

4/4/73

UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

In the Matter of )  
 ) Docket Nos. 50-329A  
CONSUMERS POWER COMPANY ) and 50-330A  
(Midland Units 1 and 2) )

APPLICANT'S ANSWER TO MOTION TO  
COMPEL PRODUCTION OF INDEX

Pursuant to Section 2.730(c) of the Commission's Rules of Practice, Consumers Power Company ("Applicant") answers and opposes a Motion to Compel the Production of Index, filed by the Intervenor on March 28, 1973. The Motion seeks production of "an index or some reasonable identification of discovery documents" which Applicant has furnished in response to the Joint Document Request served on July 26, 1973; the Motion further states that the document it seeks "should be referenced to the document request(s) to which it is meant to be responsive" (p.1).

For the reasons set forth below, Applicant submits that the Motion should be denied.

1. A Document Index Does Not Exist

As Applicant's counsel advised Intervenor's counsel on March 7, 1973, Applicant does not possess a document index in which a produced document is "referenced to the document request(s) to which it is meant to be responsive". Since most of the items in the Joint Document Requests are "all documents" requests and are frequently repetitive and cumula-

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tive, counsel has found no need to prepare such a document. Rather, as counsel advised the Intervenors on March 20, 1973, each appropriate document in Applicant's files was compared to the Joint Document Request and, if responsive to any item therein, was furnished to the joint discoverers. Applicant has maintained a segregated file of such documents, but has no index or list which provides the information sought by the Intervenors.

2. A Document Index would be Unduly Burdensome to Create at this Juncture

It is too late to require that Applicant's counsel prepare the type of document index which the Intervenors seek. The Joint Document Request was filed more than eight months ago and in response thereto, Applicant has produced some 25,000 document pages. The Joint Request did not ask Applicant to maintain a document index. To construct one at this juncture would require a complete review of every produced document and its appraisal against approximately 150 sub-categories in the document demand. To require this at this late point in time would be unconscionably wasteful and time consuming.<sup>1/</sup>

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<sup>1/</sup> By contrast, Applicant's discovery to the intervening parties requested production of an index at the time the discovery demand was served. (Applicant's Initial Interrogatories and Request for Documents, filed August 4, 1972, p.2). It should be noted that Intervenors' response to this aspect of its request has been incomplete and of little use to Applicant.

Applicant submits that the Board should not impose this burden and expense on Applicant when the demand is patently tardy and unreasonable.<sup>2/</sup>

3. A Document Index is not Relevant to the Issues Raised in this Proceeding

According to Section 2.740(b)(1) of the Rules, the scope of discovery is limited to "matters in controversy" which have been identified by the hearing Board. This Board set forth the controverted matters in this proceeding in its Order of August 7, 1972 (p.3). The activity of Applicant's counsel in deciding which of the numerous demands to which a document was responsive does not present an issue with regard to which discovery can be had in this proceeding. Hence, discovery sought here is clearly not related to "access to coordination", and must be denied as irrelevant.

The Board has previously considered and rejected similar discovery efforts by the Intervenor et al. In sustaining Applicant's objections to the Joint Document Request's

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<sup>2/</sup> The Intervenor's demand also runs afoul of the well-established principle that a party cannot be forced to "create" a document to respond to a demand for document production. Soetaert v. Kansas City Coca Cola Bottling Co., 16 F.R.D. 1 (D.C. Mo. 1954); 8 Wright and Miller, Federal Practice & Procedure (1970 ed.), p. 625.

demand for file index descriptions, the Board held:<sup>3/</sup>

"Applicant's first objection is to request no. 2 -- file indexes and documents describing Applicant's filing system . . . . The Department of Justice argues that the data requested will enable it to locate relevant material. We do not agree. With the issues clearly drawn, the Department should be able to frame requests appropriately limited to relevant material. Accordingly, Applicant's objection to this request is sustained.

Applicant submits that the reasoning contained in the Board's ruling as to file indexes applies with equal force to document discovery indexes and that the Intervenors' Motion should therefore be denied.

4. A Document Index Prepared by Counsel Would be Privileged

All documents furnished to other parties in this proceeding were reviewed by Applicant's counsel and reflect counsel's conclusion that the documents are called for by at least one of the various document demands served upon Applicant. Thus, any index or other document related to the reasoning underlying Applicant's discovery responses would record the mental impressions and conclusions of its counsel on this question in this proceeding.

The Commission's Rules direct the hearing Board to

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<sup>3/</sup> "Order Ruling on Applicant's Objections . . .," November 28, 1972, p. 2.

prevent the "disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney . . . concerning the proceeding." Section 2.740(b)(2) of the Rules of Practice. Thus, Applicant's counsel should not be required to create and produce a document index.

5. The Information Sought by the Intervenors is Equally Available to them as Applicant

By letter dated April 2, 1973, Applicant advised the Intervenors and other parties to this proceeding that it had completed its production of documents responsive to all discovery demands served upon it. The Intervenors allege that it is "impossible to ascertain the extent of compliance" because the produced documents "are not susceptible to any chronological order, subject or other identification . . . ." (Motion, p. 2).

Although it is unclear precisely what the Intervenors have in mind, it should be noted, parenthetically, that pursuant to understanding and Board admonition, production was made seriatim as materials came to light in the extensive file search. Thus, it would have been totally impossible to place the documents in chronological order or in other categories without holding them for production to the end of the period. Further, this would have required massive additional effort which would have greatly extended the time required for production.

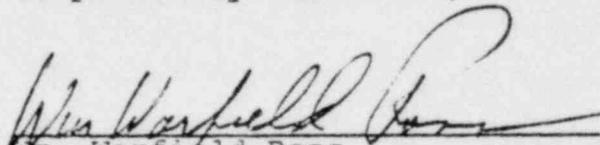
Additionally, the Intervenors are clearly as able as

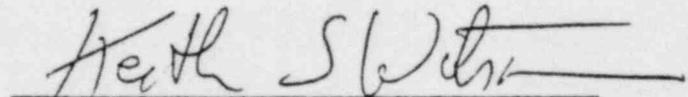
Applicant to arrange the documents in chronological or whatever order they deem appropriate. And since the Intervenors jointly authored the document discovery requests served upon Applicant, they are in an even better position than Applicant to ascertain which produced documents are responsive to which discovery request.

Conclusion

WHEREFORE, Applicant opposes the Motion to Compel the Production of Index and urges the Board to deny the Motion.

Respectfully submitted,

  
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April 4, 1973

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CERTIFICATE OF SERVICE

I hereby certify that copies of APPLICANT'S ANSWER TO MOTION TO COMPEL PRODUCTION OF INDEX, dated April 4, 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 4th day of April, 1973:

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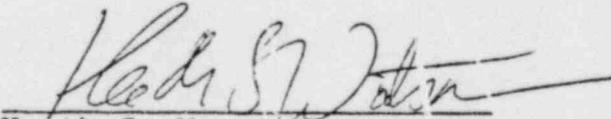
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