

UNITED STATES OF AMERICA
BEFORE THE
ATOMIC ENERGY COMMISSION

In the Matter of)
) Docket Nos. 50-329A
Consumers Power Company) 50-330A
(Midland Plant, Units 1 and 2)

Supplemental Memorandum To
Applicant's Response To Motion To Quash
Daverman Subpoena

Pursuant to leave granted by the Board Chairman during a conference call on October 9, 1973, Consumers Power Company ("Applicant") supplements its "Response to Motion to Quash Daverman Subpoena" in light of the affidavit filed by Robert Daverman on October 5, 1973.^{1/}

In his affidavit, Mr. Daverman states that he offered to "make all of our files available to them [Consumers] under supervision . . ." during a telephone discussion with Applicant's economic consultant. The purported offer, however, is belied by the other oral and written communications between the parties concerning the subpoena. Moreover, it is undisputed that Daverman agreed to comply with the subpoena and never raised the issue of compensation until compliance was complete. As discussed in detail below, these circumstances do not justify Daverman's claim for \$3,000 compensation.

^{1/} Applicant's counsel was not served with this filing until last Thursday, October 11, 1973.

8006170 971

M

I.

The events surrounding the Daverman subpoena must be viewed in context. The subpoena was served on August 6, 1973, with compliance ordered by August 27. Although Applicant's Washington counsel spent the week of August 13 in Grand Rapids, Michigan near Daverman's offices, Daverman did not contact them. To be sure, in the course of the depositions, Messrs. Brand and Pollock reported that Mr. Daverman intended to "cooperate" with Consumers and on one occasion, Mr. Brand mentioned in passing that Consumers would "get carte blanche", i.e., "get everything he has" (Tr. 285).^{2/} But, off the record, Mr. Brand and Mr. Pollock emphasized that neither was authorized to speak for Mr. Daverman in this regard.

Daverman's first communication about the subpoena was contained in a letter dated August 17 to Chairman Garfinkel.^{3/} That letter made no reference to Daverman's permitting Consumers access to all of his documents. On the contrary, it stressed that many documents were "confidential" communications and would not be produced (p. 1).

Nor did the letter suggest that Consumers visit Daverman's offices and review his files there. Rather, it

^{2/} This deposition page was attached to the letter from Pollock to Chairman Garfinkel of October 25, 1973.

^{3/} A copy of the letter is attached as Exhibit 1.

spoke solely in terms of the search being conducted by Daverman's own "engineering and clerical" organization and complained about the burden of such an effort (p. 1). In closing, the letter requested a meeting with Consumers representatives "to develop a specific item-by-item approach to responding to the subpoena" (pp. 2,3).

On August 22, 1973, Chairman Garfinkel called Consumers' Washington counsel. He stated that he was troubled by the August 17 letter and granted leave to Consumers to communicate directly with Mr. Daverman to discuss the matters raised in the letter. Washington counsel so advised its economic consultant, Joe Pace of NERA, and instructed him to discuss the subpoena with Daverman on an item-by-item basis so as to alleviate the alleged burden in responding.

According to the attached affidavit of Dr. Pace,^{4/} Mr. Daverman began the conversation by making a passing reference to the effect that the subpoena, as written, was so burdensome that Consumers should send its representatives to Grand Rapids to review the documents it sought. Dr. Pace replied that the purpose of his call was to discuss the subpoena on an item-by-item basis so as to eliminate Daverman's concern about burden.

4/ The affidavit of Dr. Pace is attached as Exhibit 2.

After completing the item-by-item discussion with Dr. Pace, Mr. Daverman indicated he understood the subpoena to be considerably reduced in scope and that he would comply with it, as modified. At no time in the course of his discussion with Dr. Pace did Daverman suggest that many manhours would be required to comply or that the modified subpoena was unduly burdensome. Nor did Daverman suggest that he expected Consumers to compensate him for his time. The foregoing is verified by Dr. Pace's aforementioned affidavit.

On August 23 and 24, 1973, Consumers' Washington counsel and Daverman's counsel wrote letters summarizing the discussions between Mr. Daverman and Dr. Pace.^{5/} Although not totally in agreement, it is significant that neither letter made reference to Consumers having open access to Daverman's files and that neither mentioned any claim for compensation by Daverman for his efforts in responding to the subpoena.

II.

What emerges from the foregoing is that Daverman never offered Consumers open access to his files. Rather, from the outset, Daverman sought to exclude certain allegedly "confidential" documents from inspection. Moreover, once the scope of the subpoena had been greatly narrowed through discussions with Dr. Pace, Daverman abandoned any suggestion that Applicant's

^{5/} See letter from Watson to Daverman dated August 23, 1973, attached as Exhibit 3, and letter from Pollock to Daverman dated August 24, 1973, attached as Exhibit 4.

representatives visit his office and, in lieu thereof, Daverman agreed to comply through the efforts of his own organization.

Also, in communications with Dr. Pace and Consumers' counsel, neither Daverman or his counsel ever suggested that the subpoena as modified was burdensome or that Daverman would seek compensation for his efforts in responding thereto. The question of compensation was not raised until the September 7 prehearing conference, by which time Daverman had substantially completed extracting documents responsive to the subpoena.

III.

Had Applicant been confronted with a choice between "open access" to Daverman's files or payment of \$3,000, it would surely have opted for the former alternative. But, as the foregoing illustrates, neither alternative was discussed with Applicant. Rather, Daverman agreed to respond to the subpoena and then, confronting Applicant and the Board with a fait accompli, now demands compensation.

Applicant submits that nothing contained in the Daverman affidavit, filed October 5, 1973, justifies his claim for compensation. We, therefore, reiterate the views set forth in our Response that the Motion to Quash should be denied.

Respectfully submitted,

Keith S. Watson
Wald, Harkrader & Ross
1320 Nineteenth Street, N.W.
Washington, D. C. 20036

October 12, 1973

Attachments to Supplemental Memorandum

- EXHIBIT 1 -- Letter from Daverman to Chairman Garfinkel dated August 17, 1973.
- EXHIBIT 2 -- Affidavit of Dr. Pace dated October 12, 1973.
- EXHIBIT 3 -- Letter from Watson to Daverman dated August 23, 1973.
- EXHIBIT 4 -- Letter from Pollock to Daverman dated August 24, 1973.

EXHIBIT 1