

UNITED STATES OF AMERICA
BEFORE THE
ATOMIC ENERGY COMMISSION

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

ANSWER TO APPLICANT'S MOTION TO EXTEND
TIME TO OBJECT TO REQUEST FOR ADMISSIONS
AND MOTION TO COMPEL APPLICANT'S RESPONSE

Pursuant to Section 2.730(b) of the Commission's Rules of Practice, 10 C.F.R. Part 2, the Department of Justice answers and opposes Applicant Consumers Power Company's motion to extend time to object to the Department's Request for Admissions and Interrogatories as to Proposed Contentions. Further, the Department moves the Board for an order compelling Applicant's full response to the Request for Admissions and Interrogatories as to Proposed Contentions no later than April 2, 1973.

In its Second Prehearing Conference Order, dated November 3, 1972, the Board, concerned with expediting this hearing after long delay in defining the scope of Applicant's document production under the First Joint Request, */ directed

*/The First Joint Request was served upon Applicant on July 26, 1972. Applicant's counsel was prepared to and did discuss objections thereto on September 7, 1972. Further discussions were held, and some of Applicant's objections were resolved by agreement. Documents were made available

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a procedure for making and resolving objections to future discovery requests and prescribing terms for compliance with those requests:

2. If there is any objection to a request for information made by a party under the discovery procedure, such objection will be reduced to writing and submitted to the party seeking the information within five working days. If the objection is found to be unsatisfactory, the party seeking discovery shall forthwith file a motion with the Board. The other parties will have two working days in which to respond after taking into account mailing time allowed under the Rules of Practice. The Board will rule on said motion.

Section 2.742(b) of the Commission's Rules provides as follows:

(b) Each requested admission shall be deemed made unless, with a time designated by the presiding officer or the Commission, and not less than ten (10) days after service of the request or such further time as may be allowed on motion, the party to whom the request is directed serves on the requesting party either (1) a sworn statement denying specifically the relevant matters of which an admission is requested or setting forth in detail the reasons why he can neither truthfully

*/ Footnote continued from page 1.
for inspection commencing on October 16, 1972. Applicant made its objections to the Board on October 26, 1972; and the Board issued an order ruling on the objections on November 28, 1972. Although Applicant had proposed to complete discovery under the First Joint Request by December 31, 1972, it subsequently sought an extension of time until February 16, 1973, to complete discovery from its headquarters offices alone. By letter of February 17, 1973, counsel for Applicant advised that production of documents from those offices was substantially complete. The Board has now ordered complete production under the First Joint Request by April 2, 1973.

admit nor deny them; or (2) written objections on the ground that some of all of the matters involved are privileged or irrelevant or that the request is otherwise improper in whole or in part. Answers on matters to which such objections are made may be deferred until the objections are determined. If written objections are made to only a part of a request, the remainder of the request shall be answered within the time designated.

The Department served its Request for Admissions and Interrogatories on Applicant's counsel in this proceeding on February 12, 1973, at the prehearing conference. (Section 2.712(b) of the Commission's Rules prescribes that, when a party has appeared by an attorney, service be made upon the attorney of record.)

On February 21, 1973, Applicant's counsel, by telephone, requested an extension of time until April 2, 1973, to make a "definitive response" to the Request for Admissions and Interrogatories, except for items to which Applicant might object; and any objections would be made known to the Department well before April 2. We agreed to extend the time for Applicant's response until April 2, 1973, but objected to its delaying the making of objections beyond the time limits set by the Board in the Second Prehearing Conference Order.

On February 23, 1973, eleven days (nine working days) after service of the Request for Admissions and Interrogatories, Applicant's counsel advised the Department by letter that it would not be prepared to discuss the Request with us or to detail its objections until March 12, 1973. The letter

suggested that detailed examination of the Request by company personnel (rather than counsel) was required before final objections could be made, while listing some objections based upon preliminary review.

The Department's purpose in formulating the Request for Admissions and Interrogatories was to attempt to simplify and narrow the issues in this proceeding by setting out the basic elements of our case; and, as a corollary, to introduce the complex technology of the electric power industry to the Board in manageable form. We hope not to have to submit proof of all the propositions set out in the Request; much of it is very basic. We would like to know as quickly as possible what we will need to prove. The Board has rejected the use of depositions for proof of fact and will require live witnesses presenting live direct testimony.

This means we must determine what kinds of witnesses will be necessary, select them, and marshal them for appearance on particular hearing dates. We do not now know Applicant's position on many relevant matters herein. We will be severely prejudiced in our case preparation if Applicant is permitted to delay responding--and to delay this proceeding--by the technique of delaying objections until a month after service then making massive objections (as indicated by the number of requests objected to after only an "initial preliminary review"--173 out of 235), taking more time for briefs and possibly reply briefs, oral argument (which we

might request), a decision by the Board and more time for response to overruled-objection items thereafter (Applicant has proposed fifteen days).

We are at a loss to understand why Applicant professes to require a detailed examination of the Request by company personnel in order to formulate objections. Relevancy of discovery can surely be judged by counsel. If Applicant does not agree with a requested admission of a relevant matter of fact as worded by the Department, its recourse is to deny it in whole or in part and state reasons why it cannot agree, treating the requested admission as an interrogatory in the case of complete denial. It may respond that it does not know whether the requested admission is true or not based on information available to it. Ambiguity of a request for admission or the difficulty of stating contrary contentions in detail because of subject matter complexity should be dealt with in a response, not an objection to responding. Each of the requested admissions is short and straightforward; Applicant should have no difficulty responding in kind.

The Board established an orderly procedure for objecting to discovery. We worked within that procedure in making and resolving objections to the interrogatories and document request Applicant propounded to the Department, and the Board was never asked to rule thereon.

All parties, including Applicant, should be required to follow the Board's established procedure. If Applicant was unable to formulate its objections within the time required,

it should have sought an extension before its time had elapsed. Not until eleven days after service of the Department's Request for Admissions and Interrogatories did Applicant ask the Board for an extension of time to object--four days after time had run for objecting to the Department's statements qua interrogatories and one day after time had run, under the Commission's Rules, for actually filing written objections to requested admissions.

The Board has scheduled this antitrust hearing for June 25, 1973, and has warned the Department to be prepared without fail to present its case on that date. To meet that deadline, we ask that our preparation be permitted timely to proceed and that the Board look with disfavor on the prospect for further delay raised by Applicant's motion.

The Department of Justice requests that the Board deny Applicant's motion to extend time to object and grant the Department's motion to compel Applicant's response to the Request for Admissions and Interrogatories.

Respectfully submitted,


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March 2, 1973
Washington, D. C.

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CERTIFICATE OF SERVICE

I hereby certify that copies of ANSWER TO APPLICANT'S MOTION TO EXTEND TIME TO OBJECT AND MOTION TO COMPEL RESPONSE, dated March 2, 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 2nd day of March, 1973:

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