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UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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

ORDER AND RULINGS ON APPLICANT'S OBJECTIONS TO REQUEST FOR ADMISSIONS FILED BY THE DEPARTMENT OF JUSTICE

(April 5, 1973)

The Department of Justice served its request for admissions on the Applicant on February 12, 1973. The request sought responses to 235 numbered items. As a result of the Applicant notifying the Department that it had objections to a number of the requests, the latter filed a motion to compel responses to the request for admissions on March 2, 1973. The Applicant filed its answer to the motion to compel on March 12, 1973. The Department filed a reply to the Applicant's answer on March 22, 1973.

A. Preliminary Discussion Regarding The Legal Bases For The Board's Rulings.

In order to better understand the subsequent rulings made herein by the instant Atomic Safety and Licensing Board (Board), we believe it appropriate at this point to discuss the legal reasoning behind those rulings.

The Applicant's objections to responding to certain of the requests for admissions (Requests) may be categorized as follows: (a) Objections to matters occurring prior to 1960; (b) Objections to Requests unrelated to the Lower Peninsula of Michigan; (c) Objections on the ground of ambiguity of a particular Request; (d) Objections on the ground thatsome of the Requests call for legal conclusions or opinions; and (e) Objections on the basis of lack of knowledge.

Legal discussion on the merits of the Applicant's objections must first commence with a study of the applicable statute. Section 105c.(5) [42 USC 2135 c.(5)] provides in part "The Commission shall . . . . make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a." Since the Department of Justice previously advised the Board that its case does not rely in any way on the question of "activities under the license creating a situation inconsistent with antitrust laws", then the Department's case rests solely on that provision relating to "maintaining a situation inconsistent with antitrust laws".

Consequently, it appears to this Board that in dealing with the issue of maintaining a situation inconsistent with

the antitrust laws, the inquiry to be conducted must of necessity take into account those inconsistent activities that prevailed at the time of the Commission's Notice of Hearing and subsequently, and the market conditions existing during this same period. In this regard, however, we do not conclude that "activities inconsistent with the antitrust laws" are synonymous to violations of the antitrust laws. The former requires a lesser burden of proof to be sustained. Therefore, the Board determines that a full-scale inquiry into the utility industry is not required in a case which calls for a far lesser analysis. This view is buttressed by the statement of Walter B. Comegys, Deputy Assistant Attorney General of the Antitrust Division, Department of Justice, given to the Senate Subcommittee on Antitrust and Monopoly, on May 6, 1970. 1/

On page 142 of the Subcommittee's Hearing, Mr. Comegys stated the following:

> "We do not consider such a licensing proceeding as an appropriate forum for wide-ranging scrutiny of general industry affairs essentially unconnected with the plant under review."

1/ Senate Subcommittee on Antitrust and Monopoly, Hearings on Competitive Aspects of the Energy Industry, 91st Cong. 2d. Sess. May 5-7, 1970, pp. 141-142.

We believe that going back to 1960 is a sufficient period of time in which to acquaint the Board with an understanding of the structure of the market in which the Applicant operates and an understanding of those practices alleged to have been engaged in by the Applicant that are now asserted as being inconsistent with the antitrust laws. In this regard, it should be noted that Justice has not alleged that the Applicant has engaged in activities in violation of the antitrust laws. In such circumstances, a thirteen-year time-frame for discovery is sufficient to enable the Department to present an adequate case. Accordingly, we agree with the Applicant's objections to the furnishing of responses to Requests dating back prior to 1960. 2/

Consonant with our rulings above, we also believe that the geographic market involved in the instant proceeding includes those regions presently serviced by the Applicant. More specifically, it covers the areas in which the Applicant supplies electrical power to wholesalers and retailers. Further, it encompasses those areas which reasonably could be serviced by the Applicant as a result of any expansion

2/ Standard Oil Co. v. U. S., 221 U.S. 1 (1910); U. S. v. Reading Co., 253 U.S. 26 (1916); American Medical Assn. v. U. S., 130 F.2d 233 (D.C. Cir. 1942), Aff'd 317 US 519; F.T.C. v. Cement Institute, 333 U.S. 683 (1947) are not dispositive of the issue of broad discovery in the instant proceeding since they deal with specific violations of the antitrust laws.

of its electrical power sources. In addition, responses will be required to Requests dealing generally with the question of electrical power coordination or intergration so long as they can be shown to have applicability to the operations of Applicant from the time of the Notice of Hearing, including future operations. Accordingly, the decision as to whether a Request is within the proper marketing region or relevant product market can only be determined by a specific review of the Request.

Objections on grounds of ambiguity can only be resolved by a study of a particular Request. However, the Board agrees with the Department of Justice that the Applicant should respond to Requests containing words such as "economically feasible", "Relatively close", "sometime prior", "reasonable", "substantial", and "high-voltage transmission", assuming that the remainder of the numbered Requests containing these words are specific enough for responses. The requiring of responses to such phraseology does not bar the Applicant from incorporating language that defines or explains the bases for its responses.

While we agree that present Rule 36 of the Federal Rules of Civil Procedure does not prohibit responses to requests calling for legal opinions and conclusions of law,

nevertheless, this observation is unpersuasive in light of a specific Commission Rule on the subject of requests for admissions. The Board is bound by the Agency's Rules of Practice. Section 2.742 authorizes the serving of requests for admissions for the purpose of seeking the admission of the truth of any specified matter of fact. Thus, the Commission's Rule is more restrictive than Rule 36.

The language of Section 2.742, however, does not bar an interpretation that is harmonious to the concept of a fair and expeditious hearing. Consequently, we envisage no injustice to the meaning of "specified matter of fact" if we interpret these words in a manner tending to accomplish the objective of reducing further the relevant issues in this proceeding and/or the amount of evidence to be offered and, at the same time, protect the responding party from being severely and unfairly restrained in the presentation of its legal case. Therefore, we believe it improper to require responses calling for conclusions of law, legal opinions, interpretation of legal instruments, or responses to broad, hypothetical questions. However, it would not strain the meaning of Section 2.742 to require responses that embody opinions of fact, where it is evident that the opinions sought fall slightly short of being a direct factual response.

With respect to an inability to respond affirmatively or negatively because of a lack of knowledge, the Board concludes that a response to that effect is satisfactory. However, the Applicant may not give lack of information or knowledge as a reason for failure to admit or deny unless he also states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny.

The Board will not anticipate the Applicant's responses to the approved Requests by ruling now on the interrogatories being sought by the Department of Justice. Should interrogatories be necessary after the responses are provided, the Department will file a separate motion requesting same.

B. Rulings On The Objections Of The Applicant To The Request For Admissions Submitted By The Department Of Justice.

With the foregoing discussion as a frame of reference, the Board is now prepared to rule on each of the objections raised by the Applicant. The numbers herein correspond to those objections contained in the Applicant's Answer filed on March 12, 1973.

1	-	Response not required. The Department should indicate more specifically what it means by "demand market".
2 thru 10	-	Responses not required since they deal with matters prior to 1960.
11	-	Need not be answered. The request is conjectural in nature.
12	-	Need not be responded to in view of the Applicant's statement that it does not own diesel electric engines. Further, the relevancy of the request is not clear.
13 thru 20	-	Need not be answered. Responses need not be given to broad, hypothetical factual requests.
21	-	Must be answered. The Applicant in its response may indicate its definition of the word "generator". Request relates to general industry matters that possibly have applicability to the operations of Consumers Power Company.
22	-	Must be answered.
23	-	Must be answered. The request does not call for a legal opinion.
24 thru 39	-	Broad, hypothetical facts involved. Responses not required.
40 thru 53	-	Need not be answered. The requests call for legal opinions or conclusions.
54 thru 58	-	Need not be answered. The requests discuss broad, hypothetical facts.
59 thru 66	-	No responses are required. The requests are too hypothetical in nature or call for legal opinions.
67 thru 70	-	No responses required. The requests are hypothetical in nature and call for broad opinion answers.

71 - No response required; not relevant to the issues in this proceeding.

72 thru 74 - Responses not required; legal conclusions or opinions are involved.

75 thru 79 - Responses not required. The requests involve broad, hypothetical facts.

80 - No response required. The request is too indefinite for a proper response.

81 thru 82 - No response required; legal opinions are involved.

83 thru 87 - Must be answered; opinion of fact.

88 - Need not be answered. Not relevant to case.

89 thru 104 - Need not be answered.

108 thru 111 - Need not be answered. The Board does not understand the meaning of "foregoing transaction"(108). There is no indication that the transaction occurred subsequent to 1960. Also with respect to 111, the Board does not see the relevancy of inquiry into the Applicant's advice to the town voters.

112 - Need not be answered. The Board does not see the relevancy of this request to the instant proceeding.

114 - No response need be made to that request. The Department of Justice must indicate the cities involved in this request and whether or not the transactions occurred subsequent to 1960.

115 thru 116 - No response required.

117 - Response required. We are not concerned with the Gainsville case but merely the Gainsville formula.

118 thru 121 - Must be answered.

122 - With the deletion of that part of the sentence mentioning "including those using the Gainsville formula", that request must be responded to. Also, general industry matter involved that may apply to Consumers Power Company

123 thru 124 - No responses required. Legal interpretation of agreements are involved. In addition, the requests are hypothetical in nature.

126 - A response must be made taking into account the Board's ruling deleting "in effect".

127 thru 128 - A response must be given.

131 - A response must be given.

132 - Must be answered.

134 thru 138 - Must be answered.

139 - Need not be answered. The request calls for a legal opinion.

140 - Need not be answered; calls for legal interpretation.

141 thru 146 - Must be answered.

147 - Need not be answered. This particular request is argumentative in nature.

148 - Need not be answered. It is not relevant to the instant proceeding.

149 thru 151 - Must be answered.

152 - Need not be answered. The request is too indefinite and appears to require an expression of a legal opinion.

153 thru 154 - Must be answered.

156 thru 158 - Must be answered.

159 - Must be answered as it relates to the Applicant's operations.

160 thru 165 - Must be answered.

166 - Need not be answered. The request requires Applicant to express legal opinions.

167 - Must be answered so long as the period encompassed by the request does not relate to a period prior to 1960.

169 thru 171 - Must be answered.

177 - Must be answered.

178 thru 180 - Need not be answered.

181 - Need not be answered. Not relevant to the issue in the instant proceeding.

182 thru 185 - Need not be answered.

186 thru 188 - Need not be answered. Calls for responses to legal argument.

189 - Need not be answered as it requires legal conclusions to be made.

190 thru 195 - Need not be answered. Responses require legal interpretations of State law.

196 - Need not be answered. The request is ambiguous; it does not identify municipal utilities; the relevancy of the request unclear.

197 - Need not be answered.

198 thru 199 - Must be answered.

200 - Need not be answered.

201 - Must be answered.

202 thru 203 - Need not be answered.

204 - Need not be answered. This request calls for a legal conclusion.

205 thru 212 - Need not be answered.

213 thru 221 - Must be answered.

222 - Need not be answered. It is argumentative and calls for a legal conclusion.

223 thru 225 - Must be answered.

227 - Need not be answered.

228 - Must be answered. Request calls for opinion of fact.

229 thru 230 - Need not be answered. The Applicant need not express legal opinions.

231 thru 232 - Need not be answered.

233 thru 234 - Need not be answered. The word "relevant" implies a legal conclusion.

235 - Need not be answered. It calls for a legal conclusion.

The Applicant is directed to supply the responses required herein within fourteen (14) days after service of this Order.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

J. V. Leeds, Jr.
J. V. Leeds, Jr., Member

Hugh K. Clark
Hugh K. Clark, Member

Jerome Garfinkel
Jerome Garfinkel, Chairman

Issued at Washington, D.C.
this 5th day of April 1973