

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))

To the Atomic Safety and Licensing Board:

APPLICANT'S ANSWER TO INTERVENORS' MOTION
TO COMPEL PRODUCTION OF PRE-1960 DOCUMENTS

Pursuant to Section 2.730(c) of the Commission's Rules of Practice, 10 C.F.R. Part 2, Consumers Power Company ("Applicant") herewith files its answer in opposition to the intervenors' "Motion to Compel the Production of Documents" dated prior to 1960, which was filed on January 26, 1973. The Motion is, in essence, an untimely request for reconsideration of the Board's previous rulings with regard to pre-1960 documents and should be summarily denied.

The documents which intervenors' Motion seeks are precisely the same as those sought in a letter to Applicant on September 21, 1972 -- to which Applicant formally objected on October 26, 1972. (Applicable extracts from these objections are attached hereto as Appendix A.) On November 1, 1972, the intervenors filed an extensive Answer to Applicant's objections; the present Motion raises no issues and discusses no facts that were not thoroughly set forth in intervenors' November pleading.

At the same time as the foregoing pleadings were filed, the Department of Justice also sought to secure

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similar pre-1960 documents from Applicant. Applicant's objections of October 26 also dealt with the Department's demands; the Department answered this pleading in November 2, 1972.

The Board's order of November 28, 1972, was entitled "Order Ruling on Applicant's Objections to Document Requests . . ." (emphasis supplied) which, as noted above, included Applicant's objections to the pre-1960 document request of the intervenors. The Board's ruling in this regard was as follows:

It is the opinion of the Board that the Applicant's present economic position and the nature of its recent activities can be shown adequately with documents dated on and after January 1, 1960. However, it is recognized that the negotiations which form the basis of executed agreements may have encompassed a substantial period of time Therefore, Applicant is required to produce documents prior to January 1, 1960, which form part of the records of negotiations of each coordination contract executed by Applicant after January 1, 1960. As thus modified, [Applicant's] motion is granted.

More than two months have passed since the Board's ruling concerning pre-1960 documents. The intervenors now come forward to seek reconsideration of the Board's ruling without offering any new basis or evidence in support of their request and without explaining why their effort to obtain reconsideration is filed two months out-of-time.

This consideration alone requires rejection of their Motion.

The untimeliness of the Motion also would gravely prejudice Applicant, and substantially delay this proceeding. During the last two months, Applicant has carried forward a massive Company-wide file search and has, in the course of the search, extracted those pre-1960 documents specified in the Board's aforementioned order. To date over 3.8 million document pages have received document-by-document scrutiny, while millions of others were reviewed through sampling and similar techniques. The extraction phase of Applicant's headquarters file search was completed last week.

The intervenors' pre-1960 document requests do not seek specifically identified material but rather call for all documents "comprising or relating" to broad categories covering as much as a ten-year time span. Thus, they demand a Company-wide file search comparable in scope and burden to the aforementioned effort just completed. To amend the Board's previous decision concerning pre-1960 documents and thus to require such an expenditure of time and resources as a result of intervenors' unjustifiable delay, would clearly be unduly burdensome, inequitable and improper.

WHEREFORE, Applicant respectfully requests the

Board to deny intervenors' Motion of January 26, 1973, for pre-1960 documents.

Respectfully submitted,

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February 7, 1973

APPENDIX A

Applicant's Objections to Document
Requests and Motion for Protective
Orders

filed October 26, 1972

[only that section dealing with pre-
1960 document requests is included
here]

B. Pre-1960 Document Requests

Applicant objects to the document requests contained in (1) the Department of Justice's "Motion to Compel the Production of Four Categories of Documents . . .", August 16, 1972, and (2) the Intervenor's letter from Fairman to Ross, dated September 21, 1972, to the extent that they require production of pre-1960 documents. The pre-1960 documents called for in these requests are not relevant to this proceeding and thus are not subject to discovery under Section 2.740(b) (1) of the Rules.

In its Prehearing Conference Order, the Board limited discovery to January 1, 1960, but offered to entertain motions relating to production of prior documents (p.4).

That order arose out of discussions at the Prehearing Conference on July 12, 1972, at which opposing counsel discussed discovery at some length. Counsel for the Justice Department and the Intervenors found the proposed 1960 cut-off date to be "adequate" (Tr. 96) and "appropriate" (Tr. 100) respectively, although each reserved the right to seek prior material of "very narrow issues" (Tr. 96) and "specific items" (Tr. 100), respectively.

When pressed by Board member Clark to explain what "narrow issues" he had in mind, counsel for the Justice Department replied:

". . . Now it is quite possible that there may be other sources, and we are going to try to exhaust these sources before we go to Consumers. For example, the files of the Federal Power Commission. Their forms go back a certain period of time, but there may be laps and gaps. Their rules change. Transmission maps are very hard to come by. It may be that we might have to go to Consumers for a transmission map in a particular year." (Tr. 96).

The requests of the Justice Department and the Intervenors to which Applicant objects bear no resemblance to the material described in the foregoing quotation. They call not for specific transmission maps and the like but rather for all documents relating to broad subject categories dating, in some cases, from 1947 to the present. In nearly all instances, the requests are so broad as to require a Company-wide file search and thus to further burden an already over-burdened file search process.

The commentary which accompanies the pre-1960 discovery requests of the Justice Department and the Intervenor offers no justification for a burdensome and open-ended inquiry into pre-1960 material. Indeed, no justification exists since this proceeding is concerned with the present day maintenance of a 'situation' in an antitrust context, not with prior history.

Events which transpired prior to 1960 have no relevance to the present 'situation' under review. Significantly, in discussing Applicant's conduct, the Justice Department's advice letter mentioned only post-1960 events: the inter-connection agreement with Lansing (signed in October 1970); the coordination negotiations between Applicant and two generation rural electric cooperatives (in 1963-64); the coordination negotiations with MMCPP (from 1969 to present); and the Michigan Pool agreement and operation (since 1962).

Concerning the issues raised by the Intervenor, it is noteworthy that every wholesale, coordination and pooling agreement to which Applicant is presently a party became effective within the last ten years. Thus, the negotiations and other pre-1960 subject areas referenced in the Justice and Intervenor's requests relate to proposals and agreements which have been long since superseded.

The only possible rationale for a broad-scale

pre-1960 inquiry which Justice and the Intervenors seek must rest on the hypothesis that Applicant unlawfully acquired (as opposed to maintains) its allegedly monopoly power. However, at the Prehearing Conference, counsel for the Justice Department conceded that he possesses "no evidence" (Tr. 61) that Applicant acquired its monopoly by unlawful means and stressed that the Department's case related to Applicant's present use of alleged monopoly power (Tr. 60-61). The Intervenors have also neither alleged, nor come forward with evidence related to, unlawful acquisition. To permit inquiry into pre-1960 material for the purpose of searching for such evidence would constitute the classic "fishing" expedition which the Commission rules proscribe. See Part I, supra.^{17/}

17/ At the Prehearing Conference Chairman Garfinkel and Board member Clark posed two questions suggesting their concern with such a fishing expedition:

"CHAIRMAN GARFINKEL: How could we permit you discovery on something that you are really not contending? That is if there is discovery and you seek discovery on the question of the activities which maintained the situation inconsistent, and you are not indicating that they illegally used this monopoly power -- that is illegally obtained it -- how are you going to get evidence endeavoring to show that the applicant illegally obtained the power to foreclose, say, the municipals from participating in joint coordination?" (Tr. 61).

"MR. CLARK: Isn't it the antitrust law, that it doesn't matter whether the monopoly was legally or illegally acquired if you are using it in violation of the antitrust laws -- isn't that really an immaterial matter as far as we are concerned? Do we care how they got the monopoly as long as they are using it illegally now?" (Tr. 61-62).

At the Prehearing Conference the Board wisely denied general discovery prior to January 1, 1960 - nearly thirteen years ago. The date chosen is more than fair to the Joint Discoverers: typically, discovery in antitrust cases has been limited to ten years. See, e.g., U.S. v. Maryland and Virginia Milk Producers Association, 20 F.R.D. 441 (D.D.C. 1957); Stanzler v. Loew's Theatre and Realty Corp., 19 F.R.D. 286 (D.R.I. 1955). The reasonable discovery limitation imposed by the Board, which is more liberal than that normally permitted in antitrust cases, should not be abandoned without a far more specific showing of relevance and need than that put forward by the Justice Department and the Intervenors.

Finally, Applicant submits that efforts to seek broad inquiry into pre-1960 material misconceive the nature of this proceeding. The Commission is charged under Section 105(c) of the Atomic Energy Act with "anticipatory" antitrust review. Statesville v. AEC, 441 F.2d 962, 974 (D.C. Cir. 1969); letter from Hart to McLaren, dated November 9, 1970, 116 Cong. Rec. S. 19257 (emphasis supplied). The JCAE Report which accompanied the 1970 amendments to Section 105(c) made clear that the Commission's mandate under the statute was to examine the situation under review and to conclude:

whether, in its judgment, it is reasonably probable that the activities under the license would, when the license is issued or thereafter, be inconsistent with any of the antitrust laws" (em-

phasis supplied). 1970 U.S. Cong. and Admin. News. 91st Cong. 2d Sess., p. 4994.

The parties to this proceeding have offered their divergent views to the Board concerning the proper interpretation of the words "activities under the license" i.e., the causal nexus between Applicant's general conduct and licenses to construct and operate nuclear units. There can be no disagreement, however, that the "activities" subject to review are events in the future -- "when the license is issued or thereafter". While an examination of Applicant's conduct in the immediate past may be necessary to put its proposed future "activities under the license" into a meaningful context, such a examination obviously does not require general inquiry into pre-1960 conduct.

Applicant therefore respectfully requests the Board to order that the pre-1960 documents sought by the Justice Department's Motion of August 16, 1972, and the Intervenors' letter of September 21, 1972, not be subject to discovery in this proceeding.

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CERTIFICATE OF SERVICE

I hereby certify that copies of APPLICANT'S ANSWER TO INTERVENORS' MOTION TO COMPEL PRODUCTION OF PRE-1960 DOCUMENTS, dated February 7, 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 7th day of February, 1973:

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