11-15-72

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)	)	

To the Atomic Safety and Licensing Board:

APPLICANT'S REPLY TO THE ANSWERS
OF THE DEPARTMENT OF JUSTICE AND THE INTERVENORS

Pursuant to Section 2.730(c) of the Commission's Rules of Practice, 10 C.F.R. Part 2, and to the attached motion for leave to file, Consumers Power Company (hereinafter "Applicant") hereby submits its Reply to the "Answer of the Department of Justice to Applicant's Objections . . .", (hereinafter "Answer I") and to the "Answer of Intervenors to Applicant's Objection . . .", (hereinafter "Answer II").[1/]

Preliminarily, we note with regret the Department's apparent refusal to engage in further discussions with Applicant about discovery. Contrary to the Department's assertions (Answer I, p.2-3), discussions are currently in progress with respect to at least two items. In one case, the Applicant is considering the Department's suggested modifications, while in the other the Department has offered to suggest modifications but, as yet, has not done so. Moreover, as

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1/ Although a party to the Joint Document Request, The Commission's staff filed no answer to Applicant's objections.

the file search and document analysis processes move forward, it is not unlikely that other problems of interpretation may come to light for the first time.

We therefore urge the Board to rule only on the objections raised by Applicant and not to take other action which would preclude discussions between counsel to resolve differences without resorting to the Board.

For the reasons set out below, the Answers are without merit and each of Applicant's objections should be sustained.

1. Oral Argument

In its Motion, Applicant requested that oral argument be held pursuant to Section 2.730(c). That section clearly leaves to this Board the discretion whether or not to hold oral argument upon a given motion.

It is evident from the Answers that the Department and the Intervenors consider the Joint Document Request and the other document demands to be extremely important aspects of this proceeding. Indeed, the Department virtually concedes that the purpose of the requests is to obtain evidence, which it presently lacks, "to establish a prima facia case of antitrust inconsistency". (Answer I, p. 6). In addition, as Applicant's Objections outline in detail, the various document requests present important issues of relevance, burden, and infringement upon Applicant's constitutional rights.

Significantly, in federal courts, oral argument is almost always held on discovery objections since experience has demonstrated that such argument sharpens the issues and thus conserves the tribunal's time and resources in deciding the issues raised. Applicant also submits that the resolution of the issues raised by its objections herein are sufficiently complex and significant to require an opportunity for each party orally to present its views to the Board.

The discoverers' alleged fear that oral argument will delay discovery is unfounded (Answer I, p.2; Answer II, p.3)[2/]. All counsel and two of three Board members reside in the metropolitan Washington area; Applicant is prepared to participate in oral argument within twenty-four hours notice. Thus, oral argument will not delay discovery.

Efforts to deny Applicant's opportunity to be heard on objections to a similar discovery demand were rebuffed by the Duke Power antitrust hearing board, and oral argument has been set in that proceeding. We urge that Applicant be afforded a similar opportunity here.

2/ The Intervenor's attack upon the timeliness of Applicant's Objections is without merit (Answer II, p.2-3). Intervenors have never heretofore expressed any concern about the progress of discovery, much less ever asked the Board to expedite discovery.

2. Fishing

Several of Applicant's objections rest on its view that the document requests in question constitute "fishing", i.e., defining document designations so broadly as to sweep into their dragnet thousands of irrelevant documents "in the hope that something will turn up". FTC v. American Tobacco Co., 264 U.S. 298, 306 (1924) (Holmes, J.) 3/

Neither Answer takes issue with Applicant's view that the Commission's Rules of Practice prohibit "fishing". However, the Intervenors argue disingenuously that fishing is "inherent" in discovery, citing the Schwimmer case (Answer II, p. 7). But Schwimmer involved a grand jury subpoena and the decision itself noted that in adjudicatory proceedings the discovery permitted opposing parties is much narrower than grand juries enjoy. 232 F.2d at 862. Since under the Commission's Rules fishing is prohibited, where fishing is "inherent" in a request, that request is fatally defective.

The Department's defense of its "fishing" requests is equally untenable. The Department attempts to brush aside

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3/ The concept of "fishing" set forth in American Tobacco and many other cases is clearly broader than the definition proposed by the Answers (Answer I, p.7; Answer II, p.5). See, e.g., United States v. Ling-Tempo-Vought, Inc., 49 F.R.D. 150 (W.D. Pa. 1970); Flickinger v. Aetna Cas. & Sur. Co., 37 F.R.D. 533 (W.D. Pa. 1965). See also 8 Wright and Miller, Federal Practice and Procedure §2206 (1970 ed.) and cases cited in fn 99.

Applicant's contention that several of the Joint Document Requests are no more than fishing expeditions by again suggesting that the Department is not subject to the Commission's Rules of Practice on discovery.[4/] The Department, it is claimed, may pursue its discovery "on suspicion" and without regard to the relevance of the documents that it seeks (Answer I, p.6).

At the last Pre-hearing Conference in this proceeding this Board rejected similar Department contentions that the Commission's Rules of Practice pertaining to discovery are not applicable to the Justice Department. There, the Department argued that the Applicant should provide it with free copies of requested documents, even though

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4/ The Department's reliance upon United States v. Morton Salt Co., 338 U.S. 632, 640-643 (1950) is entirely misplaced. In Morton Salt the Court was concerned with the general law enforcement powers of the Federal Trade Commission. Significantly, once that Commission's adjudicatory process begins, these broad powers are superseded by more restrictive discovery procedures which are applicable to all parties, including the Commission's staff. See All-State Industries of North Carolina, Inc., FTC Docket 8738, 3 CCH Trade Reg. Rep. ¶18,103 (Nov. 13, 1967).

Similarly, the Department's discussion of ultimate burden of proof is irrelevant since that burden of proof has no relationship whatsoever to discovery issues. Applicant is aware of no authority, and the Department cites none, to support the view that a party possessing the ultimate burden of proof is subject to different discovery standards than other litigants (Answer I, p.6).

the Rules of Practice clearly provide otherwise, because its role "shouldn't be regarded as simply that of an adversary where we are seeking some private advantages, but [as] simply carrying out the inquisitorial role of the Commission in this regard" (Tr. 171). The Board rejected the argument in a holding equally persuasive here:

> CHAIRMAN GARFINKEL: I appreciate your concern, Mr. Brand, but I think this Board is govnerned [sic] by rules of discovery now.
>
> What should have been done or what the practice should be prior to the actual notice of hearing is one thing, but the case, in dealing with discovery, does not require the furnishing of documents or copies free. So I am bound by that type of ruling. I can't be concerned, in this proceeding, with what the procedure should be prior to the initiation of a law suit (Emphasis supplied).

This Board should not countenance the Department's efforts to re-litigate an issue that the Board resolved one month ago. Moreover, the Board's ruling was clearly correct. According to Section 2.700 of the Commission's Rules of Practice, the sections of the Rules which contain the discovery procedures (Sections 2.720, 2.740-742, and 2.744) govern procedure in all adjudications "initiated by the issuance of a . . . notice of hearing". This proceeding, of course, was initiated by a notice of hearing on April 11, 1972, and is, therefore, governed by those discovery procedures.

It is also clear that Congress intended the Department of Justice be governed by the same discovery rules

as other participants in this proceeding since the 1970 amendment to Section 105(c)(5) of the Atomic Energy Act provides for the Department's participation "as a party" (emphasis supplied) in the antitrust hearings which its advice letters recommend.[5/] The Commission's procedures carefully delineate the discovery rights and responsibilities of parties to the proceeding; one such delineation explicitly proscribes "fishing" for evidence.

We urge the Board to re-affirm that the Commission's Rules apply to all parties to this proceeding. Each Department request should then be examined in light of the Rules' and the Board Chairman's explicit proscription of fishing.

3. Request 2: Applicant's Filing System

According to the Department's Answer, this request seeks a "detailed description of Applicant's filing system" in order to obtain a "clear picture of the sources of documents provided in response to their request . . ." (Answer I, p.8). The Intervenors offer a similar rationale. (Answer II, p.7).

In discussions with opposing counsel, the joint discoverers have made clear that they request the descriptive titles contained upon every file folder in the Company. These discussions make a mockery of the Department's claim that its request is "narrowly directed" (Answer I,

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5/ 84 Stat. 1473, 42 U.S.C. §2135(c)(5).

p.7). By contrast, the Intervenors concede that the request's purpose is "fishing or exploration" (Answer II, p.7). It is obvious that the Intervenors are correct in this regard and that the request is only a pretext for a fishing expedition, i.e., an effort to peruse file titles "in the hope that something will turn up". See Part 2, supra.

The file indexes will not indicate the files from which any given document came. If the discoverers actually seek no more than to ascertain the "source" of documents provided in response to their document demands, the method they propose to utilize here will not only be unnecessarily time-consuming but also will fail to achieve the purported purpose. Applicant's objection to this request should therefore be sustained.

4. Requests 3(e) et al: Applicant's Legal and Political Activity

Ignoring the grave Constitutional issues raised by the Applicant's objections, the Department and the Intervenors press their efforts to obtain documents which relate to Applicant's political and legal activities.

The discoverers discourse at great length on a point which Applicant readily concedes: Applicant is, by the nature of its business, thrust into the political and legal process at several levels. This being so, say the discoverers, Applicant's activities in these spheres must be relevant to the antitrust questions at issue in this

proceeding.[6/] The discoverers thus neatly ignore the holdings of Pennington and Noerr that political and legal activities are not violative of the antitrust laws. This tack is particularly pertinent in light of the failure by either the Department or Intervenors to allege that any "sham" is here involved.[7/]

Once the Answers finally turn to the question of privilege raised by Applicant's Objections, their arguments rest upon the erroneous assumptions that (1) Applicant enjoys fewer Constitutional protections than other persons and (2) that Applicant's First Amendment rights would not be "chilled" by the discovery sought.

6/ In the course of this effort, the Department's Answer (p.9) inaccurately characterizes Applicant's objection in this regard as "in all essential respects, identical" to that of the plaintiff in Gulf States Util. Co. v. McLaren, Civil Action No. 71-102 (M.D. La. 1972). The Court's minute entry, which is attached to the Department Answer as Appendix A, does not discuss the basis for its holding concerning documents related to political and legal activity. Moreover, plaintiff's memorandum in that case, which is attached hereto as Appendix A, reveals that, unlike Applicant here, Gulf States' objections were not founded upon Constitutional principles. Moreover, the case arose under the Antitrust Civil Process Act, 15 U.S.C. §§1311-1314, which unlike the Commission's Rules, permits the discovery of irrelevant documents and condones "fishing" expeditions. Petition of Gold Bond Stamp Co., 221 F. Supp. 391, 397 (D. Minn. 1963). Thus the aforementioned case is not remotely in point to the issues raised in Applicant's Objections.

7/ See pp. 15-16, infra.

The Answers concede that Supreme Court cases have protected certain entities from document production where such production would "chill" the exercise of First Amendment rights. But, the Department asserts, Applicant cannot "step into the shoes" of those to whom the Court has offered such Constitutional protections because it is a "mighty" utility with considerable assets and revenue (Answer I, p.15). In a similar vein, the Intervenors argue that, as a "regulated public utility", Applicant must "supply information" regardless of Constitutional consequences (Answer II, p.12).

We would have expected that the discoverers would be more sensitive to a fundamental principle of Constitution law -- that all persons, regardless of economic or other status, enjoy basic Constitutional rights. Gideon v. Wainwright, 372 U.S. 335 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). To be sure, this principle has usually found expression in cases where the rights of the economically disadvantaged were under attack. Id. However, the threat to basic freedoms which arises from erosion of this principle is also cause for concern when weight is given to the favorable economic status of the person claiming Constitutional rights. Moreover, it is equally well-settled that the Constitution protects the rights of corporations. Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949); Grosjean v. American Press Co., 297 U.S. 233(1936).

The argument of the discoverers ignores the Noerr case itself, where defendants included 24 railroads -- an industry of considerable political power and financial resources and an industry, like the electric utility industry, that is subject to pervasive government regulation. Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). In Noerr, despite the railroads' status as large, regulated common carriers, the Court held their participation in the political process to be beyond the scrutiny of the Sherman Act in the following words:

> "[W]e have restored what appears to be the true nature of the case -- a 'no-holds-barred fight' between two industries both of which are seeking control of a profitable source of income. Inherent in such fights, which are commonplace in the halls of legislative bodies, is the possibility, and in many instances even the probability, that one group or the other will get hurt by the arguments that are made. In this particular instance, each group appears to have utilized all the political powers it could muster in an attempt to bring about the passage of laws that would help it or injure the other. But the contest itself appears to have been conducted along lines normally accepted in our political system, except to the extent that each group has deliberately deceived the public and public officials. And that deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned. That Act was not violated by either the railroads or the truckers in their respective campaigns to influence legislation and law enforcement." (Footnotes omitted). 365 U.S. at 144-45.

The Answers not only cloud the Applicant's right to the protection of the First Amendment, but they are also disingenuous in their analysis of how the exercise of those rights would be chilled by granting the document discovery request. The "chilling" impact upon Applicant's First Amendment rights has nothing to do with punishment for past political activity or with the outcome of this proceeding, as claimed by the Department (Answer I, pp.15-16). Rather, whatever the outcome, permitting discovery of Applicant's internal files relating to political activity will put Applicant on notice that the privacy of these files is not inviolate. This knowledge, in turn, will inevitably inhibit Applicant's future exercise of its First Amendment rights. "[I]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government". Lamont v. Postmaster General, 381 U.S. 301, 309 (1965) (Brennan, J., concurring). See also Baird v. State Bar of Arizona, 401 U.S. 1 (1971); Baggett v. Bullitt, 377 U.S. 360 (1964).

In Lamont, supra, the Court held that the Post Office could not condition delivery of "communist political propaganda" upon the addressee's written request for delivery. According to the Court, the condition was "almost certain to have a deterrent effect" on the exercise of the First Amendment rights since the addressees "might think" that public disclosure of the request could result in adverse

consequences. 381 U.S. at 307. Clearly, the inhibitory and chilling effect of the discovery which the Department seeks in this proceeding is no more "remote" (Answer I, p.16) than governmental action proscribed by the Court in Lamont.

The Answers also suggest that the "chilling" effect which would result from discovery of political activities must defer to the discoverers' "interest" in making such discovery (Answer I, p.17; see also Answer II, p.12-13). However, where, as here, the discovery would inhibit activity which is in the public interest, the discoverers must satisfy a standard of "exceptional necessity". Bredice v. Doctors Hospital, Inc., 50 F.R.D. 249, 250 (D.D.C. 1970). Neither the Department nor the Intervenors has made any such showing.

In an effort to demonstrate the necessity for production of documents relating to political activity, the discoverers rely upon dicta contained in a footnote to the Pennington case, supra, 381 U.S. at 670, n.3. According to the footnote, it would be "within the province" of the trial judge to admit otherwise-privileged evidence of political activity where he found it (1) "probative", (2) "not unduly prejudicial" and (3) where the evidence "tends reasonably to show the purpose and character of the particular transactions under scrutiny".

Reliance upon such dicta here is misplaced since as one court has held, "not only is it illogical to infer

from evidence that [defendant] also engaged in certain completely lawful [political] conduct that it also engaged in other conduct which was unlawful, but it would seem that to draw such an inference in this case would be an infringement upon defendant's First Amendment rights". United States v. Johns-Manville Corp., 259 F. Supp. 440, 453 (E.D. Pa. 1966) (cited by the Department's Answer I, p.16). The Johns-Manville court also perceptively observed that none of the cases cited in the Pennington footnote "involved a situation in which predatory intent was inferred from participation in constitutionally protected activities". Id.

It is significant that the discoverers do not indicate for which "particular transaction under scrutiny" they seek the requested documents. Having failed to identify any such transaction or to demonstrate the relationship between it and the documents requested, they have not justified the "chilling" impact on Applicant's First Amendment rights that would be the inevitable result of producing these documents.

Finally, the objections put forward by Applicant cannot be circumscribed by the Department's cryptic reference to the so-called "sham" exception of the Noerr-Pennington principle. (Answer I, p.12-13). In the Noerr case, supra, the Court noted that its holding did not encompass conduct which is a "mere sham to cover what is actually nothing

than an attempt to interfere directly with the business relationships of a competitor . . ." 365 U.S. at 144 (emphasis supplied). Recently, while reaffirming the principles enunciated in Noerr and Pennington, the Supreme Court explained that, in the context of the judicial process, the sham exception includes efforts to deter competitors having "free and unlimited access" to agencies and the courts or to abuse the adjudicatory process by perjury, fraud or bribery. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 511 (1972).

The sham exception is of no relevance here. First, the requested documents here under challenge involve all of Applicant's political and legal activity. They are not restricted to documents related to Applicant's alleged efforts to deter competitors' "free and unlimited access" to agencies or the courts or to abuse the adjudicatory process by perjury, fraud or bribery. Second, neither the Department nor the Intervenors have alleged that Applicant ever engaged in any political conduct which could be categorized as falling within the "sham" exception to the Noerr-Pennington doctrine (See Answer I, p.12).

No tribunal should permit a chilling invasion of Applicant's Constitutionally-protected rights based upon the bald assertion that Applicant has frequently undertaken political or legal activities. Applicant's objections relating to political and legal activities should therefore be sustained.

4. Request 4: Documents Related to Pooling

The Department's rationale[8] for Request No. 4 completely fails to justify the burdensome fishing expedition which it proposes to pursue. The Department's Answer states that it seeks to explore the "day-to-day operations" of Applicant as a member of the Michigan Pool. Its purpose, according to its Answer, is to ascertain "what benefits are realized and what responsibilities [are] incurred thereunder" (Answer I, p.20).

Preliminarily, the "benefits" and "responsibilities" of the day-to-day operation of the Michigan Pool have nothing to do with the issues set forth in the Board's Prehearing Conference Order of August 7, 1972 (p.3). Neither the Intervenors, nor any other municipal or cooperative utility, have sought membership in the Michigan Pool and no proposal to this effect has been advanced in this proceeding.

Most important, to the extent any aspect of the operation of the Michigan Pool is relevant to this proceeding, the Department fails to explain why it needs each and every document involving every action by every committee or subcommittee engaged in pool activities, regardless of its subject matter.

Finally, it should be noted that the Answer defends the request only in terms of the Department's alleged need for minutes of executive, pooling, and operating committees

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8/ The Intervenors do not answer Applicant's objection to Request 4.

(Answer I, p.20), even though the demand as worded in the Joint Document Request encompasses considerable more material[9/] (See also Answer I, p.21). Even were the Answer read to concede that such additional material is irrelevant, the document demand is still defective. The Department concedes that its request calls for "irrelevant matter" (Answer I, p.21). The Rules limit discovery to "relevant" documents and require that documents be "designated" with "reasonable particularity"; they do not permit inspection of "irrelevant matter". See Section 2.741(a) and (c).

The Department's offer to "sample" and "exclude" the documents that are not relevant reveals its fundamental misconception of this Commission's discovery processes (Answer I, p.21). Such an offer merely confirms that the Department seeks to review all of the minutes "in the hopes that something will turn up". See Part 2, supra. The Board should not countenance such a classic fishing expedition.

5. Request 5(d), (e), and (i): Applicant's Gas Operations

The Answers of the Department and the Intervenors concerning request 5 verifies what Applicant suspected: that these parties for the first time seek to import into this nuclear electric licensing review a full antitrust inquiry of Applicant's operations as a natural gas utility.

9/ The Request itself seeks reports and minutes of all committees, subcommittees and task forces and all "documents relating thereto".

Without even discussing Applicant's well-documented argument that its gas operations are beyond the scope of this proceeding, the Department and the Intervenors propose that Applicant initiate an extensive file search for documents relating to gas operations. Applicant submits that even accepting arguendo the broad scope claimed by the Department for the 1970 Atomic Energy Act amendments, the AEC is not obligated to inquire into competitive conditions within the natural gas distribution industry. Such an inquiry will inevitably proliferate, and greatly enlarge, this already extended proceeding. Surely, Applicant's distribution and sale of natural gas do not constitute "activities under the [Midland plant] license" which the AEC must scrutinize in an antitrust context.

It is noteworthy also that neither the Department nor the Intervenors assert that Applicant's gas operations have in any way affected the relationship between Applicant's electric system and other electric systems. Rather, the discoverers' rationale for seeking gas operation documents rests entirely upon surmise. For example, the Department speaks in terms of "steps Applicant may have taken", while the Intervenors allege that some operations "may" involve certain policy determinations (Answer I, p.23; Answer II, p.11) (emphasis supplied). Such words reveal that the attempt to inquire into Applicant's natural gas

operations is merely an effort to fish for additional evidence and issues that have no relevance to this proceeding.

Applicant's counsel has been informed by officials from the "gas" side of the Company that the document requests relating to gas operations are so broad[10/] that few, if any, files within this part of the Company could be deemed unlikely to contain responsive material. Thus discovery relating to such issues would jeopardize Applicant's ability to meet the schedule set forth in the Board's Prehearing Conference order of November 3, 1972.

6. Request 10: Documents Comprising Certain Files

The two Answers on their face demonstrate the impropriety of permitting documents to be designated and requested solely on the basis of their location in certain files. According to their Answers, the discoverers seek to ascertain "the entire record" of "day-to-day relationships" between Applicant and all of its wholesale customers in order to discover "the anticompetitive means and techniques employed by Applicant over the years . . ." (Answer I, p.26; see also Answer II, p.4).

10/ For example, Request 5(i) appears to require every document relating to every wholesale gas rate filing since such rates could conceivably "affect the cost of fuel" for other Michigan utilities. Similarly, Request 5(e) would seem to include all documents reflecting the extensive inter-energy competition between Applicant as a natural gas utility and Detroit Edison in the many areas where, by the very terms of the Request 5(e), Applicant provides no electric service.

This is a virtual admission that the discoverers seek access to entire files in the hope of turning up documents which might relate to anticompetitive conduct. In other words, the discoverers here abandon any effort to designate documents, as the Rules of Practice require, and assert a right to inspect files, which, the Department concedes, are "voluminous" (p.26) and which, it also admits, may (or may not) contain relevant documents. The Department's offer to "sample and exclude" "repetitive, routine documents" found in these files (p.26) merely confirms that the demand sweeps volumes of documents into its ambit which are not relevant to this proceeding.

The Intervenors' particular rationale for seeking access to entire files is equally disingenuous. Their Answer attaches documents allegedly written by Applicant and states that a review of the entire file where such documents reside would put the matters discussed in the documents in "context" (Answer II, p.4). This explanation simply begs the question. If the Intervenors actually seek only to inspect "memoranda or communications" relating to the subject areas covered in the documents they attach to their Answer (p.4), they possess ample ability to frame document requests with the particularity which the Rules require.

7. Request 23: Tax Returns

As the Department concedes,[11/] the issues raised by Applicant's objection to request 23 is whether or not data relevant to this proceeding and contained in its tax returns is "readily obtainable otherwise" (Answer I, p.29).

Throughout negotiations with the Department concerning this request, counsel for the Department refused to identify precisely what data contained in the returns it seeks and needs. Having persisted in its failure to do so in its Answer, the Department is clearly not entitled to these returns.

The Department's only elucidation of the grounds for its request is that it does not seek to find out how much tax Applicant pays, but rather wants to ascertain "how much tax was not paid" (Answer I, p.29) (emphasis supplied). The latter question appears to be an exercise in metaphysics; in any event, contrary to the Department's assertions, the amount of taxes not paid has never been put in issue by Applicant (Answer I, p.28).

Applicant has raised the issue of comparative tax burdens, i.e., the amount of taxes it pays compared to the amount of taxes paid by other neighboring utilities. This inquiry is, of course, vital since many of these utilities

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11/ The Intervenors do not answer Applicant's objections to this request.

pay no taxes and borrow capital at reduced rates, and are thus afforded competitive advantages of direct relevance to this proceeding. The Department fails to explain why a study of comparative tax burden requires any more than a record of taxes paid, capitalization, revenues received, and expenses incurred. Such data, as the Department concedes, is contained in Applicant's Form 1's filed with the Federal Power Commission.[12/] (Answer I, p.27).

Thus, since the data relevant to the tax issues raised in this proceeding are "readily obtainable otherwise", request 23 should be denied.

8. Pre-1960 Documents

The efforts of the Department and the Intervenors to burden Applicant and the Board with a file search extending to documents written in the 1940's should be given short shrift. As the Chairman of this Board has noted, the Department's advice letter constitutes the "charge" in this case (Tr. 112); that letter concerns only post-1960 activity of the Applicant.[13/] Thus, it is clear that pre-1960 conduct is not "at the very heart of the factual controversy in this proceeding" (Answer I, p.30), as the Department alleges.

12/ Prior to the Notice of hearing in this proceeding, Applicant provided the Justice Department and the Commission staff with copies of all of Applicant's Form 1's since 1960.

13/ The Chairman also stated that "we [the Board] believe that discovery should be limited basically to items that arise . . . in the Department's letter of advice" (Tr. 124).

The two Answers attach and reference documents which purport to cast light on issues that have been raised in this proceeding. It is inappropriate at this juncture to discuss their relevance or to contest the wholly unsupportable conclusions that the Department and the Intervenors derive from their content. Nevertheless, it should be noted the document attached by the Department (Answer I, appendix B) was not prepared by, and does not refer to, Applicant; it has no remote relevance to Applicant or this proceeding.[14/] The Intervenor's pre-1960 attachments relate to two events: Applicant's offer, made at the behest of Coldwater officials, to purchase that city's electric system in 1950 and Applicant's offer to interconnect with Traverse City in 1955. Applicant submits that such events, dating back seventeen and twenty-three years respectively, are too remote in time to bear upon the "anticipatory antitrust impact" of the nuclear licenses which Applicant seeks.

The discoverers base their request for pre-1960 documents upon a "continuing conduct" theory, i.e., that certain business relationships between Applicant and other

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14/ In its Answer (p.32) the Department incorporates by reference a 1965 document pertaining to the Michigan Pool which it attached to another pleading. That document fails to sustain the Department's need for pre-1960 documents relating to the pool. The Pool agreement was signed in 1962. There is no evidence to support the view that this agreement "first came under consideration" in the "period 1944-1950" (Answer I, p.32).

utilities existed prior to 1960 and have continued to the present time. Even assuming the factual accuracy of the theory,[15/] it does not support broad-based discovery requests prior to 1960. The discoverers' contentions here are identical to the Department's position which was rejected in United States v. Grinnell Corporation, 30 F.R.D. 358 (D.R.I. 1962). In that case, probably the most significant Section 2 monopolization case of the decade, the Department sought production of documents dating as far back as 1907. The Department defended its request on the theory that at least one of several agreements between Grinnell, its competitors, and co-defendants was signed in 1907. The Court ordered production of the 1907 agreement and "subsequent agreements named in the [Department's] motion" because they were alleged to have remained in operation as late as six years prior to the time the case was filed. 30 F.R.D. at 360 (emphasis supplied). However, the Court permitted discovery only of the named "agreements themselves" and restricted discovery of such documents as "correspondence, papers, and records" to ten years prior to the filing date. Id.

15/ As Applicant pointed out in its Objections, Applicant is not presently a party to any wholesale or coordination agreement that became effective prior to 1962. The oldest agreement is the Michigan Pool agreement which was signed in 1962. There is no evidence that this agreement "first came under consideration" in "the period 1944-1950" (Answer I, p.32) or that any of Applicant's other present wholesale or coordinating arrangements were considered or negotiated prior to 1960.

Here the pre-1960 document requests are not individually named or otherwise identified; rather they are described as "relating to" certain broad subject categories and thus their production requires a Company-wide file search. This Board, like the Grinnell court, has recognized that whatever the relevance of remote events may be to the issues raised herein, such general and unspecified document requests should be confined to reasonable time periods. The Board's twelve-year limitation is eminently reasonable and should not be abandoned merely because Applicant's present business relationships are alleged to pre-date 1960.

9. Historical Manuscripts

The Department's final effort to broaden this proceeding to unmanageable proportions seeks manuscripts relating to the Company's history from the nineteenth century to 1960.

The Department advises that it has undertaken a study of Applicant's company history at least since 1915 and seeks these manuscripts "for the purposes of checking our own". (Answer I, p.36). Whatever the scope of this proceeding, it certainly does not include historical episodes which transpired in 1915 -- or even in 1940. Whatever the reasons for the Department's historical curiousity, Applicant submits that it has no possible relevance to this proceeding, and Applicant should not, therefore, be required to assist

the Department's historian in his pursuit of abstract knowledge.

10. The Schedule of Discovery

The Board should not permit the Department[16/] to re-litigate and modify the discovery schedule discussed at the Prehearing Conference of October 25, 1972.

At the Prehearing Conference, Applicant's counsel detailed Applicant's considerable efforts to respond to the four separate and extensive document requests served upon it by various parties between July 26 and September 25, 1972. (Tr. 114-118). Applicant's counsel also advised the Board that Applicant could substantially comply with these requests by January 1, 1973 -- subject, of course, to the uncertainties inherent in those requests to which Applicant has objected (Tr. 118). Counsel for the Department of Justice expressed no objection to this schedule at the Prehearing Conference. The Board then ruled that all discovery should be completed by February 16, 1973.

Throughout these proceedings Applicant has stressed, and opposing counsel have concurred, that the Company should be put to the burden of only one Company-wide file search. Clearly, therefore, the file search and document analysis processes could not be undertaken until (1) all document

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16/ The Intervenors' Answer does not discuss the discovery schedule.

requests were received, (2) the meaning of ambiguous requests was discussed with the joint discoverers, and (3) the Board had resolved contested issues relating to the requests. The last document requests were filed on September 25, 1972; negotiations between counsel were held in late September and October; and Applicant's Objections were filed in late October. Hence, there can be no question as to Applicant's considerable and expeditious efforts to comply with the spirit and the letter of the Commission's discovery procedures and the Board's discovery schedule.

Apparently ignoring such efforts, the Department now proposes to scuttle the discovery schedule put forward at the Prehearing Conference. The dates the Department suggests are completely unrealistic. As for the asterisked items, the Applicant has already submitted a majority of the requested material and is able to assure production of the remaining documents by the end of this month.

The documents called for by the four document requests are voluminous.[17/] Nevertheless, Applicant anticipates that production of such documents will commence at the end of November and can be substantially completed, in accordance with counsel's representations at the Prehearing Conference, by the first of the year. This schedule will severely tax

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17/ In the Chairman's words, the document demands constitute a "very, very broad search of the Applicant's files." (Tr. 125).

Applicant's resources; the schedule suggested by the Department would only jeopardize the file search process and sabotage Applicant's efforts to comply fully with the document demands.

We urge, therefore, that the Department's motion to compel discovery on the dates it proposes be rejected.

CONCLUSION

The Department's concluding remarks advance several untenable assertions that require response. The Department would have the Board believe that, by applying for nuclear licenses, Applicant waives its presumption of innocence that is the very foundation of American jurisprudence. The Department also suggests that, simply because the Attorney General has recommended a hearing in this proceeding (as it has in about one-third of all nuclear license applications it has reviewed), Applicant should be denied its opportunity to object to demands, which do not comply with this Commission's rules or are otherwise objectionable. Finally, according to the Department, Applicant's efforts to "resist discovery" are motivated by a desire to conceal violations of law (Answer I, p.37).

The Department's accusations are without foundation. The Department is simply another litigating party in this proceeding with no more or less discovery rights than any other party. The Commission's Rules governing discovery strike a careful balance between the discoverer's desire

to prepare his case and the discovered party's desire to maintain privacy and control of its internal records. The Department would have this Board ignore that careful balance.

Applicant has not "resisted" discovery in this case. It has agreed to comply with most of the items contained in the various document requests. It raises objections to a few demands only because they flagrantly offend the spirit and letter of the Commission's Rules or constitutional principles.

We urge the Board to reject the hyperbolic rhetoric in the Department's conclusion, and to resolve the issues raised by Applicant's objections in accordance with the principles of fairness embodied in the Commission's Rule of Practice.

Respectfully submitted,

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November 15, 1972

ATTACHMENT A

NOTE: Only those pages of the Memorandum dealing with the Noerr-Pennington argument have been included in this Attachment.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

GULF STATES UTILITIES COMPANY,	:	
	:	
PETITIONER	:	CIVIL ACTION NO. 71-102
	:	
VS.	:	
	:	
THOMAS E. KAUPER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, UNITED STATES DEPARTMENT OF JUSTICE,	:	MEMORANDUM RESPONSE TO MOTION FOR ENFORCEMENT
	:	
RESPONDENT	:	

Upon the terse assertion that the Antitrust Division, Department of Justice, was conducting an inquiry for the purpose of ascertaining whether or not there existed a violation of Title 15, USCA, sections 1 and 2, by conduct of "agreements in reasonable restraint of trade between your company and neighboring bulk power supply systems, monopolization and attempted monopolization of bulk power supply and monopolization and attempted monopolization of the retail distribution of electric power", and without notice or previous request for information, the Antitrust Division invoked the Antitrust Civil Process Act (15 USCA, 1311-1314) and served Gulf States Utilities Company with a motion to produce documents covering a significant portion of the corporation's activities over an eleven-year period.

After deliberation Gulf States responded by filing a petition for order to set aside or modify the civil investigative demand pursuant to 15 USCA 1314 (b), in which a number of objections to the production of documents were raised. However, with the knowledge that the discovery procedure invoked was only investigatory in nature and that partial compliance could not be construed as an acknowledgment that there constituted a reasonable basis for issuance of the motion in the first place, Gulf States made a good-faith effort to produce the documents demanded in the subpoena,

and, in fact, has forwarded approximately _____ thousand documents to the Antitrust Division. Arrangements were reached between counsel limiting the scope of the motion in order to minimize the burden of Gulf States in selecting, sorting and reproducing documents thus curing an area of objection.

However, Gulf States, as a matter of principal, adhered to its initial objection to providing two categories of documents included in the production provided for in the civil investigative demand, viz: (a) documents involving company activities to influence government action - legislative, judicial, executive or administrative[1] which were withheld by Gulf States for the reasons stated in paragraphs 5 (b) and (c) of its petition; and (b) communications between Gulf States and its attorneys and attorneys and parties similarly aligned with Gulf States in litigation on which the attorney-client privilege has been urged. This proceeding involves those documents.

There are two questions of law to be resolved by the court in this proceeding, and they are:

(1) Relevance of documents relating to the company's activities to influence "government action" to a civil antitrust investigation in the light of the NOERR-PENNINGTON doctrine (EASTERN RR CONFERENCE VS. NOERR MOTOR FREIGHT, 365 US 127 (1961); UNITED MINE WORKERS VS. PENNINGTON, 381 US 657 (1965); and

(2) Whether the Department of Justice has made a prima facie case that the otherwise privileged communications between Gulf States and its attorneys and attorneys commonly aligned in litigation, constitute communications in furtherance of illegal activity and, therefore, not entitled to a privileged status.

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(1) Because of the volume of documents reviewed and returned, Gulf States did not rigidly adhere to this objection in its sorting of documents and, accordingly, many documents covered by this category have already been furnished the Department of Justice.

Gulf States interposes no objection to the government's request for an in-camera inspection of the privileged documents by the court, and such documents will be produced at the hearing on this matter.

1. RELEVANCE TO A CIVIL ANTITRUST INQUIRY OF DOCUMENTS INVOLVING ACTIVITIES TO INFLUENCE GOVERNMENT ACTION UNDER NOERR-PENNINGTON DOCTRINE

Gulf States urges as a matter of law that the NOERR-PENNINGTON rule as further defined by the Supreme Court in CALIFORNIA MOTOR TRANSPORT COMPANY VS. TRUCKING UNLIMITED, 404 US 508, 40 US Law Week 4153 (1972), precludes documents reflecting activities to influence government action from being relevant or reasonable to a civil antitrust inquiry. The Antitrust Civil Process Act extends to documentary material "relevant"to a civil antitrust investigation (15 USCA 1312 (a)), provided such demand does not require the production of any document which would be held to be "unreasonable" if contained in a subpoena duces tecum issued in aid of a federal grand jury investigation (15 USCA 1312 (c)). Documents reflecting activities involving attempts to influence government action are not relevant to civil antitrust inquiry, and their production would be considered as unreasonable if viewed in the light of grand jury subpoenas.

The NOERR-PENNINGTON doctrine, as amplified by the recent TRUCKING UNLIMITED decision, involves a conflict between the reach of the Sherman Act in matters of economics and the basic constitutional rights of persons to freedom of speech and right of petition guaranteed by the First Amendment. In the NOERR case the Supreme Court was concerned with an injunctive action brought by an association of motor carriers seeking to restrain a railroad association from conspiring to restrain trade and monopolize the long-distance freight business through a publicity campaign and lobbying efforts allegedly calculated to destroy the motor transport freight business. Justice Black, speaking for a unanimous court, recognized the fundamental constitutional issues raised in any action seeking

to deny or eliminate a person's freedom of speech and right of petition to the government, stating:.

> In the first place, such a holding would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly unjustified in this case in view of all the countervailing considerations enumerated above. For these reasons, we think it is clear that the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws. *** 365 US at pages 137-8.
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> * * * * *
>
> In rejecting each of the grounds relied upon by the courts below to justify application of the Sherman Act to the campaign of the railroads, we have rejected the very grounds upon which those courts relied to distinguish the campaign conducted by the truckers. In doing so, we have restored what appears to be the true nature of the case - a "no-holds-barred fight" between two industries both of which are seeking control of a profitable source of income. Inherent in such fights, which are commonplace in the halls of legislative bodies, is the possibility, and in many instances even the probability, that one group or the other will get hurt by the arguments that are made. In this particular instance, each group appears to have utilized all the political powers it could muster in an attempt to bring about the passage of laws that would help it or injure the other. But the contest itself appears to have been conducted along lines normally accepted in our political system, except to the extent that each group has deliberately deceived the public and public officials. And that deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned. That Act was not

violated by either the railroads or the truckers in their respective campaigns to influence legislation and law enforcement. *** 365 US at pages 144-5.

In UNITED MINE WORKERS VS. PENNINGTON, SUPRA, the court was concerned with an alleged conspiracy in violation of the antitrust laws between a labor union and large coal companies to impose upon the coal industry a wage and productivity agreement through efforts to influence TVA to refrain from purchasing coal from the companies not subject to the agreement and effectively eliminate such small coal operators from business. In a decision which can be argued as broadening the rule of the NOERR case, the court concluded that:

> Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.
>
> * * * * *
>
> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as a part of a broader scheme itself violative of the Sherman Act.[2] 381 U.S. at page 670.

In the TRUCKING UNLIMITED decision the Supreme Court reaffirmed the NOERR-PENNINGTON doctrine and added that the NOERR-PENNINGTON ruling, which pertained principally to activities to obtain legislative action, also encompassed legal actions calculated to obtain judicial decisions favorable to the economic interest of the moving party. Justice Douglas said:

> We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the anti-trust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors. 40 U.S. LAW WEEK at page 4154.

On the basis of these decisions Gulf States Utilities Company denies relevancy of the documents.

With all candor it is admitted that the Antitrust Division has been quite successful in having the courts conclude that information it sought to produce was "relevant and reasonable". There are exceptions, however.

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2. Counsel for Justice Department argues that language in a footnote to this quotation establishes the relevancy of the documents in question. This is discussed at page 7 infra.

In UNITED STATES VS. UNION OIL COMPANY OF CALIFORNIA, 343 F. 2d 29 (9th Cir., 1965), the production sought by the government was denied because it pertained to activity which was alleged to lead to a possible future violation and not restricted to the literal interpretation of the definition of "antitrust investigation" contained in 15 USCA, section 1311, which encompassed only activity constituting a present or past violation. It is true that the documentary information objected to here must be considered in a different context from the documentary information involved in the UNION OIL COMPANY case; however, the case does establish that "relevance" is a meaningful prerequisite to production. Gulf States submits that the documents covered by paragraph 5 (b) and (c) of the civil investigative demand to which objection has been made could not constitute evidence of a violation of sections 1 and 2 of the Sherman Act under the NOERR-PENNINGTON - TRUCKING UNLIMITED doctrine, and consequently are not a relevant subject of inquiry, if "relevancy" is to be given any meaning.

Counsel for the Justice Department contends that the information requested in paragraph 5 (b) and (c) "can constitute evidence of a violation of sections 1 and 2 of the Sherman Act under the "sham" exception enunciated in the NOERR decision as explained by the "denial of access to the courts and agencies" language in TRUCKING UNLIMITED. Alternatively, Justice contends that the documentsare relevant to this inquiry because they might tend to be admissible in evidence to show purpose and character of other conduct which allegedly forms the basis of violation, citing a footnote in PENNINGTON[3], and the Fifth Circuit opinion in HOUSEHOLD GOODS CARRIER'S BUREAU VS. TERRELL, 452 F. 2d 152 (5th Cir., 1971).

With respect to the first contention, Gulf States simply denies that its activities to influence government action (legislative, judicial, executive and administrative) within the meaning of the NOERR-PENNINGTON rule denied any party access to courts and agencies as contemplated in

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3. See page 7 infra.

TRUCKING UNLIMITED. Therefore, they cannot constitute a violation of the Sherman Act and would not be relevant to the inquiry.

Our reasons for support of this conclusion will be developed and discussed in following portions of this brief dealing with the issue of whether or not Justice has made a prima facie case that otherwise privileged documents are discoverable because they reflect activity violating sections 1 and 2 of the Sherman Act.

As to the second and alternative contention, Gulf States suggests that such doctrine as may evolve from the PENNINGTON footnote and developed in the CARRIER'S BUREAU case is not apposite here. This ruling presupposes that there is other conduct separate and apart from the activities to influence government action which could form the basis of a Sherman Act violation. We have carefully reviewed the affidavits filed by Justice and it is reasonable to conclude that the only activities which Justice documents in its claim of an alleged violation of the antitrust laws are lobbying to influence legislative and administrative action, lawsuits to obtain a favorable judicial result and publicity efforts in connection therewith[4] directed against rural electric cooperatives.

The government argues in a circle - the alleged illegal activity consisted of action to influence government action; but if not relevant to establish a violation of the Sherman Act, is is relevant to establish a purpose for other activities which might establish a violation. The circle is not complete. No other activities are cited and documented.

2. THE PRIVILEGE WITH RESPECT TO COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT

The government contends that communications between Gulf

4. In the affidavit there are conclusionary assertions of denial of access of Gulf States' transmission lines to others, offering some municipalities reserve-sharing contracts to the prejudice of LEC, and offering contract proposals which if accepted would allegedly restrict LEC, Lafayette, Plaquemine and Dow Chemical Corporation from use of Gulf States transmission lines for their best interest. No factual data is offered to corroborate such conclusion.

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-329A
CONSUMERS POWER COMPANY	)	and 50-330A
(Midland [illegible], 1 & 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Leave to File Applicant's Reply to the Answers to the Department of Justice and the Intervenors and said Reply have been served on the following by deposit in the United States mail, this 15th day of November, 1972:

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