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 U.S. v. Consolidated Edison of New York,
 Inc.
 S.D.N.Y., 1994.

United States District Court, S.D. New
 York.

UNITED STATES of America

v.

CONSOLIDATED EDISON OF NEW
 YORK, INC., Constantine J. Papakrasas
 and Philip B. McGivney, Defendants.
No. 93 CR. 1062(JSM).

Aug. 5, 1994.

[Andrea M. Likwornik](#), [Peter C. Sprung](#),
[Matthew E. Fishbein](#), Asst. U.S. Attys.,
 S.D.N.Y., New York City, for the Govern-
 ment.

[William J. Schwartz](#), [Alan Levine](#), Kron-
 ish, Lieb, Weiner & Hellman, New York
 City, for defendant Consolidated Edison.

[John R. Wing](#), [Eve B. Burton](#), Weil, Got-
 shal & Manges, New York City, for de-
 fendant Constantine J. Papakrasas.

[Stephen E. Kaufman](#), [David Nachman](#),
 Stein, Zauderer, Ellenhorn, Frischer &
 Sharp, New York City, for defendant Philip
 B. McGivney.

MEMORANDUM OPINION AND ORDER

[MARTIN](#), District Judge:

*1 Most of the pre-trial motions in this case were decided on the record during the course of oral argument. At that time, the Court took under advisement the defendant Papakrasas' motion to dismiss Count Four of the indictment and Consolidated Edison's motion seeking discovery of the statements and grand jury testimony of its employees. For the reasons set forth below, Papakrasas' motion to dismiss Count Four

is denied and Consolidated Edison's motion with respect to the statements of its employees is granted.

Papakrasas is charged in Count Four with making a false statement in a matter within the jurisdiction of the United States in violation of [Title 18, United States Code § 1001](#) in that he "falsely informed the New York City Department of Health... that there was no asbestos in the manhole at the time of the explosion." Defendant claims that this statement to a New York City official was not a statement made in a matter within the jurisdiction of an agency of the United States. The Government contends that it was because the release of asbestos into the atmosphere was a matter within the jurisdiction of the Environmental Protection Agency.

The legal principals controlling on this motion were clearly set forth in the Second Circuit in [United States v. Davis](#), 8 F.3d 923, 929 (2d Cir.1993), where the Court stated

[T]here is no requirement that a false statement be made *to* the federal agency; it must only have been made in '*any matter within the jurisdiction of any department of agency of the United States*'....

A federal department or agency has jurisdiction within the meaning of [18 U.S.C. § 1001](#) 'when it has the power' to exercise authority in a particular situation as distinguished from 'matters peripheral to the business of that body.' [United States v. Rogers](#), 466 U.S. 475, 479, 104 S.Ct. 1942, 1946, 80 L.Ed.2d 492 (1984). In situations in which a federal agency is overseeing a state agency, it is the mere existence of the

federal agency's supervisory authority that is important to determining the jurisdiction. (emphasis in original) (citations omitted).

In this case, the Environmental Protection Agency clearly had supervisory authority over the state agency with respect to a potentially hazardous release of asbestos into the atmosphere. The Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA") was enacted to address problems of pollution caused by hazardous substances such as asbestos "by creating a comprehensive and uniform system of notification, emergency governmental response, enforcement and liability." *United States v. Carr*, 880 F.2d 1550, 1552 (2d Cir.1989) (citation omitted). Acting pursuant to CERCLA, the EPA administrator promulgated the National Contingency Plan ("NCP") to provide coordinated responses to the release of hazardous substances. 40 CFR § 300.3(b). Under the NCP in effect at the time of the explosion, a federal on-scene coordinator is designated to coordinate the Government's response to the release of a hazardous substance and is to coordinate efforts with appropriate state and local response agencies. 40 CFR §§ 300.33(b)(3), 300.62(a)(1). Provisions of CERCLA were supplemented in 1986 with the adoption of the Superfund Amendments and Reauthorization Act of 1986, which included the Emergency Planning and Community Right-to-Know Act ("EPCRA"). EPCRA established planning and notification requirements concerning the presence of hazardous chemicals and requires owners and operators of facilities to notify state and local emergency planning authorities of releases of materials such as asbestos. *See* 42 U.S.C. § 11004(b). Although the defendants argue that EPCRA did not apply to Con Edison's facility at issue in the present

case, the Court at oral argument rejected that contention.

*2 Given the fact that the NCP designates the EPA as the federal on-scene coordinator for hazardous substance releases in Manhattan (*see* 40 CFR § 300.33(a)), and recognizes the role to be played by state and local public safety officials who are anticipated to be the first government representatives on the scene of a potential environmental incident, Mr. Papakrasas' statements to the Department of Health official was clearly a matter within the jurisdiction of the United States. A knowingly false statement to the local Department of Health official would, therefore, constitute a violation of Title 18, United States Code § 1001.

In response to Consolidated Edison's motion for discovery of statements of all of its officers and employees, including their grand jury testimony, the Government concedes that there is no Second Circuit precedent directly on point with respect to statements made by corporate employees outside the grand jury. The Government notes, however, that with respect to grand jury testimony, it is only obligated to produce testimony of a witness who "(1) was, at the time of that testimony, so situated as an officer and employee to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to the alleged conduct in which the witness was involved." F.R.Crim.P. 16(a)(1)(A). The Government contends that that limitation should also apply to statements outside the grand jury. The Court sees no reason to so

limit the defendants' right to such statements.

With respect to the grand jury testimony, the dispute between the parties revolves around the question whether Con Edison must stipulate as to the identity of those individuals who have the requisite power to bind the corporation. The Government recognizes that an amendment to [Rule 16](#) has been approved by the Judicial Conference and will become effective December 1, 1994 and that under the amendment a defendant will not be required to make a stipulation such as the one upon which the Government is now insisting. *See* 55 Crim.L.Rep. 2029-30 (May 11, 1994). The Government argues, however, that the report on the amendment indicates that its purpose is to change the existing law and, therefore, the Court lacks the power to order production of the Grand Jury testimony without the requisite stipulation from the corporation.

There is little question that the new rule will become effective on December 1, 1994. Given the fact that this amendment embodies the determination of the Judicial Conference as to the most equitable procedure for determining what grand jury testimony is provided to a corporation, it would be exalting form over substance to refuse to apply the rationale of the rule to interpret the present ambiguous language. Moreover, this Court would clearly have the authority, on Consolidated Edison's application, to adjourn this trial for several months so that the new rule would become applicable and the grand jury testimony produced without a stipulation from the defendant. In the Court's view, such a delay would be in neither the defendant nor the Government's interest, and it therefore seems much more sensible simply to order

the Government to produce the grand jury testimony without requiring a stipulation from Consolidated Edison.

***3 SO ORDERED.**

S.D.N.Y., 1994.

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Not Reported in F.Supp., 1994 WL 414407 (S.D.N.Y.), 39 ERC 1892

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