

6/19/73

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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

APPLICANT'S MOTION FOR LEAVE TO
SUBMIT OUTSIDE EXPERTS' DIRECT
TESTIMONY IN WRITTEN FORM PRIOR
TO HEARING

Pursuant to Sections 2.730(a) and 2.743(b) of the Commission's Rules of Practice, 10 C.F.R. Part 2, Consumers Power Company ("Applicant") moves the Board for an order authorizing the parties to submit direct expert testimony prepared by outside consultants in written form sufficiently prior to the hearing to permit adequate preparation for cross-examination. The testimony would be required to be verified by the witness, and the witness would be called only for cross-examination. Company and other non-expert witnesses would present live direct evidence.

Applicant submits that the presentation of direct expert testimony in written form will greatly simplify

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and expedite counsel's preparation for examination of such testimony. It should also be of substantial assistance in developing a coherent record, and obtaining an accurate resolution of the issues to be tried herein.

I.

The complexity of the evidence likely to be presented at the hearing cannot be gainsaid. Both applicant and the Department of Justice have retained independent economic and engineering consultants to prepare complex technical studies which will be embodied in evidence presented in this proceeding. Based on present information, this testimony presented by one or both parties will cover such topics as the geographic and product markets for sales of energy in Michigan's lower peninsula, engineering and economic factors affecting power pooling, electric system coordination, electric system dispatching, forced outage probability analyses of various systems and system combinations, rate comparisons, rate design analysis, engineering feasibility of self-generation and third party interconnections by smaller utility systems, wheeling engineering studies, and the application of

economic analysis to antitrust principles in the electric utility industry. Much of this testimony will be accompanied by detailed statistical exhibits which, absent prepared direct testimony, will be extremely difficult to present in a coherent and intelligible fashion. Even if this could be accomplished with live direct as a testimonial "tour de force," it would unquestionably greatly extend the time required for the oral hearing.

II.

The requirement of live direct testimony by outside experts will greatly complicate and hinder preparation for the hearing in this proceeding.

Presently established procedure provides for the exchange only of exhibits. As stated, these exhibits will include complex engineering and economic studies, and, without explanatory testimony, their full meaning will not be clear. Thus, in order to prepare adequately for cross-examination, the parties will have to depose one another's

expert witnesses. This will require the exchange of exhibits at a date sufficiently early to permit such depositions. That date must of course be well prior to the close of discovery which is now set for August 30.^{1/}

Compounding the scheduling problems that this complex procedure will impose, it must be anticipated that in view of the complexity of the evidence, the depositions of the various experts will consume a substantial amount of time. This appears to be an unnecessary waste of the limited time available to counsel and witnesses to prepare for this complex case.

The exchange of prepared direct evidence would expedite our procedure by eliminating unnecessary scheduling complexities and by eliminating the need for extensive, complicated and burdensome depositions of the various expert witnesses.

^{1/} Counsel for Applicant have tentatively agreed on July 30, subject of course to the concurrence of other parties and this Board, and more particularly, subject to this Board's action on this motion.

III.

It is submitted that the utilization of prepared direct testimony by independent engineering and economic witnesses will enhance the quality of the hearing record. To the extent that such testimony raises credibility issues, they involve the soundness of the witness' assumptions, the validity of his inferences and reasoning, and the factual accuracy of his data. Compared to these criteria, credibility is surely tested hardly, if at all, by a witness' ability to recite from memory the details of a complex technical study. Further, it is submitted that credibility as reflected in the expert's underlying premises, logical processes and factual accuracy can be tested much more thoroughly by searching cross-examination based on careful study of prepared testimony and exhibits than by an ad hoc effort following live direct presentation.

Finally, the use of live direct testimony in presenting evidence of this complexity should greatly prolong the hearings.

IV.

It should be noted that all of the parties except the Department of Justice concur with Applicant's position concerning written, expert direct testimony. The Commission staff has authorized Applicant to state it favors the submission of outside expert evidence in written form, while the intervenors have previously stated on the record that they "agree totally" with Applicant's earlier position favoring written testimony (Tr. 355).

These views are consistent with the Commission's Rules which provide for written direct testimony except where the Hearing Board expressly rules otherwise. See Section 2.743(b).^{2/} This procedure is also followed uniformly at the Federal Power Commission which has had probably the most extensive experience in hearing cases involving issues comparable to those in the instant proceeding. See Section 1.26(c)(2)(iii) of the Federal Power Commission's Rules of Practice, 18 C.F.R. Part 1.

^{2/} While not of course in any way controlling on this Board, the Hearing Board in the Duke Power Company's AEC antitrust proceeding (Docket No. 50-269, et al.) has directed the filing of written direct testimony (with the Department of Justice's concurrence).

The Atomic Energy Commission and the Federal Power Commission are not alone in encouraging use of written testimony for expert witnesses. Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d), explicitly provides for the use of such testimony in initial licensing proceedings.^{3/} Kenneth Davis^{4/} has praised the "increase in reliability and precision" of the procedure, while the Administrative Conference^{5/} has offered the following summary of its advantages:

"(1) exchange of written evidence facilitates settlement techniques in situations in which there is staff participation; (2) the hearing examiner, after studying the direct evidence of the parties prior to hearing, can participate in the case in an intelligent fashion, leading to more effective use of conference techniques and more informed rulings at the hearing; * * * and (4) the efforts of the parties at the oral hearing, if one is necessary, are confined to clarifying the major issues through informed cross-examination. Properly handled, written procedures should result in a more adequate record being produced in a shorter space of time."

^{3/} The applicable statement is: "In rule making or determinating claims for money or benefits or applications for initial licenses, any agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form"

^{4/} 2 Davis, Administrative Law Treatise, §14.16 (1958 ed.).

^{5/} Selected Reports of the Administrative Conference of the United States 1961-1962, S. Doc. No. 24, 88th Cong., 1st Sess. 92 (1963) at 93.

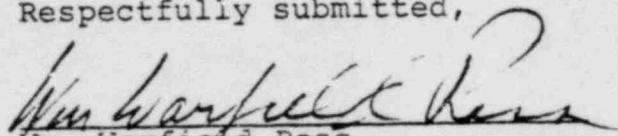
It should be noted that, although because of the jury system, written testimony is not invariably utilized in Federal Courts, a comparable procedure has been adopted in complex litigation there. Thus, according to Section 4.20 of the Manual for Complex Litigation, written offers of proof, including "a detailed statement of the factual data and scientific, technical or economic authorities or other material relied on", should be required. The Manual notes that this process is "particularly useful in complex cases" (such as the instant proceeding) "in which the parties expect to offer opinion or other evidence on complicated scientific, technical or economic issues." This Manual is reprinted in Vol. 1 (Part 2) Moore: Federal Practice, pp. 140-142 (1973 ed.).

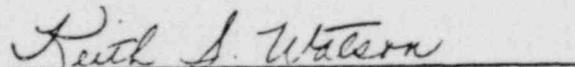
V.

It would be preferable if all parties were to exchange written direct outside expert testimony. However, counsel for the Department of Justice has advised the undersigned counsel that in all probability he will oppose this motion. That being the case, and if the

Board should decide to permit the parties a choice of procedure, Applicant would reluctantly be agreeable to a procedure whereby the Department presented its outside expert direct testimony live, if it chose to do so. In such event, Applicant would agree not to depose the Department's experts prior to hearing, on the understanding that the hearings would be recessed following such testimony for some reasonable period to permit preparation of cross-examination. However, as previously stated, Applicant believes that it would be highly desirable, and comport with fairness, if all parties' expert direct evidence was submitted in written form.

Respectfully submitted,


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June 19, 1973

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 APPLICANT'S MOTION FOR LEAVE TO SUBMIT OUTSIDE EXPERTS' DIRECT TESTIMONY IN WRITTEN FORM PRIOR TO HEARING, dated June 18, 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 19th day of June, 1973:

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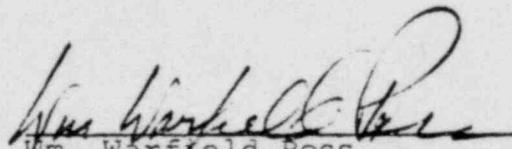
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