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March 5, 1973

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 DENYING SUPPLEMENTAL MOTION OF TWENTY-ONE MUNICIPALITIES -- NOT PARTIES -- TO QUASH SUBPOENAS ON GROUNDS OF CONFIDENTIALITY

Consumers Power Company (Applicant) seeks discovery concerning electrical systems against twenty-one municipalities (the Municipalities) located in Michigan's lower peninsula, none of whom are parties to this proceeding. The Municipalities sought to avoid discovery by Motion, dated January 9, 1973, to quash subpoenas and document requests on the grounds (1) of irrelevancy, (2) not permitted by the Rules, and (3) undue burden.

At the Third Prehearing Conference held on February 12, 1973, in Washington, D. C., the Municipalities argued relevancy and undue burden but did not argue question of Rules. Rule 2.740a permits discovery of non-parties. The Board ruled (Tr. p. 218) that all valid (relevant) discovery would be allowed. Thereupon, each request for documents and each interrogatory was ruled upon separately.

The Board did not, in so many words, rule that there was no undue burden. However, in the detailed review of the items, every effort was made to reduce the scope, consistent with the needs of the Applicant. By its Third Prehearing Conference Order, dated February 16, 1973, the Board denied the Motion to Quash, subject to rulings on individual items. Of necessity, this included a ruling on all points raised to the Motion.

During the Third Prehearing Conference, the Municipalities raised, for the first time, the question of confidentiality (Tr. pp. 290-295). The question was limited to interrogatories 45, 46, and one other (Tr. p. 298). The Municipalities were given until February 20, 1973, to file a supplemental motion on this new question (Tr. p. 297), and until March 16, 1973, to appeal on all rulings regarding this discovery (Tr. pp. 320-321).

On February 20, 1973, the Municipalities filed a Supplemental Motion to Quash on grounds of confidentiality. This Motion was directed to Document requests 4 and 5, and Interrogatory requests 7, 8, 45, 46, 59 and 60. Since the ruling herein made is equally applicable to the enlarged scope, we will deal with the matter as presented in the Motion.

Although relevancy had already been ruled upon by the Board, both individually by item (Tr. pp. 219-320) and as a whole (Tr. p. 323), and the Third Prehearing Conference Order (pp. 2-5) ordered the discovery to be complied with as relevant, this point was further argued by the Municipalities in the Supplemental Motion (page 5 line 9 to page 9 line 9). The Applicant made its argument as to relevancy in its answer to Motion to Quash, January 19, 1973 (page 5 lines 1-18), and elaborated on at page 5 line 19 to page 7 line 17. As to the discovery allowed by the Board, the showing by Applicant is deemed adequate. The Board adheres to its ruling as to relevancy.

As has been pointed out above, the Board has already ruled on the question of undue burden. Nevertheless, the Municipalities again attempt to raise this issue. Thus, on page 3 lines 4-5 of the Supplemental Motion they state: " . . . the amount of information requested concerning the non-party customers or potential customers is virtually unlimited." In any discovery proceeding, the person addressed is only required to search and produce that which he has. Some of the small Municipalities have as few as "six or four employees, which include meter reading and the various services that they have to do . . .".

(Tr., Third Prehearing Conference, p. 196). Even the larger ones have as a maximum 52 employees (Tr. p. 195). In the absence of convincing evidence to the contrary, the Board has difficulty in believing that these few employees could have produced unlimited quantities of documents which must be searched. Therefore, the Board adheres to its prior ruling refusing to quash on the grounds of undue burden.

On the question of confidentiality, the Municipalities take the position that the discovery would disclose trade secrets, i.e., confidential information of a competitive nature, and will confer undue benefits to Applicant, allegedly a direct business competitor. The Municipalities concede that there is no privilege, but urge that the need of the information must be sufficiently great to justify disclosure. Also, materiality must be clear. Having found the information to be material, we now weigh the disadvantages of the Municipalities against the need of the Applicant. If it is found that a situation inconsistent with the antitrust laws will be maintained by issuance of the license sought by Applicant, then such license, if issued, could be subject to conditions deemed by Applicant to be economically severe. Applicant has a

right to contest the contentions of the other parties to this proceeding by every lawful means, including relevant discovery. The desire of the Municipalities to maintain confidentiality of competitive information must give way to Applicant's need and right to self defense.

More importantly, however, the defense of confidentiality in the context of this proceeding is not available to the Municipalities on legal principle. Common law long has made public records of this type available to all persons having occasion to examine them for any lawful purpose. Burton v. Truite, City Treasurer of Detroit, Supreme Court of Michigan, Dec. 28, 1889, 44 N.W. 282 (copy attached to Applicant's answer to the Supplemental Motion). The Constitution of the State of Michigan, Article IX, Sec. 23 (quoted on page 10 of the Supplemental Motion) requires such records to be open to inspection. Michigan Statutes make it a misdemeanor to refuse access. Title 28 Mich. Code § 28.760 (copy - Attachment A to Applicant's answer). That which is available for public inspection cannot be confidential.

The rule favoring public access is for the purpose of enabling the citizens and taxpayers to find out how public monies are spent. In the present situation, the citizens

of the Municipalities are not only taxpayers, but are also essentially stockholders of the Municipal electric systems and are retail customers thereof. Thus, they have a triple reason for wanting to know the costs, rates for classes of customers and other details of operation of the systems. Accordingly, both the spirit and the letter of the law oppose the granting of confidential status to the records of the Municipalities.

During the Third Prehearing Conference, the Board granted the Applicant leave to reword items to avoid refusal of such items because of form or breadth. The Applicant's subpoenas were rewritten and resubmitted on February 16, 1973. Also, on February 22 1973, Applicant filed a revised Motion to Compel Non-Parties to Respond to Depositions upon Written Interrogatories. This Motion was granted by the Board by Order dated February 27, 1973.

For the reasons stated above, the Supplemental Motion to Quash Subpoenas on "Grounds of Confidentiality" is denied, and the Municipalities are ordered to comply fully with the Board's Order of February 27, 1973, and to the revised subpoenas issued February 20, 1973. Attention is directed to the fact that time to appeal to the Appeal Board is not later than the close of business on March 16, 1973.

Lastly, the Municipalities apparently expect that, if the Supplemental Motion is denied, a protective order will be granted. (Supplemental Motion page 12 lines 16-17 and page 13 lines 7-10). As has been previously noted herein, such a protective order would be contrary to the common law and the Constitution and Statutes of the State of Michigan. Consequently, the Board concludes that the issuance of such an order is unwarranted, and the request therefore is denied.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

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J. V. Leeds, Jr.

Hugh K. Clark
Hugh K. Clark

Jerome Garfinkel
Jerome Garfinkel, Chairman

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

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CERTIFICATE OF SERVICE

I hereby certify that copies of an ORDER DENYING SUPPLEMENTAL MOTION OF TWENTY-ONE MUNICIPALITIES, ETC., dated March 5, 1973, in the captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 5th day of March 1973:

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