UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

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

ANSWER OF THE DEPARTMENT OF JUSTICE TO APPLICANT'S MOTION FOR LEAVE TO SUBMIT OUTSIDE EXPERTS' DIRECT TESTIMONY IN WRITTEN FORM

Pursuant to Section 2.730(c) of the Commission's Rules of Practice, 10 C.F.R. Part 2, the Department of Justice answers and opposes Applicant Consumers Power Company's motion of June 19, 1973, for an order "authorizing" submission of direct expert testimony prepared by outside consultants in written form.*/

Applicant's motion is nothing more than an attempt to reargue one more time a decision (1) made by the Board at the first prehearing conference in this proceeding (July 12, 1972), (2) reiterated at the second prehearing conference (October 25, 1972), and (3) reaffirmed after further argument at the third prehearing conference (February 12, 1973).

Chairman Garfinkel expressed quite clearly the Board's ruling on the question of live versus prepared expert testimony at the first prehearing conference:

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*/ We note that, despite styling its motion as one "for leave" to submit written testimony and using the word "authorizing" in stating the motion initially (page 1), Applicant would in fact have the Board compel all parties to submit such direct expert testimony in writing (pages 8-9).

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CHAIRMAN GARFINKEL: Again, counsel for all parties, as the Board sees it, it looks like the question of credibility of witnesses may come up, and also because the issues are complex, this Board is not going to accept written testimony in lieu of oral testimony. This Board will want the witnesses to be present, to be subject to cross examination, and also to examination by the Board.

MR. ROSS: Point of clarification, Mr. Chairman. Are you by that ruling precluding our preparing and circulating testimony in advance?

CHAIRMAN GARFINKEL: You can do anything you want, but we will not accept it unless there is a stipulation that the testimony is valid testimony and it will not be subject to cross examination. If there is any testimony that is going to be subject to cross examination we want that party to be there personally for direct examination.

MR. ROSS: In other words, you want the direct put in live?

CHAIRMAN GARFINKEL: Live unless there is a stipulation that this testimony is the testimony everybody agreed to. (Transcript, pp. 80-81)

The question arose again at the second prehearing conference, when Mr. Brand suggested that a change in the Commission's Rules of Practice [Section 2.743(b)] might affect the Board's earlier ruling. Chairman Garfinkel emphasized that such was not the case:

CHAIRMAN GARFINKEL: No, forget about that. I made a ruling in this case that we will take oral testimony and that ruling stands.

MR. BRAND: I see, your Honor. That eliminates our problem.

CHAIRMAN GARFINKEL: Right. I was worried about your question of canned testimony. That is out. The question of credibility of witnesses--as I recall the Board's ruling, the credibility of witnesses in this case is very important and it is not the same situation as you would find in a licensing case. I am not applying the restructured rules, canned testimony rules, in this case.

Moreover, Mr. Brand, this proceeding, I believe, preceded the promulgation of the restructured rules, in which case I am not, the Board is not bound by the restructured rules in this matter. (Transcript, p. 156)

In response to a question from Mr. Fairman, Chairman Garfinkel elaborated further on the matter:

CHAIRMAN GARFINKEL: . . . I think the Board ruled in the prior prehearing conference if the entire testimony is stipulated, then we don't have any objections to having it in, because that is a stipulation. But I don't want just the direct testimony stipulated and then have the other party cross-examine.

If that is going to happen, I want the direct testimony to be given orally and I want the cross-examination orally. (Transcript, p. 163)

Notwithstanding the Board's prior ruling, and the reiteration and explanation thereof, Mr. Ross saw fit to raise this question once again at the third prehearing conference, and the following discussion transpired:

MR. ROSS: Can I bring up one other wrinkle at this time?

CHAIRMAN GARFINKEL: Sure.

MR. ROSS: We don't know what the Department of Justice or intervenors are going to put on, but we have some general idea, and we do contemplate putting on testimony, as I have already said, on the record, of both company witnesses and of experts, outside experts, who will be economists.

The Board has ruled that it wants the direct testimony on live, and we, of course, acquiesce in that, and we would intend to put the company witnesses on live in compliance with that ruling.

I just want to raise, just for the Board's consideration, as to whether it would not be more expeditious and a better procedure if we could have the experts direct--I am talking about all parties' experts--put on in prepared form and the

witness called for cross-examination, since expert testimony lends itself very readily to this and since there is no real question of credibility with regard to an expert who has no personal knowledge of the matters here, and to the extent that his testimony needs to be tested, it can be tested on cross-examination.

CHAIRMAN GARFINKEL: How do you feel about that, Mr. Brand?

MR. BRAND: Your Honor, we can live with any set of ground rules, but we don't care to have the ground rules changed. We thought this was going to be all live.

CHAIRMAN GARFINKEL: I just wanted to get your feeling. I think in an antitrust case, especially a case of first impression, the credibility of experts may be in issue in an antitrust case, Mr. Ross, and in my experience with the Federal Trade Commission, we have had a number of experts who were severely cross-examined and they didn't come out for the better.

MR. ROSS: I wasn't contemplating doing away with the cross-examination, Mr. Chairman.

CHAIRMAN GARFINKEL: But that is not the same as listening to live--and the Board, unlike in other cases, the Board itself has the right to ask questions and is also getting an impression of how he answers the questions. I think the question of credibility is so important that the Board should be able to view him live all of the way.

On that basis, we would like it live, we will stay with that order.

* * *

MR. ROSS: . . . And one more clarification, Mr. Chairman, I hate to take the Board's time, but we have to be clear on this, because there is a tremendous effort involved in this.

Live testimony can mean two things, it can mean that the witness has to testify without reference to prepared testimony, and the numbers and the details in that. It also can mean that the witness must be asked the question and he must testify orally, but he can make reference to his notes and to his prepared materials.

If it were the former, the extent of preparation of a witness would have to be quite different. He would, in effect, have to memorize a lot of things.

My query specifically is suppose Mr. Brand and I decide to exchange prepared direct, which you have said we could do, if we chose to do so.

CHAIRMAN GARFINKEL: You can do anything between the parties.

MR. ROSS: Would it be permissible, if we put on a witness and I ask him a question and he would, in effect, be reading the answer which he has previously prepared?

CHAIRMAN GARFINKEL: The question first, in order for us to make a ruling, I would have to know whether Mr. Brand would raise an objection to that type of approach.

MR. BRAND: I would, your Honor, if we are going to have live testimony, we ought to do it live. However, I would have no objection to any witness examining, for example, tables or statistics or reference books, anything of that sort, on the stand, that he needs on which to base a responsible answer.

But the idea of a witness, if we are going to have a live testimony proceeding, simply reading from an already prepared answer, that would be objectionable, in my view.

CHAIRMAN GARFINKEL: There is your answer, Mr. Ross.

MR. ROSS: You realize, of course, that there will be, we will have rather extensive statistical exhibits and he couldn't function if he couldn't refer to those.

MR. BRAND: I have no objection whatsoever to his referring to statistical exhibits and I would propose that our witnesses be afforded the same advantage. They probably will have great notebooks of statistical materials that they may have to refer to.

MR. ROSS: We have no difficulty with this, we are prepared to do it, I just wanted to know

beforehand, before we got in there and hadn't prepared the witnesses adequately for the memory work that is required, whether this would be a requirement.

MR. BRAND: There is one additional item to which I would like to refer--

CHAIRMAN GARFINKEL: I wanted to ask how the intervenor feels about this?

MR. JABLON: I agree totally with Mr. Ross, I think the testimony should be written.

CHAIRMAN GARFINKEL: Very well.

We have ruled against that. (Transcript, pp. 350-352, 353-355)

The record is plain that the Board has decided to require live direct testimony in this proceeding. The Department agrees with the Board's ruling for the reasons stated by Chairman Garfinkel and Mr. Brand at the February 12, 1973, prehearing conference, as quoted above, and believes no further reconsideration of that ruling is called for.

The role of the experts in this proceeding will be to explain effectively to the Board the economics of the electric power industry and the antitrust principles to that industry. In some cases an explanation of the results and significance of technical and statistical exhibits may be required. The exhibits may be complex; the experts' explanations thereof need not and should not be complex. We are confident that the Department's expert witnesses will be able to present their testimony live in a coherent and intelligible fashion

without requiring an inordinate amount of time to do so and would hope Applicant's experts are qualified to do the same.*/

We maintain that taking the depositions of outside-consultant expert witnesses to prepare for their cross-examination is entirely practicable. It would be proper and necessary and not at all a waste of time even if "canned" testimony were to be permitted, because statistical tables and other such formulations frequently require explanation. We anticipate and have heretofore offered our expert witnesses for such depositions by the Applicant on reasonable terms and conditions.**/ We see no difficulty in scheduling such depositions during the eight-week period between the proposed July 30, 1973, exhibit-exchange date and the September 24, 1973, hearing date. ***/ Further, we are agreeable to exchanging summaries of our experts' proposed testimony, on July 30, along with the exhibits they will sponsor and the underlying working papers. We oppose Applicant's suggestion that, in lieu of deposing the Department's experts prior to hearing,

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*/ And, of course, no one suggests that the experts may not refer to their exhibits, working papers, tables, notebooks of statistical materials or reference books in presenting their testimony.

**/ "Reasonable terms and conditions" would include the ability to take similar depositions of Applicant's outside expert witnesses and of its officers and employees who possess qualifications as experts in engineering or economics and intend to present testimony of a technical or conclusory nature in this proceeding.

***/ We did not intend the proposed August 30, 1973, discovery-cutoff date to limit the taking of depositions of this type. In any event, the parties could take such depositions by agreement even after an established date for the close of discovery.

the hearing be recessed after their testimony so as to permit Applicant then to formulate cross-examination. Applicant will have ample opportunity to prepare its cross-examination in the eight weeks before the hearing.

CONCLUSION

For the reasons stated above, the Department of Justice urges that Applicant's motion be denied. Should the Board nevertheless decide now to authorize the parties to submit "canned" direct testimony, we ask that it do so in the true sense of the word "authorize"--and not require the Department present its direct expert testimony in such fashion.

Respectfully submitted,

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Washington, D. C.
June 28, 1973

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CERTIFICATE OF SERVICE

I hereby certify that copies of ANSWER OF THE DEPARTMENT OF JUSTICE TO APPLICANT'S MOTION FOR LEAVE TO SUBMIT OUTSIDE EXPERTS' DIRECT TESTIMONY IN WRITTEN FORM and NOTICE OF APPEARANCE for C. Kent Hatfield, dated June 28, 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 28th day of June, 1973:

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