

LAW OFFICES

WALD, HARKRADER & ROSS

ROBERT L. WALD  
CARLETON A. HARKRADER  
WM. WARFIELD ROSS  
STEPHEN B. IVES, JR.  
DONALD H. GREEN  
SELMA M. LEVINE  
THOMAS C. MATTHEWS, JR.  
JOEL E. HOFFMAN  
GEORGE A. AVERY  
ALEXANDER W. SIERCK  
TERRENCE R. MURPHY  
WILLIAM R. WEISSMAN  
STEPHEN M. TRUITT  
JAMES K. WHITE  
KEITH S. WATSON  
TONI K. GOLDEN  
JAMES DOUGLAS WELCH  
ROBERT A. SKITOL  
THOMAS W. BRUNNER\*

\*NOT ADMITTED IN D. C.

1320 NINETEENTH STREET, N. W., WASHINGTON, D. C. 20036

AREA CODE 202  
296-2121

CABLE ADDRESS: WALHARK

OF COUNSEL  
PHILIP ELMAN  
NEAL P. RUTLEDGE

May 8, 1973

Alan S. Rosenthal, Esquire  
Chairman, Atomic Licensing  
and Appeals Board  
Atomic Energy Commission  
1717 H Street, N. W.  
Washington, D. C. 20545

THIS DOCUMENT CONTAINS  
POOR QUALITY PAGES

Re: Consumers Power Company, Midland  
Plant Units 1 and 2, AEC Docket  
Nos. 50-329A, 50-330A, Department  
of Justice File No. 60-415-20

Dear Chairman Rosenthal:

Pursuant to the Board's Order of April 24, 1973, I am pleased to advise that Consumers Power Company ("Applicant") and the twenty-one municipalities have reached agreement concerning the method of compliance with Applicant's discovery. However, agreement has not been reached concerning confidential treatment of certain discovery items for the reasons set forth in the final paragraph of this letter.

The enclosed agreement reflects the understanding of the parties concerning the method of compliance. It generally provides that, in the first instance, the systems will respond to Applicant's discovery except to the extent a response is deemed unduly burdensome. Claims of undue burden will be specified and, in the event of disagreement about burden, resort will be had to the Board. Where Applicant (or the Board) accepts a system's claim of burden, Applicant will be granted access to inspect and copy system records under the terms set forth in the agreement.

With regard to restricting the dissemination of certain discovery items, the parties have not been able to reach agreement. Applicant has offered to accept responses to the requests in coded form so as to protect customer identities.

8006190 762

M

Alan S. Rosenthal, Esquire  
May 8, 1973  
Page Two

The municipals have offered to supply the information only if its use is restricted to counsel and, under certain terms and conditions, to Applicant's outside economic consultants.

In Applicant's view, the municipals have not adequately explained why Applicant's offer concerning coded responses will not adequately protect disclosure of customer identity. In addition, the municipals have not explained, and we cannot fathom, what competitive disadvantage would accrue to the municipals even if the information which Applicant seeks did in fact reveal the identity of their larger customers. As the Department of Justice observed in its advice letter in this proceeding (p.3), "competition in regulated industries is not the hour by hour competition of the marketplace". For example, Applicant's retail industrial rates are regulated and are uniform throughout its service area, so that it cannot reduce its rates or design a rate structure to attract a particular customer.

The municipals offer to restrict the responses to those outside of the Company effectively denies Applicant access to information which two AEC tribunals have found relevant to this proceeding.

The 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. Since outside and economic consultants lack such expertise, the discovery will be meaningless unless appropriate Company officials are permitted access to it.

Therefore, to confine use of the discovery in question to certain individuals outside of the Company denies Applicant access to discovery which the Appeals Board (and the hearing Board) have found it is entitled. We therefore urge the Appeals

WALD, HARKRADER & ROSS

Alan S. Rosenthal, Esquire  
May 8, 1973  
Page Three

Board to reject the municipals' proposal in this regard and to rule that Applicant's offer to accept the responses in coded form adequately protects the systems.

Sincerely,

/s/

Keith S. Watson

KSW:asl

Enclosure

## Definitions

1. "Applicant" is Consumers Power Company, its employees, and agents.

2. "The Systems" are the twenty-one electric systems (and their employees and agents) owned and operated by twenty-one Michigan municipalities which Applicant has served with subpoenas and notices of depositions upon written interrogatories.

3. "Applicant's discovery" are the attachments to the subpoenas duces tecum and the notice of depositions upon written interrogatories served by Applicant upon the system or the municipality they serve. "Document demands" are the items contained in the aforementioned attachment to the subpoenas duces tecum. "Interrogatories" are the items contained in the aforementioned attachments to the depositions upon written interrogatories.

4. Except as specified in the foregoing paragraphs, words and phrases herein are defined as set forth in the "Definitions" section of the aforementioned attachments.

## Agreement

1. Except as provided in paragraph 3 below, the systems will serve upon Applicant responses to each item to Applicant's discovery by providing a full response thereto; provided, however, where the system deems that a response to a particular item is unduly burdensome, in lieu of a full response the system may so state. Any such statement concerning undue burden must be verified by a qualified system employee and shall specify (1) what documents or other sources were consulted in seeking to respond, (2) what documents or other sources are likely to possess the information sought, (3) the number of manhours which the system estimates would be necessary to secure a full response. Such a statement shall be filed for each item about which a claim of undue burden is made.

2. The systems shall employ their best efforts in seeking to respond to Applicant's discovery without incurring undue burden and shall serve upon Applicant their responses and statements concerning undue burden within forty-five days of the date hereof. An interrogatory shall not be deemed unduly burdensome merely because it requires the system to make reference to readily available documents or to consult with readily available individuals not employed by the system.

Within the scope of paragraphs one and two above, where a system's response to an interrogatory or document demand is incomplete (except where accompanied by a claim of undue burden), appears to have been misconstrued by the system, or is ambiguous, Applicant may seek clarification or further response concerning that interrogatory or document demand.

3. Each system shall have the option of responding to interrogatories 16 through 43 inclusive by the following procedure: the system shall serve upon Applicant, upon reasonable conditions, a full response to document requests 1(a) to 1(c) (together with all available work papers related to any documents provided) and to interrogatories 1 and 4, within fifteen days of the date hereof. Within fifteen days of service of such full response, Applicant may serve upon any system interrogatories relating to the documents provided pursuant hereto. (Such interrogatories may include interrogatories 16 to 43 inclusive but shall be limited to discovery seeking clarification or explanation of the documents provided pursuant hereto). These interrogatories and responses thereto shall be governed by the terms and conditions set forth in paragraph one and two above. The system shall respond fully or provide statements concerning undue burden (as provided in paragraphs 1 and 2 above) to such interrogatories within thirty days of service thereof.

4. Within ten days of each system's service of certification that they have complied in full with Applicant's discovery in accordance with paragraphs one through three above, the Applicant shall notify the systems and the Appeals Board with regard to such claims of undue burden (raised by the systems pursuant to paragraph one above), which Applicant controverts and seeks further response. Within five days after service thereof, the systems shall either file objections with the Appeals Board or notify Applicant that it will provide the further responses sought by Applicant.

5. With regard to those discovery items to which Applicant does not controvert a system's claim of undue burden, or where the Appeals Board sustains a system's objection to an item on grounds of undue burden pursuant to paragraph 4 above, Applicant shall be afforded the opportunity to inspect and copy any document (within the possession, custody, or control of the system) which may be required to respond to each such item in full. Applicant shall have forty-five days after service of a Board ruling sustaining claims of undue burden to complete the inspection and copying process. Such process shall be accomplished under the following terms and conditions:

(a) Applicant's inspection shall be made during the system's normal business hours;

(b) the system, wherever possible, shall provide Applicant with office space to accomplish the aforementioned inspection;

(c) during such inspection, the system shall make available to Applicant system personnel qualified to assist Applicant in locating and inspecting documents or other sources of information responsive to Applicant's discovery; and

(d) in addition to other assistance, the system's personnel shall specify to Applicant those particular documents in which the system believes information responsive to a given discovery item will most likely be found. In the event that the specified documents do not, in Applicant's reasonable judgment, provide a full response, Applicant may inspect and copy any files, records or other documents (within the system's possession, custody or control) which Applicant reasonably believes may contain responsive information.

6. Nothing in the agreement should be construed (1) to compel the systems to respond in a manner other than that which would be considered full compliance but for this



agreement, or (2) to waive the system's rights to object to Applicant's discovery pursuant to the Commission's Rules of Practice.

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) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing letter and attachment, dated May 8, 1973, in the above-captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 9th day of May, 1973:

Jerome Garfinkel, Esq., Chairman  
Atomic Safety and Licensing Board  
Atomic Energy Commission  
Washington, D. C. 20545

Dr. J. V. Leeds, Jr.  
P. O. Box 941  
Houston, Texas 77001

Hugh K. Clark, Esq.  
P. O. Box 127A  
Kennedyville, Maryland 21645

William T. Clabault, Esq.  
Joseph J. Saunders, Esq.  
David A. Leckie, Esq.  
Public Counsel Section  
Antitrust Division  
Department of Justice  
Washington, D. C. 20530

James Carl Pollock, Esquire  
2600 Virginia Avenue, N. W.  
Washington, D. C. 20037

Joseph Rutberg, Jr., Esq.  
Antitrust Counsel for  
AEC Regulatory Staff  
Atomic Energy Commission  
Washington, D. C. 20545

Wallace E. Brand, Esq.  
Antitrust Public Counsel Section  
P. O. Box 7513  
Washington, D. C. 20044

Atomic Safety and Licensing Board  
Atomic Energy Commission  
Washington, D. C. 20545

*Keith S. Watson*  
Keith S. Watson

5/8/73

UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of NOTICE AND ORDER FOR FINAL PREHEARING CONFERENCE dated May 8, 1973 and ORDER DENYING JOINT INTERVENORS' MOTION TO COMPEL, FILED MAY 1, 1973 dated May 8, 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 8th day of May 1973.

*Peggy A. Dawson*  
Office of the Secretary of the Commission

Attachment: Service List

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