

47/73

UNITED STATES OF AMERICA
BEFORE THE
ATOMIC ENERGY COMMISSION

In the Matter of
CONSUMERS POWER COMPANY
(Midland Plant, Units 1 and 2)

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)
)

Docket Nos. 50-329A
50-330A

ANSWER OF THE DEPARTMENT OF JUSTICE
TO APPLICANT'S MOTION TO COMPEL PRODUCTION
OF DOCUMENT AND MOTIONS OF THE DEPARTMENT
FOR PROTECTIVE ORDERS AND TO COMPEL
PRODUCTION OF DOCUMENTS BY APPLICANT

Pursuant to Sections 2.740(f)(2) and 2.740(c) of the Commission's Rules, 10 C.F.R., Part 2, the Department of Justice answers Applicant's motion to compel production, dated April 9, 1973; and further moves the Board for a protective order denying discovery of the document sought by Applicant.

In the alternative, should the Board order the document produced, the Department moves for a protective order limiting its distribution strictly to Applicant's counsel in this proceeding, with timely notification to Intervenors and the Department prior to any further disclosure in the proceeding, so as to permit application for an additional protective order. Finally, again should the Board order this document discovered, the Department moves that Applicant be ordered likewise to produce its documents relating to current negotiations--which it now reveals have been withheld according to

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Keith S. Watson's letter of April 10, 1973, Appendix A hereto)--to the Intervenors and the Department, with such conditions for confidentiality as the Board deems appropriate.

The document sought by Applicant is a report dated February 14, 1973, prepared by Daverman Associates, engineering consultants to the Michigan Municipal and Cooperative Power Pool (MMCPP), summarizing a meeting of Pool members held at the Daverman offices on that date. The subject of this meeting was Applicant's contract proposal of January 29, 1973, to the MMCPP, the reaction of its members to this proposal, and contemplated counterproposals to parts of Applicant's offer.

Mr. A. J. Hodge, of Daverman Associates, included this conference report with other material recently forwarded to the Department (see Department's document No. 8799 made available to Applicant on discovery, attached as Appendix B). According to counsel for Intervenors, Mr. Hodge had apparently misunderstood instructions from Mr. A. E. Steinbrecher, manager of Northern Michigan Electric Cooperative, concerning what material was to be forwarded. Thus we are in possession, apparently by mistake, of an MMCPP internal memorandum detailing its bargaining position and objectives in future negotiations with Applicant.

Clearly, disclosure of this information, even if limited to Applicant's attorneys in this proceeding, would be patently unfair and prejudicial to the MMCPP. In the process of contract

negotiation, if one side becomes totally informed as to the objectives of the other, it achieves a significant bargaining advantage.

Per Chairman Garfinkel's conference call of April 11, 1973, the Department is submitting the document for in camera inspection by the Board. We believe an examination of the document will show that it would be of little or no value to Applicant in preparing for this hearing. If anything, it helps the cases of the Department and the Intervenors by illustrating MMCPP's desire for coordination with Applicant and its problems with the terms offered by Applicant. We submit that the Board, in ruling on these motions should weigh the negligible benefit to Applicant of disclosure against the substantial prejudice to the MMCPP.

Should the Board nevertheless order discovery, we believe that a protective order strictly limiting distribution to counsel in this proceeding would be necessary to minimize the damage to MMCPP. Under such an order, if counsel for Applicant, after examining the document, believes it necessary to introduce or otherwise disclose the document in this proceeding, they would timely notify the Intervenors and the Department so as to permit application for an order protecting against such introduction or disclosure.

Applicant has suggested that this procedure would be satisfactory to it (Motion to Compel, p. 2).

Should the Board nevertheless rule that internal documents regarding current negotiations are subject to discovery, this burden should be made to fall upon Applicant as well. We have obtained no documents of this sort from the Applicant, despite its claim to the contrary. Of the documents it has provided us (only after securing our promise to hold them confidential and to advise counsel beforehand if ever we sought to use them herein--the documents referred to on page 2 of Applicant's April 9, 1973, Motion to Compel), none concern Applicant's current negotiations with MMCPP. Most are correspondence to or from Applicant--material already in the hands of the MMCPP as the sender or recipient, and hardly confidential to Applicant. The most recent internal document of Applicant regarding negotiations with MMCPP that it has provided, "confidentially," is dated January 13, 1971--more than five months before the Department rendered its antitrust advice to the Atomic Energy Commission in this matter. On April 2, 1973, Applicant advised us that additional documents were available completing its document production under the First Joint Request as the Board had directed, except for matters deemed privileged (see letter of Keith S. Watson, dated April 2, 1973, attached as Appendix C). We duly obtained those documents for copying. Then on April 9, for the first time, Applicant informed us that it had additional nonprivileged documents Nos. 25375-25391 and 25427-25431--documents ostensibly relating to current negotiations--and would

withhold those documents from production pending the Board's ruling on its April 9 Motion to Compel (see Appendix A). We ask that the Board, if it orders production of MMCP's internal current negotiation document, out of fairness require Applicant to produce the alleged current negotiation documents it now admits to withholding--as well as any other current negotiation documents, internal or otherwise, that may be responsive to the First Joint Request.

Respectfully submitted,


C. FORREST BANNAN


DAVID A. LECKIE

WALLACE E. BRAND

Attorneys, Antitrust Division
Department of Justice

April 17, 1973
Washington, D. C.

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April 10, 1973

*NOT ADMITTED IN D. C.

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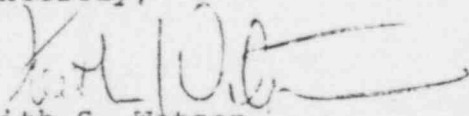
Re: Consumers Power Company, Midland
 Plant Units 1 and 2, AEC Docket
 Nos. 50-329A, 50-330A, Department
 of Justice File No. 60-415-20

Dear Mr. Brand:

Please be advised that document pages numbered 25375 to 25391 and 25427 to 25431 are being withheld from the normal production process since they relate to negotiations currently in progress between Applicant and other entities, including MMCPP members who are intervening parties in this proceeding.

Although a confidentiality arrangement would ordinarily appear to be in order (see my letter to you dated February 7, 1973), the Department has taken the position in Mr. Bannan's letter of April 2, 1973, that such arrangements are not appropriate. Since this issue is now before the Board pursuant to our Motion to Compel filed yesterday, we do not deem disclosure of the aforementioned documents to be called for pending the Board's ruling in this regard.

Sincerely,

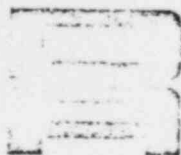


Keith S. Watson

KSW:asl

cc: James Carl Pollock, Esquire
 Joseph Rutberg, Esquire

February 16, 1973
DA 7111-24



Mr. Wallace Brand
Anti-Trust Division
U. S. Department of Justice
P. O. Box 7513
Washington, D.C. 20044

Dear Mr. Brand:

At the request of Mr. A. E. Steinbrecher, Manager, Northern Michigan Electric Cooperative, we are sending you one copy each of the following:

1. Latest contract proposal from Consumers Power Company to the Michigan Municipals & Cooperatives Power Pool. Proposal bears the date of 1/29/73. (Note that this is an Interchange Agreement, but does not include a schedule for purchase of firm capacity and energy. Consumers proposed that firm purchases be handled under a separate form of contract using Consumers' FPC filed "PP-1" tariff; see following item.)
2. Contract form proposed by Consumers for firm purchases required by Interchange Agreement dated 1/16/73. (Note that "PP-1" schedule is based on kVA demand, while Interchange Agreement is based on kW demand for the types of interchange involved; this would pose control problems since both contracts would have to work through the same interconnection(s). Also, "PP-1" contract does not provide for multiple points with respect to metering and billing, whereas Interchange Agreement is clear on multiple points and intergration of metering.)
3. "PP-1" schedule with increased rates as filed with FPC in conjunction with request for permission to increase wholesale rates.
4. Daverman Associates' conference report of February 14, 1973, covering NMICPP meeting and proposed counter proposals to parts of Consumers' latest contract proposal.

Very truly yours,

DAVERMAN ASSOCIATES, INC.

A. J. Hodge

AJH:jlb

Enc.

cc: A. E. Steinbrecher

John N. Keen

Robert Sablon, (with attachment)

518

8799

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April 2, 1973

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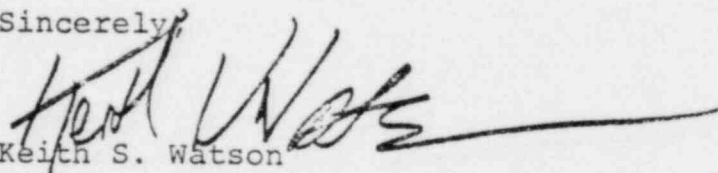
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 Plant Units 1 and 2, AEC Docket
 Nos. 50-329A, 50-330A, Department
 of Justice File No. 60-415-20

Dear Mr. Brand:

I am pleased to advise that additional documents in response to the Joint Document Request are available for inspection in accordance with procedures set out in my letter of October 16, 1972. Subject to the Board's orders and understandings of counsel, this submission completes production of non-privileged documents in response to discovery demands served upon Applicant in this proceeding.

We will advise shortly concerning those documents which Applicant deems to be privileged.

Sincerely,


 Keith S. Watson

KSW:asl

cc: Board members
 Joseph Rutberg, Esq.
 James Pollock, Esq.

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In the Matter of

CONSUMERS POWER COMPANY
(Midland Plant, Units 1 and 2)

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Docket Nos. 50-329A
50-330A

CERTIFICATE OF SERVICE

I hereby certify that copies of ANSWER OF THE DEPARTMENT OF JUSTICE TO APPLICANT'S MOTION TO COMPEL PRODUCTION OF DOCUMENT AND MOTIONS OF THE DEPARTMENT FOR PROTECTIVE ORDERS AND TO COMPEL PRODUCTION OF DOCUMENTS BY APPLICANT, dated April 17, 1973, in the above-captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 17th day of April, 1973:

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