

4/24/73

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))

APPLICANT'S REPLY TO ANSWER OF THE DEPARTMENT AND
INTERVENORS CONCERNING PRODUCTION OF DOCUMENT

Pursuant to the oral order of the Chairman of the Board on April 11, 1973, Consumers Power Company ("Applicant") replies to the Answers filed by the Department of Justice and the Intervenors on April 17, 1973, concerning Applicant's Motion to compel production of a document in possession of the Department of Justice. Applicant's Motion was filed April 9, 1973.

The document in question apparently relates to negotiations about an interchange agreement between Applicant and the Michigan Municipal Cooperative Power Pool ("MMCPP") which is composed of two municipal and two cooperative systems -- all of which are intervening parties in this proceeding.

Applicant submits for the reasons set forth below that neither the Department nor the Intervenors have demonstrated "good cause" for denying Applicant access to the document in question under appropriate terms and conditions.

I. The Document is Relevant

The Intervenors argue that the document in question does "not relate to the relevant matters in issue" (P.7), while the Department contends that "it would be of little or no value

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to Applicant in preparing for this hearing" (p.3). These statements fly in the face of the previous statements by these parties in this proceeding.

According to the Department, and Intervenors, Section 105(c) of the Atomic Energy Act requires a detailed examination of Applicant's system and its operations vis-a-vis other electric systems in order to assess the competitive "situation" in the Michigan area. Thus, according to the Department, "Applicant's position that the Commission's inquiry must focus exclusively on Applicant's activities to construct and ultimately to operate the Midland units 'and only those activities' is clearly erroneous" (Reply of the Department of Justice . . .," filed June 9, 1972, pp. 4-5). The Intervenors have endorsed the Department's expansive view as to scope and have asserted that the Commission's antitrust review under Section 105(c) should be "coextensive with the inter-related problems of concentrated control . . . and the concern of conduct in the planning, coordination and arrangements required to integrate these massive plants into regional or area programs to benefit all electric systems and the consumers they serve" ("Statement of Petitioners . . .," filed June 9, 1972, p. 15) (emphasis supplied).

In its order dated August 7, 1972, this Board "deferred" ruling whether the views as to scope of the Department, the Association, and the other Intervenors, are correct, but directed that these views would govern the scope of the "relevant matters in controversy" for discovery and evidenti-

ary purposes ("Prehearing Conference Order . . .," August 7, 1972, p. 3).

The general provisions of the Commission's discovery rules provide that "parties may obtain discovery" regarding any relevant matter "whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party" (Section 2.740(b)(1) of the Rules of Practice) (emphasis supplied). As noted in Applicant's Motion to Compel (p.2), the negotiations between the MMCPP and Applicant were discussed in the Department's advice letter of June 28, 1971, and, inter alia, led to the Department's recommendation of an antitrust hearing. Thus, a document relating to such negotiations, such as the document in question, is clearly related to the claims of one of the parties hereto.

The Intervenors and the Department further recognized the relevance in these negotiations in their Joint Document Request filed on July 26, 1972. Question 3(a) of the Request demanded committee minutes and memoranda and letters to or from Company officers concerning "interconnection plans, proposals or agreements with other electric utilities"; similarly item 5(o) requested all documents "relating" to "studies or analyses of all generation and/or transmission integration or coordination between Company and Michigan Municipal and Cooperative Power Pool or any part thereof, or any other electric utility" (emphasis supplied).

The Applicant's discovery to the Intervenors reques-

ted similar material. One request sought "each document prepared by or for the system . . . which relates to . . . suggested sources of and costs of meeting energy requirements . . ."; another discovery request to the Intervenors called for each document relating to instances in which the Intervenors have "sought, requested, considered or inquired into the initiation of wholesale electricity supply to it by any electric utility". See "Applicant's Initial Interrogatories . . .," filed August 4, 1972, items 75(a) and 79.^{1/} (Emphasis supplied).

The Intervenors have never objected to these document requests on grounds of relevancy (or on any other grounds) and by their silence have thus conceded the relevance of the MMCPP negotiations about bulk power supply. By the same token, in seeking a protective order, the Department has admitted that the document is responsive to Applicant's discovery to it -- discovery to which the Department also has not objected.

^{1/} The Intervenors' statement that the document in question relates to "contract negotiations with Consumers Power Company concerning the purchase of wholesale electric energy" (p.2) seems to bring the document squarely within the confines of item 79 and to belie the Intervenors' claims that Applicant's discovery demands did not include the document in question (emphasis supplied). See also items 41(a) and 45 in Applicant's discovery addressed to the party cooperatives, on August 4, 1972, which are identical to items 75(a) and 79 to the municipals.

Finally, the Department's Answer itself rebuts all claims of irrelevance. The Department states that the document in question "helps the cases of the Department and the Intervenor by illustrating MMCPP's desire for coordination with Applicant and its problems with the terms offered by Applicant" (p.3).

This statement makes clear that the document relates to the "access to coordination" issue set forth by the Board's order of August 7, 1972 (p.3) and even suggests that the document may be introduced in evidence by one of Applicant's adversaries at the hearing. In any event, since Applicant is entitled to all documents relating to the claims of any party, including the Department (whether or not it helps or hinders the Applicant's case), the document is obviously relevant. See Section 2.740(b)(1) of Rules.

II. This Board has Ample Power to Permit Discovery While Protecting MMCPP from Alleged Harm

The Answers of the Intervenor and the Department expound at length about the alleged harm which may result from disclosure of the document in question to the Applicant. The alleged harm apparently relates to negotiations about a proposed interchange agreement between Applicant and MMCPP which began in 1970 and are still in progress.^{2/}

^{2/} Contrary to the Intervenor's assertions (p.2), these negotiations relate not only to bulk power supply but also to reserve sharing, emergency support, economy energy and other such forms of coordination.

Since Applicant has not seen the document, it cannot assess its potential harm. Nevertheless, to deny Applicant all access to the document is unnecessary in light of Section 2.740(c) of the Commission's Rules which permits the Board to condition Applicant's access upon such terms as it deems appropriate. Surely the Board can fashion appropriate conditions to protect the Intervenors and at the same time permit Applicant access to a document necessary to its case and relevant to this proceeding.

III. The Request of the Intervenors with Regard to Applicant's Documents is Improper and Irrelevant

In their Answer, the Intervenors urge the Board to condition grant of Applicant's Motion upon Applicant's agreement to furnish various internal documents about the MMCPP negotiations which are not called for by any outstanding document demands. The Joint Document Request sought such material from Applicant and responsive documents have been furnished (See e.g., documents furnished February 6, 1973 numbered 12810, 12815 and 12873, which accompanied the Intervenors Answer (p.4).

To the extent that the Intervenors now seek additional documents not called for by the Joint Document Request, their demand must follow the discovery procedures set forth by the Rules of Practice and this Board, and in any event,

should have been advanced at an earlier time. To require Applicant to re-examine its voluminous correspondence files for the internal material Intervenor now belatedly request ignores the oppressive file search Applicant recently completed on the Intervenor's behalf and would constitute an unconscionable burden at this juncture in the proceeding. In addition, it is patently improper for the Intervenor to advance document demands in an Answer filed pursuant to Section 2.730(c) of the Rules, particularly so since the Intervenor has never heretofore made these document requests to the Applicant.^{3/}

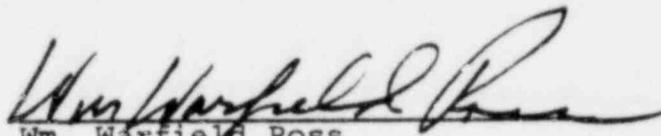
Conclusion

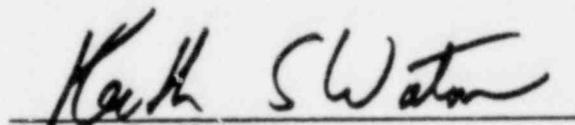
WHEREFORE, Applicant submits that neither the Intervenor or the Department have made any showing to justify denying Applicant access, under proper terms and conditions, to a document which is clearly relevant, non-privileged, and respon-

^{3/} Applicant reserves its rights to object to such discovery when properly made.

sive to Applicant's unchallenged discovery demands.

Respectfully submitted,


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April 24, 1973

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CERTIFICATE OF SERVICE

I hereby certify that copies of APPLICANT'S REPLY TO ANSWERS OF THE DEPARTMENT AND INTERVENORS CONCERNING PRODUCTION OF DOCUMENT, dated April 24, 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 24th day of April, 1973:

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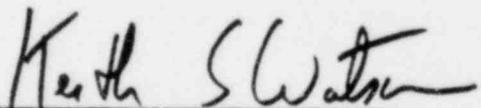
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