination) in resolving any question which may arise respecting the breadth of the discovery request.

thought Chicago to be unreasonable,<sup>19</sup> it could and should have modified the subpoena to make it returnable in Pittsburgh. *Hogan v. Ultronic Systems Corp.*, 53 F.R. Serv. 2d 45b.31, Case 1 (S.D. N.Y. 1964); *Less v. Taber Instrument Corp.*, 53 F.R.D. 645 (W.D. N.Y. 1971).

B. Finally, the Board found the time allowed between service and return of the subpoena to be unreasonable, and that 30 days should have been permitted. It found that Westinghouse was served on March 12, 1973, and that its witness had to report by March 16. The notice of deposition and request for subpoena, however, had been served by mail on March 2 and presumably reached Westinghouse by March 5. (See 10 CFR §2.710.) Thus, Westinghouse had substantially more actual notice of the discovery than the 4 days between the date of service and the reporting date. Nevertheless, the Board reasoned that a non-party such as Westinghouse should be afforded no less time than the 30 days given to a party responding to a motion for production of documents (10 CFR §2.741(d).)

Section 2.720 includes no explicit requirement to that effect. But if the Board thought that additional time was necessary in the circumstances, it could have modified the subpoena accordingly. The Board has broad discretion to increase or reduce the time permitted for discovery, depending upon the particular situation at hand. See 10 CFR §2.711. This authority extends to the alteration for good cause of time limits specified in the discovery rules. See, e.g., *Whitkop v. Baldwin*, 1 F.R.D. 169 (D. Mass. 1939), where a court directed a party to answer interrogatories within 5 days (rather than the 15 days then permitted by the rules) "in view of the imminence of a trial . . .". In any event, since the rules do not establish any specific period for a response to a subpoena, the Board should not have quashed the subpoena as being unreasonable for not providing 30 days to respond. For the Board here to have done so in lieu of exercising its authority to modify the reporting date was an abuse of discretion.<sup>20</sup>

FOR THE ATOMIC SAFETY AND  
LICENSING APPEAL BOARD

Margaret E. Du Flo  
Secretary to the Appeal Board

<sup>19</sup> While counsel for the applicant and the intervenors are located in Chicago, there may be persuasive reasons why production of the documents should take place where the underlying records are located. *Society of Independent Motion Picture Producers v. United Detroit Theatres Corp.*, 8 F.R.D. 453 (E.D. Mich. 1948).

<sup>20</sup> It need not be stressed that, in reversing the denial of discovery, we concluded not merely that the Licensing Board had erred in quashing the subpoena but, as well, that the error was prejudicial in the circumstances of this case. Discovery orders, even if erroneous, will not be overturned by us if the error was harmless. *Cf. Goldman v. Checker Taxi Co.*, 325 F. 2d 853, 856 (7th Cir. 1963).

UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

William C. Parler, Chairman  
Dr. John H. Buck, Member  
Dr. Lawrence R. Quarles, Member

In the Matter of

Docket No.

CONSOLIDATED EDISON COMPANY  
OF NEW YORK, INC.

(Indian Point Station, Unit No. 2)

NOTICE OF SUPPLEMENTAL DECISION

April 25, 1974

Our decision of April 4, 1974 in this proceeding, (ALAB-158-323), reserved judgment on the Citizens Committee for the Protection of the Environment (CCPE's) exceptions 18-21 which concern the applicant's security plan.

In a supplemental decision issued today,<sup>1</sup> we have ruled on those exceptions. That decision discusses pertinent details of the applicant's physical security plan for the protection of the Indian Point facility. Accordingly, it is being withheld from public disclosure as provided for in 10 CFR §2.790 of the Commission's regulations. Counsel for the parties who have participated in the issue concerning the adequacy of the applicant's physical security plan are being provided a copy of the supplemental decision. They have been directed not to disclose it to the public.

We have ordered, on the basis of the record in this proceeding, that the regulatory staff take prompt action to assure that certain aspects of the applicant's security plan are augmented. In part, this augmentation is being required because of regulatory requirements which have been added subsequent to the consideration by the Licensing Board of the applicant's security plan at the hearing and initial decision. Our supplemental decision emphasizes

<sup>1</sup> ALAB-197R, April 25, 1974.

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