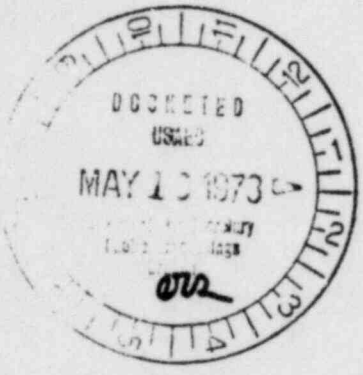
PROJ. & UTIL. FAC. 50-329A, 330A

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
William C. Parler, Member
Michael C. Farrar, Member

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



Mr. Robert A. Jablon, Washington, D. C. for the non-party municipalities, Bay City, Michigan, et al.

Mr. William Warfield Ross, Washington, D.C. (with whom Mr. Keith S. Watson and Ms. Toni K. Golden were on the brief) for the applicant, Consumer Company

DECISION
(ALAB-122)

Twenty-one Michigan municipalities[1/] have appealed to us from two discovery orders entered against them by the Licensing Board on February 27 and March 5, 1973, respectively, in this antitrust proceeding. Since they are not parties to the proceeding, the discovery orders have all of the attributes of finality insofar as these municipalities are concerned. Thus, our jurisdiction over the appeal

1/ Bay City, Charlevoix, Chelsea, Clinton, Croswell, Dowagiac, Hart, Hillsdale, Lansing, Lowell, Marshall, Niles, Paw Paw, Petosky, Portland, Saint Louis, Sebewaing, South Haven, Sturgis, Union City, and Wyandotte.

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is not affected by Section 2.730(f) of the Rules of Practice, 10 CFR 2.730(f), which prohibits the taking of an interlocutory appeal from a ruling of a licensing board. Cf. Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-116 (April 17, 1973). See also, Covey Oil Co. v. Continental Oil Co. 340 F.2d 993, 997 (10th Cir.1965), certiorari denied; 380 U.S. 964 (1965).

I

Pursuant to the provisions of Section 105 of the Atomic Energy Act, as amended, 42 USC 2135, the Commission issued on April 11, 1972 a notice that an antitrust hearing would be held on the applications of the Consumers Power Company for construction permits for its Midland Plant, Units 1 and 2.[2/] The notice stated that the issue to be considered at the hearing was whether the "activities under the permits in question would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a." of the Act. See Section 105c.(5),42 USC 2135c(5).

As reflected in its order of August 7, 1972, the Licensing Board at a prehearing conference held on July 12, 1972, granted the joint petition to intervene which had been filed by five Michigan municipalities,[3/] the Northern

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2/ The Department of Justice, in a June 28, 1971 letter to the Commission, recommended that an antitrust hearing be held. That Department has a statutory entitlement to participate as a party in the proceeding. Section 105c.(5), 42 USC 2135c(5).

3/ Traverse City, Grand Haven, Holland, Zeeland and Coldwater.

Michigan Electric Cooperative and the Michigan Municipal Electric Association (MMEA). A separate petition for intervention filed by the Wolverine Electric Cooperative had also been granted at that conference.

The August 7 order went on to indicate that the Department of Justice intended to introduce evidence to establish that the applicant's activities under the licenses will maintain a situation inconsistent with the antitrust laws.[4/] The "basic thrust of Justice's case", the Board stated, is that:

> (a) applicant has the power to grant or deny access to coordination; (b) applicant has used this power in an anticompetitive fashion against the smaller utility systems; (c) applicant's said use of its power has brought into existence a situation inconsistent with the antitrust laws, which situation would be maintained by activities under the licenses that applicant seeks.[5/]

The Board added that it was deferring its ruling as to whether Section 105c.(5) "permits a review of the applicant's activities unrelated to its construction and operation" of the Midland facility. Evidence would be received of "prior activities of the applicant" and, at

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4/ According to the Licensing Board, the Department of Justice does not intend to introduce evidence to the effect that such a situation may be created.

5/ The Board pointed out that neither the intervenors nor the regulatory staff was seeking to "enlarge this scope" of the inquiry.

the close of the proceeding, the Board would make the "necessary ruling" as to the scope of the Section 105c. (5) inquiry.

In the course of subsequent discovery pursued by the various parties, the applicant obtained the issuance of subpoenas duces tecum directed to the appellants, twenty-one Michigan municipalities which own and operate electric systems.[6/] These municipalities are members of MMEA but none of them endeavored to intervene in this proceeding. The subpoenas sought the production, for each year from 1960 to date, of a substantial number of documents relating to virtually all facets of the marketing operations conducted by these municipal electric systems. In connection therewith, the applicant also served on officials of each of the municipalities notices of deposition upon written interrogatories.

Appellants moved to quash the subpoenas "and the attached document requests and interrogatories" on the grounds that (1) the information sought was irrelevant to the issues in controversy; (2) "full-blown" discovery of non-parties is not permitted by either the Commission's Rules of Practice or the Federal Rules of Civil Procedure; and (3) an undue burden would be imposed upon them if

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6/ See fn. 1, supra, p. 1.

required to respond. Following the filing of the applicant's opposition to the motion to quash, the Licensing Board held its third prehearing conference on February 12, 1973. At that conference, the Board painstakingly examined, on an individual basis, each document request and interrogatory. In a number of instances, the Board either deleted or modified the request or interrogatory, or indicated that it would have to be revised by the applicant in order to be deemed acceptable.[7/] The motion to quash was denied and the appellants were directed to comply by April 2, 1973, with the subpoenas and interrogatories, as modified. [8/]

During the course of this prehearing conference, the appellants asserted, for the first time, that three of the interrogatories[9/] sought confidential information which was immune from compulsory disclosure. The Board chose not to pass immediately upon that assertion but, rather, to give the appellants until February 20, 1973, to file a supplemental motion directed to the issue of confidentiality.[10/]

7/ The effect of the Board's action was to reduce significantly the ambit of the discovery against the non-party municipalities.

8/ The Board indicated that the non-party municipalities had until March 16, 1973, to appeal to us from this ruling.

9/ Nos. 45, 46 and one which was not specifically identified.

10/ All of the Board's oral rulings made at this prehearing conference were memorialized in a written order issued on February 16, 1973.

On February 20, such a supplemental motion was filed directed to two of the document requests[11/] and six of the interrogatories.[12/] In essence, these requests and interrogatories sought considerable, specific information relating to various aspects of the appellants' business relationships with their largest customers. Broadly, the motion asserted that the disclosure of this information "could unduly benefit Consumers Power in competing for customers or rate making" and that, therefore, the appellants should not be required to reveal such "trade secrets" to a competitor. According to appellants, "[t]he focal point of competition is for large commercial and industrial loads [and] Michigan does not have franchised territories which would limit competition between municipalities and [applicant] for these loads."

On February 22, 1973, the applicant submitted a set of revised written interrogatories based upon the Board's rulings at the third prehearing conference and moved for an order requiring responses thereto by April 2, 1973. On February 26, the applicant filed its answer to the supplemental motion to quash the subpoenas on the ground of confidentiality, in which it contended, inter alia, that, as a matter of Michigan law, it was entitled to access to the type of information which it was seeking from the appellants.

11/ Nos. 4 and 5.

12/ Nos. 7, 8, 45, 46, 59 and 60.

On February 27, the Licensing Board entered an order granting the applicant's motion to compel the appellants to respond to the revised written interrogatories (with certain minor modifications not of present relevance). On March 5, the Board entered another order, which denied the appellants' supplemental motion to quash the subpoena on grounds of confidentiality.

In the latter order, the Board preliminarily noted that it was adhering to its prior determinations (made in connection with the denial of the initial motion to quash) that the discovery which it had allowed was relevant and that compliance by the appellants would not impose an undue burden upon them. Turning then to the question of confidentiality, the Board stated that it was required to weigh "the disadvantages [to] the Municipalities against the need of the Applicant". Pointing out that a finding adverse to the applicant on the merits of the controversy could subject any license which might issue to conditions deemed by the applicant to be "economically severe", the Board concluded that "[t]he desire of the Municipalities to maintain confidentiality of competitive information must give way to Applicant's need and right to self defense". Additionally, and "[m]ore importantly",

the Board accepted the applicant's position that, as a matter of Michigan law, the defense of confidentiality was not available to the appellants. For this reason, the Board also determined that no protective order would be entered in connection with the discovery.

As previously noted, the present appeal is from both this March 5 order and the Board's earlier February 27 order which related to the revised written interrogatories. In their brief, appellants raised these principal questions: (1) whether, prior to entering its discovery orders, the Licensing Board should have determined the scope of its inquiry in this proceeding; (2) whether the sought information is relevant to issues raised by parties to the proceeding before the Licensing Board; (3) whether the discovery orders place an "unconscionable burden" on the appellants; (4) whether the Licensing Board correctly rejected the claim of confidentiality with respect to some of the requested information; and (5) whether virtually all of the information sought by the applicant can be obtained from public documents.[13/]

13/ In addition, one of the twenty-one non-party municipalities, the Village of Paw Paw, raised the separate issue as to whether service upon its President and Clerk was proper. It asserted that neither of these officials is an employee of the municipal electric system or "knowledgeable in that field". Since this issue was not presented to the Licensing Board, we have declined to consider it. See ALAB-118.

II

Following the oral argument of the appeal on April 24, 1973, we rendered a ruling from the bench which was then incorporated in a written memorandum issued on the same date (ALAB-118). In that ruling, we rejected all of the appellants' contentions except those relating to burden and confidentiality.[14/] While expressly holding that the

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14/ The concern expressed in ALAB-118 respecting the burden which might possibly be imposed upon appellants should not be taken, however, as an approval of the posture which appellants assumed before the Board below on the burden question. From the outset, appellants steadfastly maintained that compliance with any portion of the discovery requests would entail an undue burden -- a position adhered to even after the Licensing Board had substantially reduced the scope of the discovery. But, as should have been perfectly apparent, some of the documents could have been furnished, and some of the interrogatories answered, without the imposition of any significant burden. In this connection, it is obvious, of course, that compliance with a discovery request invariably will require some exertion of effort. But it is equally obvious that a claim of undue burden (even if advanced by a non-party to the litigation) must be founded on much more than that some expense or inconvenience may have to be incurred in responding to the discovery.

We think that it is the manifest obligation of persons against whom discovery is sought to refrain from asserting a blanket claim of burdensomeness which neither is nor can be substantiated. In the future, a licensing board confronted with an all-encompassing indiscriminate claim of burden will be justified in rejecting the claim in its entirety upon a finding of lack of merit with respect to at least one of the discovery items. Further, the board need not consider whether a response to a particular item would be burdensome unless, with respect to that item, specific reasons for the claim are assigned.

Appellants' objections to the discovery based upon alleged lack of relevance were of a like character and are equally subject to these observations.

applicant was entitled to the discovery which was allowed it by the Licensing Board, we noted that we are authorized by Section 2.740(c) of the Rules of Practice, 10 CFR 2.740(c), "to take various kinds of action -- short of an outright denial of discovery -- to protect against undue burden or expense or to preserve confidentiality". Although prepared, if necessary, to consider invoking Section 2.740(c), we thought it appropriate first to ask the parties to attempt to reach an agreement between themselves on (1) possible alternative means of accomplishing the discovery which would reduce the burden on the appellants; and (2) possible feasible measures for handling the allegedly confidential information.

1. In accordance with the request in ALAB-118, the parties to the appeal engaged in negotiations which, happily, have produced a substantial area of agreement. Specifically, we are now advised by counsel that an understanding has been reached limiting the document requests and interrogatories. Further, the parties have executed a written agreement detailing the mechanics of the discovery and the method for resolving claims of undue burden which may arise with respect to particular discovery items. We approve the agreement subject to one modification. Paragraph 4 thereof stipulates that, should the parties not be able to resolve themselves a claim of undue burden addressed to a specific

item, the dispute will be submitted to this Board for resolution. We do not intend, however, to retain jurisdiction over the appeal and, in any event, think that the Licensing Board is in a better position to provide such on-going supervision of the discovery process as may be required. Therefore, we are amending the agreement to provide that any controversies respecting undue burden which may arise shall be submitted to the Licensing Board -- rather than to us -- for resolution.

2. The parties have been unable to reach agreement, however, on the manner of handling the claim of confidentiality respecting the two document requests and six interrogatories. Appellants inform us that they are willing to disclose the information sought by these requests and interrogatories under a protective order which would confine its use to the law firm which represents the applicant in this proceeding "and any consultants retained for the purpose of either this case or the Federal Power Commission's rate case * * *".[15/] Appellants object, however, to according free access to the data to Consumers Power officials although they "might agree to certain specific [company] officials seeing the data."

15/ Appellants raise a question, however, as to whether access should be given to a consultant who would have an interest "apart from this proceeding" in the allegedly confidential information.

For its part, the applicant insists that a limited access protective order is unnecessary. Additionally, it asserts that, unless the responses tc the document requests and interrogatories are available to "appropriate" Consumers Power officials, the discovery will be "meaningless". This is so, we are told, because "[t]he discovery items in question relate to the characteristics of larger customers presently or formerly served by the municipal systems and are necessary to analyze the nature of actual competition between these systems and others, particularly Applicant. Only those familiar with these systems and the competitive environment in lower Michigan have the ability to analyze and interpret the discovery responses and to prepare testimony about competition in various relevant markets. * * * outside counsel and economic consultants lack such expertise * * *."

III

In view of the agreement which has been effected by the parties to the appeal, we see no present need to elaborate upon most of our prior rulings encompassed in ALAB-118. Suffice it to say here that, while the discovery allowed by the Licensing Board is obviously quite broad, so too is the scope of issues which may possibly have to be resolved by that Board. In its June 28, 1971 letter recommending an antitrust hearing, the Department of Justice asserted that the applicant might be using its market power to deny to competitors "participation in coordinated bulk power supply to the extent necessary to maintain their long-term competitive viability". And, as we have noted, in its August 7 order the Licensing Board stated that the "basic thrust" of the Department's case was that the applicant was using its "power to grant or deny access to coordination * * * in an anticompetitive fashion against the smaller utility systems". Subsequently, in seeking its own discovery, the Department referred to an arrangement between the applicant and a relatively small competitor as reflecting "the effect of cost-price squeeze on a small system which, lacking access to coordination, is compelled to deal with its vertically integrated competitor for its bulk power supply".16/

16/ Department's Answer to Applicant's Objections to Document Requests and Motion for Protective Orders, dated November 2, 1972, at p. 34.

It is idle, we think, to suggest that the information which the applicant seeks is not possibly relevant and material to the far-ranging issues embraced by the Department of Justice's theory of the case. We appreciate, of course, that the Licensing Board has not as yet decided the sharply disputed question as to the appropriate ambit of the Section 105 inquiry -- choosing, as we have previously noted, to defer that ruling pending the completion of the evidentiary hearing which is to encompass "the prior activities of the applicant". But we regard the decision to proceed in that manner as a permissible exercise of the Board's discretion. Further, we are disinclined to accept the appellants' invitation to decide ourselves -- at this preliminary stage of the case and for no purpose other than to settle a discovery controversy -- whether the scope of the inquiry to be made by the Board below is significantly more limited than the Department of Justice (and presumably the intervenor electric systems) would have it.

Similarly, we see no necessity for us now to pass upon the appellants' claim that the information sought by the discovery would not assist the applicants' preparation of any valid defense which it might have to the charges made against it by the Department of Justice. Particularly in as complex a case as an antitrust proceeding, it would be clearly

inappropriate to pronounce judgment -- prior even to the completion of discovery -- on what may or may not constitute valid defenses.

In short, all we need consider at this juncture is whether the information sought bears a reasonable relation to defenses the applicant may wish to assert to claims which are being made by one or more of the parties and as to which, if only provisionally, the Licensing Board is permitting the receipt of evidence. As indicated in ALAB-118, we are satisfied that an affirmative answer is required.17/

17/ As Professor Moore has observed, the courts tend to apply a less stringent test of relevance in antitrust cases. See 4 Moore's Federal Practice (2nd ed.), par. 26.56[1] fn. 52.

IV

We turn now to the question which remains for us to consider. As stated in ALAB-118, we concur only in part with the resolution by the Licensing Board of the appellants' claim of confidentiality. The continuing lack of agreement between the parties respecting the proper disposition of that claim necessitates our intervention.

1. It is clear that the Licensing Board correctly concluded that, having determined the questions of relevance and materiality, the Board's function then was to balance the need of the applicant to obtain the information against any injury which the appellants might sustain as a result of its disclosure. For, as appellants do not dispute, confidential commercial information is not absolutely privileged against discovery. See Melori Shoe Corp. v. Pierce & Stevens, Inc., 14 F.R.D. 346 (D. Mass. 1953); Carter Products, Inc. v. Eversharp, Inc., 360 F. 2d 868, 872 (7th Cir., 1966). See also Covey Oil Co. v. Continental Oil Co., supra, 340 F. 2d at 999. As summarized in the Advisory Committee's Note on Rule 26(c) of the Federal Rules of Civil Procedure:

> The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection.

While we likewise find no fault with the Licensing Board's conclusion upon its balancing that the applicant's need for the information was paramount, we cannot accept the manner of disposition of the question as to whether appellants should be afforded, in the words of the Advisory Committee, a "limited protection" to insure the information would not be used for purposes other than the preparation of applicant's defenses to this action. Specifically, we think that the Board erred in its determination that any form of protective order was precluded by provisions of Michigan law which the Board construed as denying the granting of confidential status to the business records of the appellant municipalities.

a. The Board pointed to Section 23 of Article IX of the Michigan Constitution, Section 28.760 of the Michigan Statutes Annotated and the 1889 decision of the Supreme Court of Michigan in Burton v. Tuite, City Treasurer of Detroit, 44 N.W. 282. The Constitutional provision directs that "[a]ll financial records, accountings, audit reports and other reports of public monies shall be public records and open to inspection". Section 28.760 makes it a criminal offense for any officer having custody of any "city or township records" to fail upon request to make the "records and files in his office" available for inspection

by "any person having occasion to make examination of them for any lawful purpose". See also Mich. Stat. Ann. §§28.759 (declaring "official records" of political subdivisions of the state to be "public property") and 5.1710 (requiring fourth class cities[18/] to make their records available for inspection by any "person interested therein"). And in the Burton case, a writ of mandamus was issued by the court directing the respondent city treasurer to permit the inspection of city tax-sales books by a person "engaged in the abstract business".

b. The Licensing Board implicitly assumed that, if called upon to do so by the applicant, a Michigan court would invoke these authorities to require the appellants to open all of their business records to applicant's inspection. We are less confident that such an assumption is justified. Neither the applicant nor the Licensing Board has referred us to any case in which a Michigan court was confronted with a situation in which (1) the information being sought related to a commercial enterprise undertaken by the municipality; and (2) the seeker of that information was a competitor of the municipality in that particular area of business activity. We consider it unlikely that the Michigan legislature or the framers of its constitution were thinking in

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18/ A "fourth class city" is a city the population of which does not exceed 10,000. Mich. Stat. Ann. §5.1591. Most of the appellants would appear to come within this definition.

terms of such a situation when they drafted the provisions upon which the Licensing Board relied. Moreover, it is not free from doubt that the apparent underlying purpose of the provisions -- to subject the affairs of government to public scrutiny -- necessitates requiring a municipally-owned commercial enterprise to reveal its trade secrets to its competitors and thereby to place itself at a possible disadvantage vis a vis those competitors.

In the circumstances, it is a matter of conjecture whether, if asserted in a Michigan court, a claim of confidentiality respecting the information here involved would be automatically rejected on "public record" grounds. And it seems to us that, unless absolutely unavoidable, a licensing board should refrain from speculation respecting how a state court would resolve a particular question of state law. In this instance, such speculation was readily avoidable.

It is quite true that, if the reach of the Michigan constitutional and statutory provisions is as broad as the Licensing Board thought, the applicant very likely could acquire the information through state judicial processes -- i.e., by obtaining a writ of mandamus directing the appropriate municipal officer to make it available. Burton v. Tuite, supra. But the applicant has not resorted to those

processes, choosing instead to seek the information through resort to the discovery procedures available to it under the Commission's Rules of Practice. In determining to what extent, and under what conditions, the sought discovery should be allowed, the Licensing Board could take into account any clear mandate of state law. Thus for example, had it plainly appeared from relevant Michigan decisions that the information hereinvolved did not enjoy "trade secret" status under local law, the Board could have factored that consideration into its determination as to whether to exercise its Section 2.740(c) authority to issue a protective order.[19/] Even in such circumstances, however, the Board would have remained free to determine that the potential harm to appellants from unrestricted disclosure in this proceeding of the information gave rise to a federal interest in providing limited protection -- notwithstanding the absence of a parallel state interest. But where, as here, there is no decisive indication that the state would not recognize the confidentiality of the information, there is no cognizable state interest which even could be placed on the scales.

19/ Section 2.740(c), to which we referred in ALAB-118, expressly authorizes a Licensing Board to issue a protective order providing that "a trade secret or other confidential * * * commercial information not be disclosed or be disclosed only in a designated way * * *".

In sum, there was no need or warrant for the Licensing Board to attempt to resolve an unsettled issue of Michigan law. Once it had determined that the applicant was entitled to access to the allegedly confidential information, it should have decided, as a matter of federal law, whether (and if so what) limitations upon that access should be imposed through the vehicle of a protective order authorized by Section 2.740(c). Cf. Rule 26(c) of the Federal Rules of Civil Procedure. See also Covey Oil Co. v. Continental Oil Co., supra; United States v. Lever Bros., 193 F. Supp. 254 (S. D. N.Y. 1961); United States v. American Optical Co., 39 F.R.D. 580 (N.D. Cal. 1966); Julius M. Ames Co. v. Bostitch, Inc., 235 F. Supp. 856 (S.D. N.Y. 1965); Printing Plate Supply Co. v. Curtis Publishing Co., 11 FR Serv. 2d 33.319, Case 1 (E.D. Pa. 1967). This would have entailed a consideration, and balancing, of such factors as (1) the existence and extent of the competitive injury which might be sustained by the appellants if the information were employed for purposes other than the preparation of the defense of the action; and (2) whether, and if so to what extent, restrictions upon access to the information would adversely affect the ability of the applicant to make meaningful use of it for the purposes for which its discovery was sought and allowed.

2.a. We could simply now remand to the Licensing Board to make a fresh determination -- free from any consideration of Michigan law -- as to the kind of protective order, if any, which should be entered with respect to the two document requests and six interrogatories which assertedly seek confidential information. This possible course has some clear advantages in view of the fact that the determination of the protective order question requires an evaluation of several assertions of counsel which are difficult to assess without the further elucidation which the Licensing Board would be better able than we to obtain from the parties. For example, without knowing more than is presently available to us, we are handicapped in passing a confident judgment on the extent to which, in fact, the free disclosure of the information in question might provide an advantage to the applicant in the competition for certain customers.[20/] By the same token, nothing now before us provides any basis for acceptance of applicant's

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20/ We agree, however, with appellants' insistence that the identification of their large customers by some form of code would not obviate any competitive injury which might result were appellants required to identify these customers by name. The overwhelming probability is that, from the information supplied respecting a particular customer, the applicant would be able readily to ascertain its identity.

unequivocal assertion that the discovery will be "meaningless" unless the information is accessible to "appropriate" Consumers Power officials. In this connection, we would think that, as a matter of necessity, applicant's counsel and economic consultants have acquired a substantial degree of familiarity with what applicant terms "the competitive environment in lower Michigan" -- which, after all, is a central concern in this proceeding. That as it may be, it seems most unlikely that the applicant has no resort to anyone outside of its own employ who would be competent to analyze and interpret the information obtained respecting appellants' relationships with their large customers.

The temptation to remand to the Licensing Board for renewed ab initio consideration of a protective order is offset, however, by the need for applicant's discovery against the appellants to proceed without untoward further delay. In its August 7, 1972 prehearing conference order, the Licensing Board established (pursuant to the request of the parties to the proceeding) a six-month period for discovery. And in its November 3, 1972 order following a second prehearing conference, the Board specifically fixed February 16, 1973 as the deadline for the completion of all discovery. That deadline has now been exceeded by three months and the Licensing Board intends to schedule the commencement of the evidentiary hearing for June 25, 1973. See its order of May 8, 1973.

On balance, it appears that the best course is to take action ourselves on the confidentiality claim, but to empower the Licensing Board to modify that action upon a proper application and showing by one of the parties to the appeal.

b. While, as previously indicated, the precise dimensions of the potential competitive injury to appellants are not clear, we think that there is sufficient reason to place some limitation upon access to the responses to the document requests and six interrogatories. As a matter of public policy, we should be careful to insure if possible that this antitrust proceeding does not itself have the consequence of causing affirmative harm to competitors of the applicant. Accordingly, we believe that the benefit of any doubt on that score should be accorded to the appellants. We are also influenced by several antitrust cases in which federal courts ordered access restrictions on somewhat analogous discovery. See Covey Oil, Lever Bros., American Optical and Ames, supra, p. 21. In none of those cases, from all that appears in the court's opinion, was there any greater showing than that made by appellants here of a likelihood of competitive disadvantage should no limitations whatever be imposed on disclosure of the assertedly confidential information.

What constitutes an appropriate restriction is a more difficult question. In Covey Oil, the protective order entered by the district court provided that the discovery documents -- which reflected gasoline price, cost and sales volume data--were(1)to be made available only to counsel and independent certified accountants;and(2) to be used only for the purposes of the litigation. The Court of Appeals found the order to be a sound exercise of the district court's discretion. On the other hand, in Lever Bros., American Optical and Ames, the court permitted the defendant's counsel to disclose the discovered information to those personnel of the defendant with whom it was necessary for counsel to consult in order to prepare for the defense of the action. In each instance, the court went on to stipulate, inter alia, that no one obtaining access to the information was to disclose or use it for any other purpose.

We are inclined here to the Covey Oil approach. It seems to us totally unrealistic to expect corporate officials charged with making crucial marketing judgments to be able to factor out of their decisional process any pertinent information they may happen to possess -- irrespective of its source. Thus, we need not impugn the integrity of any official of applicant to conclude that the protection accorded appellants

in a Lever Bros. type order would be more theoretical than real. Moreover, for reasons already stated, we are not satisfied that there is a compelling need for the information in question to be made available to any personnel of the applicant.

Our balancing of the conflicting interests of the appellants and the applicant therefore leads us to impose the following protective order on the responses to document requests Nos. 4 and 5 and interrogatories Nos. 7, 8, 45, 46, 59 and 60: Access to the information obtained in response to those document requests and interrogatories shall be restricted (1) to outside counsel for applicant in this proceeding; (2) persons associated with the law firm of that counsel; (3) independent consultants who have been or may hereafter be employed by applicant or its counsel to assist in the defense of this proceeding; and (4) any other individual agreeable to appellants. Any person obtaining access to the information in accordance with the terms of this order shall not disclose it to any unauthorized person or use it for any purpose other than the preparation of the defense of this proceeding.

c. The Licensing Board is authorized to entertain an application by either of the parties to the appeal for

a modification of our protective order. Before granting an application for a modification which would allow disclosure of the information to a person or persons other than those specified in the order as it now stands, the Licensing Board is to require a clear and convincing showing (1) that such disclosure is absolutely necessary to the applicant's preparation of its defense of the proceeding; and(2) that the applicant's need outweighs the competitive injury which the disclosure might occasion to appellants.[21/] Further, any additional disclosure which the Board may allow upon such a showing shall be appropriately conditioned to minimize the risk of the information being utilized for business or competitive purposes.[22/]

21/ A particularly strong showing of compelling present necessity would have to be made before affirmative action were to be taken on any request that access be given to an employee of the applicant having direct or indirect responsibility for marketing decisions. We have already indicated our doubt that such a showing is possible. See p. 23, supra.

22/ We leave it to the Licensing Board (1) to superintend the carrying out of the protective order; and (2) to determine in the first instance any questions which may later arise respecting the protection of any of the assertedly confidential information which the applicant may seek to put into evidence.

V

The February 27 and March 5, 1973 orders of the Licensing Board are modified in accordance with this opinion and, as so modified, are affirmed.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND LICENSING
APPEAL BOARD

Margaret E. Du Flo
Secretary to the
Appeal Board

Dated: May 16, 1973

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of DECISION dated May 16, 1973 in the captioned matter have been served per the attached Service List by deposit in the United States mail, first class or air mail, this 16th day of May 1973.

Office of the Secretary of the Commission

Attachment: Service List

cc: Mr. Garfinkel
Mr. Rutberg
ASLBP
Mr. Braitman
Reg Files
ASLAB