11-3-72

UNITED STATES OF AMERICA
BEFORE THE
ATOMIC ENERGY COMMISSION

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

INTERVENER ANSWER IN OPPOSITION TO
APPLICANT MOTION TO COMPEL DISCOVERY
FROM MEMBERS OF THE
MICHIGAN MUNICIPAL ELECTRIC ASSOCIATION

Pursuant to Section 2.730(c) of the Commission's Rules of Practice ("Rules"), 10 C.F.R. Part 2, Intervener Michigan Municipal Electric Association ("MMEA") hereby answers in opposition to Applicant's Motion to Compel Discovery from Members of the Michigan Municipal Electric Association ("Motion to Compel"), and Applicant's request for oral argument. In support of its opposition to the Motion to Compel MMEA states:

1. The Applicant by indirection seeks to reargue the Atomic Safety and Licensing Board's ("Board") determination making MMEA a party to this proceeding, */ and thereby

*/ Prehearing Conference Order, dated August 7, 1972, page 2.

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obtain discovery of its members, discovery that is directly available to the Applicant through proper observance and use of the Commission's Rules to reach non-parties. The Applicant in its Motion to Compel needlessly raises the question of "real party" interest, when the discovery it seeks may be had separate and apart from this matter, which was determined nearly four months ago.

2. The Applicant has available to it an adequate procedural means to obtain the relief it seeks. **/ Section 2.720 provides that upon application by any party to the presiding officer, subpoenas may be issued requiring the production of evidence, which includes "documents and things." While a showing of relevance may be required, a determination of admissibility of such evidence sought is not requisite to obtaining subpoenas. These standards equate to those of Section 2.740 (General Provisions Governing Discovery), under which the Applicant now moves to compel discovery. Further, Section 2.740f(3) provides expressly that "an independent request for issuance of a subpoena directed to a person not a party for the production

*/ Sections 2.720 (Subpoenas) and 2.740a (Depositions upon oral examination and written interrogatories) of the Commission's Rules.

of documents and things" is not precluded. Further yet, Section 2.740a provides that any party may take "testimony of any party or other person"* (including written interrogatories) without leave of the presiding officer. Subparagraph (f) of Section 2.740a expressly provides that where written interrogatories are the form of discovery sought the Applicant need only serve copies of the interrogatories on the other parties with "a notice stating the name and address of the person who is to answer them, and the name, description, title and address of the officer before whom they are to be taken." The fact that the Commission Rules recognize the distinction between parties and non-parties and provide discovery of either, the Applicant's motion and request for oral argument on its motion is wasteful.

3. The Applicant has made no effort to utilize the proper means for discovery against the members of MMEA, but instead contends that there must first be a determination of the members' status by the Board. By its letter to counsel for MMEA dated August 4, 1972 Applicant endeavored to place this responsibility for

*/ Emphasis added.

obtaining documents and responses to interrogatories on MMEA and its counsel. By letter response dated August 21, 1972 the undersigned stated the view that the attempted service of interrogatories and document request on MMEA counsel was not proper.*/ By letter dated September 1, 1972 from MMEA counsel to Applicant, it was reiterated that the non-party discovery sought should be accomplished not through MMEA, but rather through direct process available under appropriate Commission Rules.**/ The Applicant erroneously implied that all systems from whom discovery is sought were clients of the undersigned and/or somehow parties to the proceeding; and requisite service of interrogatories could be had through MMEA counsel. Thus, having been advised more than two months ago that counsel for MMEA was unwilling to undertake tasks properly belonging to Applicant, in light of the Applicant's easy access under the Commission Rules, in discovery of twenty-one

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*/ J. F. Fairman letter to W. W. Ross dated August 21, 1972 is attached as Appendix A for the convenience of the parties.

**/ Applicant in its letter of August 4, 1972 presumptively sought discovery from 28 cities, towns and villages in Michigan, not all the members of MMEA. Included among the twenty-eight were two municipal systems whose officials are not members of MMEA. Discovery was sought from three electric cooperatives, also not parties to the proceeding. J. F. Fairman letter to W. W. Ross dated September 1, 1972, is attached as Appendix B.

other entities or persons, the Applicant now seeks in circular fashion what has been available to it since July 12, 1972.*/ The fact that the Commission's Rules recognize the distinction between parties and non-parties and provide means to discover both, plus the failure of the Applicant to pursue in a timely fashion the available means to such discovery combine to make the present request improper and needless.

4. The Applicant, clearly, is not (nor has it been) constrained by the Commission's Rules in its discovery of non-parties. Despite the opportunity readily available to it to acquire directly the information it desires through appropriate use of the Commission's procedures, by its Motion to Compel Discovery, the Applicant strains at "gnats" and asks the Board to require MMEA to swallow the "camel."**/ MMEA has no staff. In addition the documents

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*/ Section 2.740(a)(1) in pertinent part provides that "discovery shall begin only after the prehearing conference . . . and shall relate only to those matters in controversy." The requisite prehearing conference was held on July 12, 1972.

**/ The "Applicant's Initial Interrogatories and Request for Documents" which it seeks the 21 selected MMEA members to answer is a 43 page document plus 6 pages of special instruction for preparation of studies and data analysis. Ninety-four interrogatories or document requests are contained therein.

sought are not in the possession, custody or control of MMEA, and it is in no better position than the Applicant to gain access to such material.

5. Oral argument is not necessary to resolve the matter raised in the Applicant's Motion to Compel. Furthermore the Applicant has stated no grounds in support of its request which could serve as a basis for departing from the policy, contained in Section 2.730(c) and (d) of the Commission's Rules, that both reply by the moving party or oral argument is not deemed necessary in the deposition of matters raised by motion. The discovery it seeks may be had by the proper use of procedures available to it as pointed out in paragraphs 1 through 4 above. Likewise the approach to discovery requested by the Applicant is improper under the procedures of and law applicable to the Federal Rules of Civil Procedure ("FRCP"). (See paragraphs 6 through 8 below.)

6. Discovery of an association's members may not be had through the association who is a party to a proceeding, where the association has a separate legal status. Michigan law accords such status to MMEA.

(Prehearing Conference Exhibit 1).*/ Thus MMEA, not its members, is the intervener herein. Under Rule 34 of the FRCP discovery is only enforceable as to a party to an action.**/ In Wainwright v. Kraftco, 54 FRD 532 (1972), plaintiff, members of the Atlanta Board of Education, brought an action seeking treble damages on behalf of themselves and all similar boards throughout Georgia against milk companies. In this case, which proceeded as a class action, the court ruled that only named members of the class who were parties to the proceeding could be required to respond to the defendant's interrogatories and document requests.***/ Indeed, Holland, Zeeland,

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*/ Prehearing Conference Order dated August 8, 1972 states that Exhibit 1, "an excerpted document entitled 'Michigan Compiled Laws Annotated -- Section 600.2051 of the Michigan Code' was received and placed in the record."

**/ 28 U.S.C. 2072.

***/ Applicant herein is seeking in effect that the Board analogize MMEA and its members to a "class." The court in Wainwright observed that if the defendant's contention that all members of the class are parties to the action and duty bound to comply with the discovery rules were accepted, then indeed all such actions would be "converted into massive joinders." (54 FRD at 534)

Traverse City, Coldwater and Grand Haven are named interveners and co-incidently members of MMEA which Applicant would treat as a class. The presence of these individual systems in the proceeding, and the individual presence of MMEA refutes Applicant contention that somehow MMEA is capable of fully representing each individual system. In the instant proceeding the Applicant does not seek discovery of all MMEA members, but a selected group. This is inconsistent with its assertion that all MMEA members are the real parties in interest. If so, they all would qualify under the Applicant's theory.

7. By its Motion to Compel, preceded by the overreaching request of August 4th that MMEA and its counsel undertake discovery of 28 municipals simply because the officials of the municipal electric system are members of the association, the Applicant is attempting to burden unreasonably these members, which have varying degrees of interest in the instant proceeding, economic or otherwise. The deterent effect of extensive discovery is clear. */

*/ The court in Wainwright stated that Rules 33 and 34 of the FRCP apply only to parties. As such they have no application to all members of the class (54 FRD 534), and noted that a "number of school boards may have withdrawn from the class simply because they were intimidated by the interrogatories." (ibid.)

8. The legal authority the Applicant relies upon is not on point. The Applicant, inter alia, cites Firemen's Mutual Insurance Co. v. Erie-Lackawanna R.R. Co., 35 F.R.D. 297 (N.D. Ohio 1964), Bingle v. Liggett Drug Co., 11 F.R.D. 593 (D. Mass. 1951) and Simper v. Trimble, 9 F.R.D. 598 (W.D. Mo. 1949) in support of the respective propositions that (1) a "functional analysis" should be used to determine "whether a person must respond as a party to discovery requests;" (2) "closeness of relationship" should be used in making such analysis (Motion to Compel, pp. 3-4); and (3) that MMEA's members are playing the role of an actual party (Motion to Compel, p. 8).

(a) In Fireman's Mutual this action was brought by an insurer as an assignee of the injured party on a subrogated claim, a situation clearly distinguished on its face. The court stated: "Plaintiff is here standing in the shoes of the [injured] and will require the testimony of the insured-assignor in order to prove its claim." (35 F.R.D. at 297). MMEA is "standing in its own shoes" as it is permitted to do by Michigan law. */ As to discovery

*/ Applicant has directed separate document requests and interrogatories to MMEA.

the court was of the view that it would not be "just" under the FRCP to permit the plaintiff insurer to obtain information from the defendant without the same opportunity of inquiry being available to the defendant (ibid.). This "quid pro quo" is already present in the instant proceeding. MMEA and the other named intervenors have joined with the Department of Justice and the Commission Staff in a joint discovery request of the Applicant. In turn the Applicant has outstanding requests for documents and responses to interrogatories addressed to the individual intervenors, including MMEA. To provide the Applicant access through MMEA to non-parties, who for whatever sufficient reasons chose not to participate in these proceedings is the result that Wainwright prohibited.

(b) The Bingle case was an action for personal injuries sustained by the plaintiff while in the defendant's store. The plaintiff sought the court to compel the defendant to produce certain of its documents for inspection and copying. The defendant insurance company was defending against the claim; its attorney also represented the defendant. The sought after documents containing statements obtained by agents of the insurance company were in custody of the defendant's attorney. In

rejecting the attorney's contention that the documents were held by him only in his capacity as attorney for the insurer the court in compelling discovery declared: "To hold that statements obtained by the [insurer] for the purpose of this very litigation are immune from discovery would make possible the evasion of Rule 34 on the many occasions" where the liability insurers prepare and control the defendant's case (11 F.R.D. at 594). Patently, MMEA and its members are not related in any analogous way to the insured and insurer in Bingle. The case is not supportive of the Applicant's contentions.

The Bingle case relied on Simper v. Trimble, supra, which also involved the insured and insurer in defense of a claim for personal injuries. At issue was a motion to produce photographs. As the court noted: "With probably no exception, one of the obligations of the insurer requires it to defend its policyholder." (9 F.R.D. at 599). "For all practical purposes it is performing the exact functions and playing the precise role of an actual party to the litigation." (id. at 600). Nothing could be farther from the situation in this proceeding with respect to the relationship between MMEA and its members.

(c) The foregoing decisions deal only with where the evidence sought was prepared for litigation and was to be relied upon by plaintiff or defendant in establishing its case. In this instant proceeding the Applicant does not seek evidence prepared by MMEA members for use in this proceeding, but rather seeks to subject these municipal systems to an enormous burden and buttresses its argument for broad discovery on case law developed from facts which have no relationship to the posture of MMEA in these proceedings. Applicant has attempted to give a construction to the Chairman's statements which is not warranted. The small size, limited personnel and financial limitations of the many municipal systems combine to make it unreasonable for each to participate. The opinion of two of MMEA's directors (Motion to Compel, page 8) that this proceeding is significant to MMEA members cannot serve as a basis for finding that discovery can be had through the association. This is especially so in light of the availability of discovery by other proper means.

9. Rule 34 of the FRCP requires that only those documents which are within the custody, possession or control

of a party are subject to discovery. The test is control, not possession. United Mercantile Agencies v. Silver Motor Express, Inc., 1 F.R.D. 709 (1941). In United States v. Building and Trade Council of St. Louis, AFL-CIO, et al, 271 F. Supp. 494 (1966), the government sought to enjoin various building and trade unions from racial discrimination in hiring practices. The court denied the plaintiffs discovery request directed to the unionsbecause the documents were in the possession and control of the respective Joint Apprentice Committees. The unions and not their respective committees were the named parties in the action. MMEA does not posses, or have custody and control over the documents which the Applicant seeks. The documents are not even the sort which would come into its hands during the normal course of its activities. They are contained in the files and records maintained by the individual municipal electric systems. The requested discovery is improper and impermissible under the FRCP and the law interpreting those rules of discovery.

WHEREFORE, Intervenor MMEA requests that Applicant's Motion to Compel Discovery from Members of the Michigan

Municipal Electric Association be denied; and requests further that the Board deny Applicant's request for oral argument on this matter.

Respectfully submitted,

James F. Fairman, Jr.
Attorney for Michigan Municipal
Electric Association

November 3, 1972

Law Offices:

George Spiegel
2600 Virginia Avenue, N. W.
Washington, D. C. 20037

APPENDIX A

LAW OFFICES OF
GEORGE SPIEGEL
2600 VIRGINIA AVENUE, N.W.
WASHINGTON, D.C. 20037

August 21, 1972

TELEPHONE 333-8860
AREA CODE 202

GEORGE SPIEGEL
JAMES F. FAIRMAN, JR.
ROBERT C. McDIARMID
SANDRA J. STREBEL

William Warfield Ross, Esq.
Wald Harkrader Nicholson & Ross
1320 - 19th Street, N. W.
Washington, D. C. 20036

Re: Consumers Power Company
(Midland Units 1 and 2)
AEC Docket Nos. 50-329A, 50-330A

Dear Mr. Ross:

This is in response to your letter of August 4, 1972 transmitting Initial Interrogatories and Request for Documents directed to the municipal electric systems, cooperative electric systems, the Michigan Municipal Electric Association ("MMEA") and those systems which comprise the Michigan Municipal Cooperative Power Pool ("MMCPP"). As Mr. Spiegel's letter to you dated August 11 noted, I was away for vacation when the materials were received and now have reviewed them.

I plan to meet this week with the managers and officials of those systems and the MMEA to discuss the proposals contained in your letter and the substantive requests contained in the interrogatories and document requests. Shortly thereafter I will advise you of the procedures we feel will best facilitate moving forward with the requested discovery and develop with you suitable arrangements.

On Friday, August 18, I called your office and in the absence of both yourself and Mr. Watson I suggested to your associate, Miss Golden, that based upon my preliminary review of your requests for information, some areas appeared susceptible to being treated through the use of stipulation. In light of your knowledge as to how a substantial portion of the data may be used in the presentation of the Applicant's case, I requested that we be furnished a list of potential subjects or points for which you would be able to use a stipulation. It would be desirable if such a suggested list could be made available to me (by telephone if convenient) while I am meeting with the intervenors.

The interrogatories and document requests are stated to be directed at twenty-three municipally-owned electric systems in Michigan, in addition to the five municipal systems individually named in the Joint Petition to Intervene filed October 4, 1971 and which was granted on July 12, 1972. I am concerned, based upon the inference in the second paragraph of your letter, that this request goes beyond what was intended by the Board in its order granting intervention in these proceedings (Tr 34; Prehearing Conference Order, August 7, 1972, p. 2). In oral argument I sought to distinguish the MMEA from a petitioner in the Duke Power case, i.e., the Piedmont Cities Power Supply, Inc., which was formed by several municipalities to purchase bulk power on their behalf from the power Company. I stated the belief that the named intervening Michigan municipal electric systems could not adequately represent such other systems operating in Michigan, hence participation by MMEA was appropriate (Tr. 12-13). The Board indicated intervention by the association was proper (Tr. 32-34).

It appears that your request is improperly addressed in that it seeks information from non-party

cities and villages in Michigan, through the association. Such documents and information are not within the custody of MMEA, the party intervenor, nor does it appear that these matters pertaining to the additional cities and villages are available to it and are certainly not a product of the normal course of its association activities. On its face, the additional burden is enormous and is likely to be unreasonable. Further, it should be noted that intervenors deem it appropriate to furnish existing information, but not to prepare studies or analyses based upon such data.

It is my intention to review these matters with the intervenors and determine the most suitable, reasonable means to furnish the material sought. We do not waive the right to object to the requests submitted by your letter of August 4. A full response will be forthcoming following the meetings scheduled this week.

Sincerely yours,

James F. Fairman, Jr.

JFF/njz
cc: Members of the Board
Joseph Rutberg, Esq., AEC
Wallace E. Brand, Esq., Department of Justice

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2600 VIRGINIA AVENUE, N.W.
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SANDRA J. STREBEL

TELEPHONE 333-8860
AREA CODE 202

September 1, 1972

William Warfield Ross, Esq.
Wald Harkrader Nicholson and Ross
1320 - 19th Street, N. W.
Washington, D. C. 20036

Re: Consumers Power Company
(Midland Units 1 and 2)
AEC Docket Nos. 50-329A, 50-330A

Dear Mr. Ross:

This is a follow-up to my letter to you dated August 21, 1972. Meetings with representatives of the party intervenors were held last week to discuss the interrogatories submitted with your letter of August 4, 1972, and I am able to comment more fully based on such discussions. I believe we should use the opportunity of the meeting planned for September 8th to explore these matters further.

Interrogatories and Document Request to MMEA

Review of the questions and requests for documents indicates that response can be made to the eight items. Identification of employers requested in 2(b) we deem not relevant, but an effort will be made to respond to the extent that the MMEA files contain such data. Question 2(c) we feel is properly part of item 3. Item 3 will include materials pre-dating 1960, but will be provided to the extent the association's files permit.

Item 4 it too broad as stated. The scope should be restricted (and we so construe it) to matters affecting municipal electric power matters and exclude instances not clearly related thereto. If the request can be made more specific it will enable us to focus directly on the type of information being sought.

Item 6(e) we deem irrelevant. We assume "and subsidiaries" was intended to be "and subsidies." To the extent that any of this kind of information is ultimately required to be produced by action of the licensing board, it is more suitably directed to the municipal intervenors as is the apparent intent of items 19 through 23 of the interrogatories addressed to the latter.

Interrogatories and Document Request to MMCPP

The nine items addressed to the four systems comprising the MMCPP we believe require no explanation nor clarification by way of limitation. Item 5 we interpret as being broad enough to include work product associated with the instant proceeding and would object to furnishing any response as to such matters. In due course it may be expected that such studies will be explained and examined into at hearing. Our review indicates that items 5 and 6 may overlap one or more questions directed separately to the municipals (see Item 57) and cooperatives (see Items 32, 40-43). As to item 7 I am advised that the detailed information contained in the requested copies of bills sets forth the data sought in the subparagraphs under item 7. An explanation of the billing format employed will permit you to readily identify and tabulate the requested information. Similarly, the data requested in item 9 is available from the bills which will be submitted.

The attachment to your letter of August 4th lists twenty-eight municipals to which you would direct interrogatories. As noted in my letter to you dated August 21st, twenty-three are not parties to this proceeding. Upon further examination I am advised that your list includes only those in the lower peninsula, nine of which are customers of Detroit Edison or Indiana-Michigan. Eaton Rapids has not been associated with MMEA and Harbor Spring is no longer associated. Similarly, the list of cooperatives to which interrogatories are directed includes three (Fruit Belt, Thumb and Southeastern) electric cooperatives not parties to this proceeding. If you seek information from these twenty-three municipals and three electric cooperatives procedures are available for non-party discovery (10 CFR 2.740) and we believe your request should properly be addressed to the Commission.

On page 3 of the Appendix to your letter of August 4th as a footnote a further question is addressed to Wolverine. We would object to the question as it appears to reach information that is being produced in connection with the preparation of evidence in this proceeding. My review also indicates that items 32, 41-43 addressed to the cooperatives encompass such information to the extent that such studies, forecasts or planning analyses project beyond 1972.

Further comment directed to the interrogatories and document requests addressed to the municipals and cooperatives will be submitted to you on or before the meeting of counsel scheduled for September 8th.

Sincerely yours,

James F. Fairman, Jr.

JFF/njz
cc: Members of the Board
W. E. Brand, Esq.
J. Rutberg, Jr., Esq.

AFFIDAVIT

District of Columbia, ss;

James F. Fairman, Jr., being first duly sworn, deposes and says that he is an attorney for Michigan Municipal Electric Association and that as such he has signed the foregoing Intervener Answer in Opposition to Applicant Motion to Compel Discovery from Members of the Michigan Municipal Electric Association for and on behalf of said party; that he is authorized so to do; that he has read said Answer and is familiar with the cont · thereof; and that the matters and things therein set forth are true and correct to the best of his knowledge, information or belief.

James F. Fairman, Jr.

Subscribed and sworn to before me this 3rd day of November, 1972.

Notary Public

My commission expires: September 30, 1974

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