

RELATED CORRESPONDENCE

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

DOCKETED  
USNRC

'85 JUN -6 P4:35

In the Matter of )

KERR-McGEE CHEMICAL CORPORATION )

(West Chicago Rare Earths  
Facility) )

Docket No. 40-2061-ML  
ASBLP No. 83-495-01-ML

OFFICE OF SECRETARY  
OF THE COMMISSION  
REGULATING & SERVICE  
BRANCH

MOTION TO QUASH OR, IN THE  
ALTERNATIVE, TO MODIFY SUBPOENA

Pursuant to 10 C.F.R. § 2.720(f), Kerr-McGee Chemical Corporation ("Kerr-McGee") and Stearns Catalytic Corp. ("Stearns Catalytic") request the Board to quash a subpoena issued for the production of documents by the Custodian of Records in the Oak Brook, Illinois office of "Catalytic, Inc." This subpoena was issued ex parte at the request of the State of Illinois pursuant to 10 C.F.R. § 2.720 and was served on May 29, 1985. The subpoena should be quashed because the entity to which it is addressed, Catalytic, Inc., has no office in Oak Brook and now has no connection with the issues in this proceeding. If the Board declines to quash the subpoena, Kerr-McGee and Stearns Catalytic move in the alternative for its modification.

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I. Factual Background

In December 1980, Kerr-McGee engaged a company then known as Catalytic, Inc. to provide engineering services, through its offices in Oak Brook, Illinois, in connection with Kerr-McGee's West Chicago Rare Earths Facility. The services conducted for Kerr-McGee through this office included such matters as the development of "control work packages" or, in some cases, specifications for the dismantling of buildings, the design of a surface water drainage system, and the installation of a sophisticated incinerator. The Oak Brook office also conducted some preliminary engineering work relating to the construction of the disposal cell.

By August 1984, Catalytic, Inc. was replaced in the Oak Brook office by Stearns Catalytic as a consequence of various mergers and reorganizations. Stearns Catalytic does have a sister subsidiary named Catalytic, Inc. that provides maintenance services, but that subsidiary does not now have an office or a custodian of records in Oak Brook.

On August 29, 1984, Kerr-McGee entered into a new contract with Stearns Catalytic. Engineering services relating to the building dismantling and similar activities are conducted by Stearns Catalytic from the Oak Brook office, although a number of other services undertaken in preparation for the hearing are now performed elsewhere. Some of the documents kept in the files of the Oak Brook office relate to work undertaken by Stearns Catalytic or formerly by Catalytic, Inc. in preparation for the hearing.

## II. Motion to Quash

"Catalytic, Inc.," the organization to which the subpoena is addressed, does not have either an office or any employees in Oak Brook. Stearns Catalytic, on whom the subpoena was served, does have an office in Oak Brook, but it is not the entity named in the subpoena. Because the subpoena as drafted is unenforceable, Stearns Catalytic would arguably be within its rights in merely ignoring it. However, the spirit of the rules suggests that it would be more appropriate for the Board to quash the subpoena pursuant to 10 C.F.R. § 2.720(f).

## III. Motion to Modify

As stated above, the technical deficiency in the subpoena renders it unenforceable and it should be quashed. Even if the Board declines to quash the subpoena, however, the subpoena should be modified substantially before Stearns Catalytic is required to comply with it.<sup>1/</sup>

Stearns Catalytic has been retained by Kerr-McGee as a consultant to assist it in preparing for this and related proceedings before the Commission and the courts. Although it is very likely that a representative from Stearns Catalytic may ultimately be designated as an expert in this proceeding, Kerr-McGee has not yet reached any final decision on that point. Stearns Catalytic is now performing technical work and analysis

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<sup>1/</sup> In fact, Stearns Catalytic is prepared to produce voluntarily the documents that would be covered by an appropriately modified subpoena.

relating to issues to be resolved at the hearing, but its work is not yet completed.

It is well-established that expert consultants retained by a party in anticipation of litigation or for trial are not subject to discovery absent a showing of "exceptional circumstances" by the party seeking discovery. See Fed. R. Civ. P. 26(b)(4)(B); Manolete v. Bolger, 96 F.R.D. 179 (D. Ariz. 1982). This rule is equally applicable in proceedings before the Commission. See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-83-27A, 17 NRC 971 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-17, 17 NRC 490 (1983); Boston Edison Co. (Pilgrim Nuclear Generating Station Unit 2), LBP-75-42, 2 NRC 159 (1975).<sup>1/</sup> Rule 26(b)(4) provides:

Discovery of facts known and opinions held by experts, otherwise discoverable . . . and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

. . . .

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional

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<sup>1/</sup> A contrary conclusion was reached in General Electric Co. (Vallecitos Nuclear Center, General Electric Test Reactor), LBP-76-33, 8 NRC 461 (1978). However, that decision was expressly disapproved in Carolina Power & Light Co. and Seabrook. Moreover, the discovery permitted in General Electric concerned only the identities of experts, not the broad-ranging discovery sought by the State here.

circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. (emphasis added)

The State's Application for Issuance of Subpoenas states facts that demonstrate only that Catalytic, Inc. had some connection with this proceeding. Such a showing is minimally necessary to support a subpoena to an ordinary witness, 10 C.F.R. § 2.720(a); it is far from sufficient to meet the high burden imposed on the State by Rule 26(b)(4)(B). See Barnes v. City of Parkersburg, 100 F.R.D. 768 (S.D. W. Va. 1984). There are in fact no "exceptional circumstances" here. Kerr-McGee has placed no bar in the way of a full analysis of all relevant technical issues by the State's own experts.<sup>1/</sup> Absent such a bar, the State can hardly claim that it is "impracticable" for it to obtain the facts and opinions it needs from its own experts.

The restrictions of Rule 26(b)(4) apply to discovery of documents as well as to other modes of discovery from experts. Baise v. Alewel's, Inc., 99 F.R.D. 95 (W.D. Mo. 1983); Inspiration Consolidated Copper Co. v. Lumbermens Mutual Casualty Co., 60 F.R.D. 205 (S.D.N.Y. 1973). A broad ranging request for all of an expert's files, such as the State has made here, is improper even in the context of an expert witness. Baise v. Alewel's, Inc., 99 F.R.D. at 97-98. Where the consultant has not been

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<sup>1/</sup> Indeed most, if not all, of the relevant technical data in Kerr-McGee's possession have been or will be produced to the State through regular discovery.



designated as a witness, none of its files connected to its work as a litigation consultant should be subject to discovery.

In any event, discovery of the litigation-related documents of Kerr-McGee's experts is premature. Discovery of the underlying facts through document requests and interrogatories is still underway. Discovery relating to experts is best held at a later stage, after their work is substantially complete and their opinions are formed. Indeed, the State is taking exactly this approach with respect to documents held by its own experts.

Shortly after filing the application for this subpoena, the State responded to an interrogatory from Kerr-McGee as follows:

118. Identify each expert witness whom the State expects to call at the hearing in this proceeding, the subject matter on which each is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, a summary of the grounds for each opinion, and all documents on which each such opinion is based.

RESPONSE: This question was asked by Kerr-McGee in its first set of interrogatories. The People have nothing to add to the answer made thereto.

State of Illinois' Answers to Kerr-McGee's [Second] Set of Interrogatories and Document Requests, 72 (May 20, 1985). The previous answers to which the State makes reference identified two experts, but declined "to provide details about [their] . . . testimony" or about any studies, calculations, or analyses that they had undertaken. People's Responses to Kerr-McGee Interrogatories and Request for Documents, Nos. 64-66 (Sept. 17, 1984). Moreover, in response to Kerr-McGee's request for docu-

ments on which those witnesses would rely, the State responded "N/A". Id., No. 67.

The State is thus seeking through the instant subpoena to force Kerr-McGee and Stearns Catalytic to divulge documents reflecting preparations for the hearing at the very time the State has refused to provide similar discovery to Kerr-McGee through the normal discovery process. To the extent that discovery from experts is permitted under the rules, it should be reciprocal. Once the work of the experts has advanced sufficiently, the parties should establish a reasonable schedule for the exchange of information relating to expert testimony. At an appropriate future time, Kerr-McGee is prepared to discuss the matter with the State in good faith and will arrange for the production of discoverable documents from its expert witnesses in accordance with a mutually agreeable schedule without the need for the formality of a subpoena. Only if such negotiations are unsuccessful should the Board be involved.

Engineers at the Oak Brook office have performed some work for Kerr-McGee, such as work relating to dismantling of buildings and construction of the incinerator, that is not litigation related. Kerr-McGee and Stearns Catalytic are prepared to segregate the files in Oak Brook and to produce those that relate to work performed in the ordinary course of business (i.e., documents that do not relate to litigation preparation work). Inspiration Consolidated Copper Co. v. Lumbermens Mutual Casualty Co., 60 F.R.D. 205 (S.D.N.Y. 1973); see Bailey v. Meister Brau, Inc., 57 F.R.D. 11 (N.D. Ill. 1971).

Indeed, Stearns Catalytic is prepared to produce such documents even in the absence of a subpoena at a mutually convenient time. If the Board declines to quash the current subpoena, Kerr-McGee and Stearns Catalytic request that the subpoena be modified to require production on that basis.

In any event, Stearns Catalytic requests that the subpoena be modified to permit it to make the documents available for inspection at its offices in Oak Brook at a mutually convenient time, rather than at the offices of the Attorney General. The quantity of documents that may be subject to the subpoena is sufficiently large (over 20 file boxes) that it would pose an unreasonable burden to require Stearns Catalytic either to transport them to the Attorney General's office in Chicago or to copy them all. Indeed, some of these files may be needed for on-going work. Further, Kerr-McGee seeks a reasonable extension of time to enable both the segregation of files and the screening of files to remove any privileged documents.<sup>1/</sup>

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<sup>1/</sup> Kerr-McGee will screen the files for documents protected by the attorney-client and work product privileges. Such documents have not lost their privileged status merely because they were made available to Kerr-McGee's consultants. See Bogosian v. Gulf Oil Corp., 738 F.2d 587, 593-94 (3d Cir. 1984); Miller v. Haulmark Transport Systems, 104 F.R.D. 442 (E.D. Pa. 1984); Bailey v. Meister Brau, Inc., supra; Baise v. Alewel's, Inc., supra. Communications by Kerr-McGee's counsel to these consultants and documents prepared by the consultants at the direction of counsel as part of the preparation for this proceeding are also protected work product. 10 C.F.R. § 2.740 (b)(2); Sprague v. Director, Office of Workers' Compensation Programs, 688 F.2d 862, 869-70 (1st Cir. 1982); Baise v. Alewel's, Inc., supra.

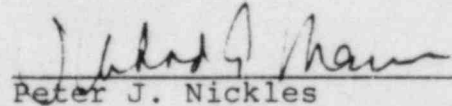


Conclusion

The subpoena issued to the "Custodian of Records" in the Oak Brook office of "Catalytic, Inc." suffers from a fatal flaw in that Catalytic, Inc. has neither an office nor any employees in Oak Brook. Even leaving this technical deficiency aside, the subpoena is overbroad in its requirement that all of the entity's files be produced. Any documents created in the ordinary course of business and otherwise relevant will be produced upon receipt of a proper request. However, the State is not entitled to a blanket access to the files of Kerr-McGee's consultants. The central policy behind the rules on discovery from experts is to permit a party to consult with experts freely in preparing its case without fear of disclosure of that preparation process to an opposing party. See Fed. R. Civ. P. 26, Advisory Committee Note. Only when that expert is designated as a witness do the countervailing policies supporting effective cross-examination require some limited discovery of the expert's preparation of his testimony. And where discovery of expert witnesses is permitted, it must be reciprocal. At a minimum, therefore, the subpoena should be modified to preserve Kerr-McGee's legitimate expectation of confidentiality in the use of

consultants to prepare for this proceeding and to require the discovery of experts that is contemplated by the rules to proceed on a fair and orderly basis.

Respectfully submitted,



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Facility)	)	OFFICE OF SECRETARY DOCKETING & SERVICE BRANCH

CERTIFICATE OF SERVICE

I hereby certify that copies of a Motion to Quash or,  
In the Alternative, to Modify Subpoena have been served by hand  
(or as noted by an asterisk, by Express Mail) on this 6th day of  
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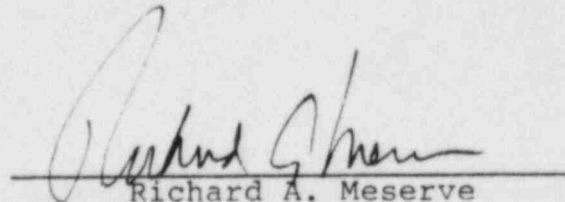
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