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UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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

ORDER DENYING APPLICANT'S MOTION
(DATED OCTOBER 26, 1972) TO COMPEL DISCOVERY
FROM MEMBERS OF MICHIGAN MUNICIPAL
ELECTRIC ASSOCIATION

By its motion of October 26, 1972, Applicant requests the Atomic Safety and Licensing Board (Board) "to compel twenty-one municipally-owned electric systems which are members of Michigan Municipal Electric Association (hereinafter "Association") to respond to Applicant's discovery request in accordance with the Commission's applicable discovery rules of practice". Fundamentally, Applicant's position appears to be that the twenty-one municipally-owned electric systems (hereinafter "Electric Systems") by virtue of membership in the Association are class members represented by the Association and hence "parties" to this proceeding for purposes of discovery.

The gist of the Commission's Rules of Practice, Sections 2.740b and 2.741 approximates Rules 33 and 34

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of the Federal Rules of Civil Procedure. Applicant suggests "that, in adopting the language of the Federal Rules, the Commission intended to follow federal court decisions which have placed a gloss upon Rules 33 and 34" (See page 3 of the Motion). In dealing with this Motion, the Board adopts Applicant's suggestion.

In its Motion, Applicant cites a number of cases in support of its contention. One of these cases relates to a garnishee and the rest are all cases where an insurance company is defending its insured. They are of little relevance to the present situation, which is much more in the nature of a class represented by an Association. In a quite recent case in the class representation field, Wainwright v. Kraftco Corporation, 54 F.R.D. 532 (N.D. Ga. 1972), Federal District Court Judge Edenfield ruled that the entire membership of a class may not be considered parties for purposes of discovery, although a few members were specifically named as parties. The facts closely approximate the situation alleged in Applicant's Motion and the decision is well reasoned. This Board agrees with the reasoning

and decision of Judge Edenfield. Consequently, the Board concludes that the Applicant's motion should be denied.

In reaching its determination, the Board has assumed that the statement by Applicant in its Motion that the Electric Systems are members of the Association is factual, and has decided the issue on that assumption. However, from the record, the facts appear to be somewhat different. The Petition to Intervene, dated October 4, 1971, clearly states that the members of the Association are "officials of thirty-four (34) municipal electric departments or utility boards in the State of Michigan" (Petition, page 2). In the record of the First Prehearing Conference, at page 32, Counsel for Applicant states, "Their (The Association) members are not the utilities themselves, as we understand it, but are merely employees of the municipal utilities". On page 8 of the Intervenors' Answer in Opposition to Applicant's Motion to Compel Discovery from members of the Michigan Municipal Electric Association, dated November 3, 1972, the comment is made that the Applicant by its Motion seeks to compel discovery of data from 28

municipals simply because the officials of the municipal electric system are members of the association.

Apparently, Applicant is seeking discovery of the Electric Systems on the premise that membership in the Association by their employees makes the Electric Systems parties to the proceeding for purposes of discovery. For the same reason that was applied to the first set of facts, the Board holds that the employees are not parties, and A Fortiori, the Electric Systems are not parties.

There is yet another reason for denying Applicant's Motion. The interrogatories were served on the Association, which has neither possession, custody, or control of the data needed to answer them. Thus, an essential requirement for discovery is missing. See Section 2.741(a)(1) of the Commission's Restructured Rules of Practice.

If it be argued that the interrogatories were served constructively on the members of the Association, the employees of the Electric Systems, the service is still fatally defective. There is no warrant in Rule 33

for the service of interrogatories on anyone except a party. Even service of the President of a corporation will not satisfy the rule. Holland v. Minneapolis-Honeywell Regulator Company, 28 F.R.D. 595 (D. DC. 1961).

In reaching its decision the Board has considered the Motion and the Answer of Intervenors and has studied the record. No need has been shown for an oral argument and Applicant's request for such argument is denied.

It should be noted that, in denying Applicant's Motion, the Board is not foreclosing the Applicant from appropriate discovery. Under Section 2.740a of the Commission's Rules, Applicant can take the depositions of knowledgeable employees of the Electric Systems. This procedure is similar to that under Rule 26 of the Federal Rules. In determining the extent of discovery from twenty-one Electric Systems, Applicant should bear in mind that extensive discovery is being had from the intervening electric systems and that under Section 2.743(c) unduly repetitious evidence will not be admitted.

For the foregoing reasons, the Applicant's Motion is denied.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

J. V. Leeds, Jr.

J. V. Leeds, Jr.

Hugh K. Clark

Hugh K. Clark

Jerome Garfinkel

Jerome Garfinkel, Chairman

Issued at Washington, D. C.,
this 15th day of November, 1972.

Reg Ltr

11-15-72

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ATOMIC ENERGY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of ORDER DENYING APPELLANT'S MOTION (DATED OCTOBER 26, 1972) TO COMPEL DISCOVERY FROM MIDLAND OF MICHIGAN MUNICIPAL ELECTRIC ASSOCIATION dated November 15, 1972 in the captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 15th day of November 1972:

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