7/9/73

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)	)	

APPLICANT'S ANSWER TO
INTERVENORS' MOTION FOR RECONSIDERATION
AND MOTION TO COMPEL

Pursuant to Section 2.730(c) of the Commission's Rules of Practice, 10 C.F.R. Part 2, Consumers Power Company ("Applicant") files its answer in opposition to a "Motion for Reconsideration of the Trial Board's November 28, 1972, Order and Motion To Compel" filed by the Intervenors on June 29, 1973.

The Intervenors' pleading ("Motion") seeks two forms of relief: First, it requests the Board to reconsider its order of November 28, 1972, inter alia, sustaining Applicant's objections to those items in the Joint Document Request relating to Applicant's operations as a natural gas utility and to its political activities. Second, the Motion requests production of all of the files in the offices of Applicant's counsel which contain documents transmitted to counsel from Applicant. Each of these requests is repetitive, untimely, and utterly without merit and should be summarily denied by the Board.

I. Motion To Reconsider

In its order of November 28, 1972, the Board sustained Applicant's objections to discovery items relating to Applicant's operations as a natural gas utility and its political activities. The Board's order followed extensive informal discussions among counsel, and a detailed exposition of the issues in pleadings filed October 26, November 1, and November 2, 1972, by Applicant, the Intervenors and the Department of Justice, respectively.

The Board's order of November 28 held issues of Applicant's gas operations and political activities to be beyond the scope of this proceeding, as defined in the Board's order of August 7, 1972 (p. 3). The Intervenors' attack upon these aspects of the November 28 order is not only untimely and unfounded, but the relief they seek would unduly burden Applicant and substantially delay this proceeding. As set forth in detail below, Applicant submits that the Motion to Reconsider should be denied.

A. The Motion To Reconsider Is Untimely

The Intervenors' Motion does not explain why they have delayed their efforts to reconsider an order promulgated more than seven months ago. Although the Intervenors purport to have found "new documentary evidence" (p. 21), these

documents were available to the Intervenors many months ago[1/] and raise no questions that were not discussed by the pleading and resolved by the November 28 order.

For example, while citing alleged "specific evidence" that Applicant engages in "legislative activities" (pp. 10-11), the Intervenors ignore the fact that Applicant's discovery objections, filed October 26, 1972, specifically conceded that Applicant "participates in a significant way in the political and legal arena" (pp. 5-6) -- a fact that the Department of Justice stressed in its Answer of November 2, 1972 (pp. 10-11). Similarly, the Intervenors purport to have suddenly discovered that Applicant sells natural gas in the same area as some municipal and cooperative systems sell electricity, but overlook their Answer of November 1, 1972, which discusses at length the alleged "control the Applicant can, has and does exercise over an electric utility selling electricity at retail in competition with Consumers' retail gas sales" (p. 10).

In short, it is clear that the Intervenors' effort to have the Board reconsider its November 28 order is not founded upon newly discovered evidence but, rather, simply represents an attempt to resurrect and reargue matters which

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1/ Documents Nos. 7334 and 23861 (cited in the Motion, p. 3) were submitted to Intervenors on January 5 and April 2, 1973, respectively, while the newspaper article on which the Motion relies is dated April 23, 1973. Thus, more than two months have lapsed since the most recent of the documents on which the Intervenors rely was available to them.

the Board properly resolved seven months ago. The Motion to Reconsider should therefore be dismissed as untimely.[2/]

B. The Intervenors' Factual "Evidence" Does Not Affect The Board's Rulings On Relevancy As A Matter Of Law

The Intervenors now purport to have "direct evidence" (p. 7) that Applicant has engaged in unfair political activities and natural gas marketing operations. Assuming arguendo, the materiality of the highly suspect conclusions of unfair conduct that they draw from this "evidence", none of the Intervenors' allegations has the slightest bearing upon the Board's ruling that Applicant's political activities and natural gas operations are irrelevant to this proceeding.

The fatal flaw in the Intervenors' thesis is contained in the November 28 order itself. The order states that whether or not "Applicant may have used its gas operations to unfairly compete with smaller utility systems" and whether or not "Applicant has engaged in unfair practices through political maneuvers", these matters are not relevant to the issues raised in this proceeding (Order pp. 2-4). Since the Board ruled, as a matter of law, that Applicant's political activities and natural gas operations

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2/ The Commission's Rules of Practice do not appear to contemplate motions to reconsider discovery orders and therefore establish no specific time limit for filing such pleadings. However, the Rules generally specify that pleadings must be filed at least within 15 days. See e.g. Section 2.762 (appeals of initial decisions).

are irrelevant, the Intervenors' claim to have found new facts relating to these matters clearly provides no basis for reconsideration of the Board's order.

Unlike the Intervenors, Applicant does not propose at this juncture to reargue the merits of discovery issues which the Board resolved seven months ago. However, it should be noted that the Board was clearly correct in its rulings about Applicant's natural gas operations and political activities. Applicant's natural gas operations were not mentioned in the Justice Department's advice letter or the Intervenors' Petitions to Intervene. Nor were they listed among the issues set forth in the Justice Department's statement of issues of July 12, 1972, or identified in the Board's Prehearing Conference Order of August 7, 1972. See Section 2.740(b)(1) of the Commission's Rules of Practice. This proceeding concerns the issuance of construction permits for nuclear electric generating units, which units have absolutely no operating or other relationship to Applicant's gas business.

Similarly, the irrelevance of Applicant's political activities to this proceeding is highlighted by the very example cited in Intervenors' Motion. According to the Motion (p. 12), Applicant allegedly "has made payments to a government official . . . who was highly

influential in formulating State policy" (emphasis supplied, p. 12).[3/] The Intervenors do not explain what "State policy" is involved or what possible relevance this matter has to the issues specified in the Board's August 7 order (p. 3).[4/]

There is no question, therefore, that the Board was correct in excluding issues relating to Applicant's political activity and gas operations from this proceeding and that the Intervenors have offered no reason why those rulings should now be reconsidered.

C. The Board Has Relied Upon Its November 28, Order In Later Rulings To The Intervenors' Benefit

In subsequent discovery rulings accruing to the

3/ The allegation, in any event, is wholly inaccurate. The individual in question was retained as a consultant by several utilities, including Applicant, and at the time was not a state official. The highly partisan newspaper article concedes that "there is nothing illegal" in the conduct alleged by the account. See col. 1, p. 2A. The Intervenors' suggestion that the alleged conduct "may have been illegal" (p. 12) is thus irresponsible and refuted by the very source of their "evidence".

4/ Although the Noerr-Pennington doctrine was not relied upon by the Board in its November 28 order, it should be noted that Applicant's conduct, as alleged by the Intervenors, is protected by that doctrine and that the "sham" exception does not apply. In the Noerr case the Court noted that the Sherman Act could proscribe activity "ostensibly directed toward influencing governmental action, [which] is actually nothing more than an attempt to interfere directly with the business relationships of a competitor . . ." 365 U.S. 127 at 144. But the Court held that the efforts to influence the Governor and the State Legislature through "vicious, corrupt and fraudulent" conduct, and thus to "destroy" competition, do not violate the antitrust laws. 365 U.S. 127 at 129. Thus, the Noerr case itself would exempt Applicant's alleged conduct from antitrust scrutiny.

benefit of the Intervenors,[5] the Board has relied upon its November 28 ruling which the Intervenors now seek to reverse.

At the prehearing conference of February 12, 1973, which considered the twenty-one municipals' motion to quash Applicant's subpoena, the Board struck Applicant's requests relating "tie-ins" between the municipals' electric service and their gas, water, and sewer service. The Chairman explained that ruling as follows (Tr. 255):

> "[W]e are going to reject it because you [the Applicant] are trying [sic] it in with gas and we made it very clear in ruling in this proceeding [that] we will have nothing to do with . . . matters other than electrical energy . . . ."

To reverse the Board's November 28 ruling in this regard would also seem to require reversal of subsequent orders which relied upon that order. Thus, in the event that the Board grants the instant Motion to Reconsider, Applicant would move the Board to reverse its aforementioned February 12 ruling concerning Applicant's discovery of electric-gas tie-in practices by the municipals.[6] In such event, Applicant also intends to proceed with discovery of the political activity of the municipal and cooperative

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5/ Although the later rulings concerned non-party municipals, the Intervenors have taken the position in discussions with counsel that objections sustained as to non-party discovery apply with equal force to Applicant's discovery of the Intervenors.

6/ Significantly, in this regard, the Department of Justice has argued that "there is exactly the same relationship" between Applicant's discovery about municipal electric tie-ins to gas service and "the materials we requested earlier and that were denied by the Board" (Tr. 257).

systems -- a course of action not previously undertaken in reliance upon the Board's ruling of November 28.

It is obvious that reversal of the Board's November 28 order relating to gas operations and political activities would result in extensive additional discovery by all parties to this proceeding and would likely create a procedural delay of significant proportions. Applicant submits, therefore, the Board should deny the Intervenors' Motion to Reconsider the Board's November 28 order.

D. To Produce The Additional Documents Sought By The Intervenors Would Burden The Applicant And Substantially Delay This Proceeding

Applicant has previously detailed to the Board its massive efforts to complete the file search of its many offices in response to the Joint Document Request of July 26, 1972.[7/] Those efforts consumed thousands of man hours and required from August 1972 to April 1973 to complete. Should Applicant be required to conduct another file search for the documents the Intervenors now seek, a comparable effort would be required and this proceeding would be further substantially delayed.

7/ The nature and extent of Applicant's efforts are amply confirmed by the deposition on June 6, 1973, of Judd Bacon, an attorney in Applicant's Legal Department who supervised the file search. This extensive sworn statement dispells any doubt concerning the thoroughness and good faith of the file search.

Notwithstanding the Intervenors' groundless assurances to the contrary (p. 15), the discovery requests about which the Intervenors seek reconsideration are for the most part "all documents" demands and would require another total file research.[8/] Indeed, the search would probably be even more time-consuming than the first effort, given the nature and extent of Applicant's natural gas operations. As the Intervenors' Motion itself observes (p. 7 fn. 1), Applicant derives nearly one-half of its revenue from the sale of natural gas. Furthermore, the service areas of its electric and gas operations are not identical so that Applicant sells natural gas in many Michigan townships where it does not provide electric service. Thus, to permit discovery into gas operations would not only require a file search of the many files previously searched, but would also demand an extensive inquiry into documents wholly segregated from electric operations not previously examined.

8/ For example, the requests in the Joint Document Request relating to gas operations read as follows:

> "Documents relating to: . . .
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> 5(d) sale by the Company of natural gas as boiler fuel to electric utilities which are wholesale electric customers of the Company (except invoices);
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> 5(e) competition between natural gas sold at retail by the Company and electric power in areas where the Company sells gas and electric service is furnished by other electric utilities; ....
>
> 5(i) activities of the Company to affect the cost of fuel for electric power generation by other persons in Michigan.

Particularly in light of the extensive discovery which Applicant has heretofore endured -- including, most recently, four weeks of depositions by the Department of Justice and the Intervenors[9/] -- to require such a burdensome effort would be unconscionable. It would also delay these proceedings for as much as one full year, to the considerable detriment of Applicant and the Commission's administrative processes.

In view of the certain burden and delay which would result from the relief which the Intervenors seek, the Motion to Reconsider should be denied.

II. Motion To Compel

In their Motion to Compel, the Intervenors renew their efforts to discredit Applicant's compliance with the massive Joint Documents Request[10/] and now demand to inspect

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9/ Other discovery of Applicant in this proceeding has included the following:

> Nineteen interrogatories from the Commission at the behest of the Department (February 25, 1971); four interrogatories from the Department (June 4, 1971); four document requests by the Department (October 29, 1971); twenty-five interrogatories from the Commission staff (November 8, 1971); thirty Joint Document Requests from the Department, the Staff, the Association, and other Intervenors (July 26, 1972); four document requests from the Department (August 16, 1972); seven document requests from the Association and other Intervenors (September 21, 1972); and 235 requests for admission and interrogatories from the Department (February 12, 1973).

10/ These efforts previously included Motions to Compel dated March 28, and May 1, 1973. Each of these Motions was denied by the Board in orders dated April 6 and May 8, 1973, respectively.

the files of Applicant's counsel containing documents supplied by Applicant but not provided to opposing counsel.

The simple response to this unusual demand is that every unprivileged document[11/] contained in counsel's files which is responsive to any discovery demand in this proceeding has been furnished to the Intervenors. To demand access to additional documents misconceives the Commission discovery processes and constitutes an effort to engage in an unconstitutional search of Applicant's property. For the reasons set forth below, the Board should reject this clearly improper and unlawful proposal.

A. The Search Of The Files Of Applicant's Counsel Constitutes A "Fishing" Expedition

In their Motion (p. 16), the Intervenors demand to inspect all "documents sent to Wald, Harkrader and Ross, Consumers' Power Company's attorneys, by Consumers Power, but not turned over to" the other parties in this proceeding. Thus, contrary to the Commission's discovery rules, the Intervenors now abandon any attempt to particularize their inquiry and simply demand that entire document files be opened for inspection.

11/ The Intervenors' Motion (p. 20) also requests a "statement" describing those documents withheld by Applicant as privileged. Such a statement was submitted to opposing counsel on April 26, 1973, in a letter from Watson to Brand (copies to all parties) enclosing ten pages which listed the date, author, addressee and subject matter of each privileged document responsive to any discovery request.

According to Section 2.741(a) and (c) of the Commission's Rules of Practice, a party may request production of " designated documents" and must describe each item and category with "reasonable particularity". (Emphasis supplied.) Here, the Intervenors fail to designate or particularize the documents which they seek other than by their location at the offices of Applicant's Washington counsel.

As previously explained, every document sent from Applicant to its Washington counsel has been reviewed and each document responsive to a discovery request has been submitted to opposing counsel. The Intervenors now seek leave to rummage through counsel's files in the hope and surmise that documents of interest to them but not responsive to their discovery requests may turn up -- a classic fishing expedition. The Commission and the Board have made clear that the Commission's discovery rule should not be construed so as to permit such expeditions. Thus, in its Statement of General Policy and Procedure which accompanied enactment of the newly-amended Rules of Practice, the Commission stated:

> "In no event should parties be permitted to use discovery procedures to conduct a 'fishing expedition' . . ." 12/

12/ Section IV(a), Appendix A, Statement of General Policy and Procedure, 37 Fed. Reg. 15139.

The Chairman of the hearing Board herein also explained at the first Prehearing Conference that a fishing expedition would not be tolerated in this proceeding (Tr. 51), and in its November 28 order the Board reaffirmed this view in the following language (p. 3):

> The Department of Justice argues that it cannot tell what is relevant without examining all of the files. This type of argument, if carried to its logical conclusion, would give the Department of Justice access to all of Applicant's documents, a procedure forbidden by Section 2.740.

In the same order the Board made further reference to the infirmity of discovery requests which are insufficiently particularized (p. 2):

> Unless we take the position that all of Applicant's files are relevant to the matters in controversy, a position we do not take, then this request calls for irrelevant material. The Department of Justice argues that the data requested will enable it to locate relevant material. We do not agree. With the issues clearly drawn, the Department should be able to frame requests appropriately limited to relevant material. Accordingly, Applicant's objection to this request is sustained.

The reasoning which led the Board to strike certain discovery requests in its November 28 order is equally applicable here. The Intervenors' demand to inspect documents, without describing them with particularity as the Commission's Rules require, is clearly improper and should be denied.

B. The Motion To Compel Would Reveal Counsel's Work Product

The documents which Applicant's Washington counsel possess were submitted by Applicant in part to enable such counsel to prepare its case in this proceeding. Although some of the documents submitted were responsive to the Joint Document Request and other discovery demands, others are duplicates, or relate to matters not sought by any discovery demand.[13/] Certain of these documents have been now organized and annotated by counsel[14/] in preparation for these proceedings, and revelation of this organization and these annotations would provide opposing counsel with the work product of Applicant's attorneys.

The Commission's Rules direct the Board to prevent "disclosure of the mental impressions, conclusions, opinions

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13/ Members of the Board, in an informal conference with all counsel held on July 6, 1973, expressed interest in the reasons why, as previously reported by the Applicant, more documents had been transferred to Washington counsel than were ultimately produced by Washington counsel. We have appended hereto an affidavit by Keith S. Watson, one of Applicant's counsel, which explains the reasons why this occurred. We also append an earlier, previously submitted, affidavit of Judd Bacon relating to this subject.

14/ These annotations include certain numbers on each document about which the Intervenors inquire (p. 20), and other writings by counsel concerning the legal significance of each document for this proceeding.

or legal theories of any attorney . . . concerning the proceeding." Section 2.740(b)(2) of the Rules of Practice. These Rules confirm the basic principles set forth in Hickman v. Taylor, 329 U.S. 495 (1947) which "made it plain that the 'work product' doctrine protected the party against discovery of information within its purview regardless of the method by which the information was sought." 4 Moore's Federal Practice, p. 26-452 (1970 ed.).

It is clear that through their Motion to Compel the Intervenors are seeking to have Applicant prepare the Intervenors' case for them. Pressed to explain a need for the information they seek, the Intervenors resort to vague musings about "fairness" (p. 20). Even this rationale misses the mark since it would be patently inequitable to grant Intervenors access to materials assembled and prepared by opposing counsel (at significant time and expense) in preparation for this proceeding.

Since the Intervenors provide no showing of need for inspecting the work product of Applicant's Washington counsel, their Motion to Compel should be denied.

C. The Motion To Compel Proposes A Constitutionally Improper Search Of Applicant's Property

Through their Motion to Compel, the Intervenors have proposed an examination of the files of Applicant's counsel

that would constitute an unreasonable search under the Fourth Amendment to the United States Constitution. Indeed, the search contemplated by the Intervenors is even broader than a similar proposal recently found to violate the Fourth Amendment in In Re Grand Jury Subpoena Duces Tecum, 342 F. Supp. 709 (D. Md. 1972).

In that case an attorney was directed by a subpoena to submit to grand jury all documents in his possession relating to certain joint ventures of his clients. Although the court noted that grand jury subpoenas could be considerably broader in scope than discovery in adjudicatory proceedings, it found the document demand unconstitutionally broad in light of the Fourth Amendment. 342 F. Supp. 709 at 714. The Court's holding relied extensively on United States v. Schwimmer 232 F.2d 855 (8th Cir. 1956), another case in which discovery of documents possessed by an attorney was denied on constitutional grounds.

In the instant case, the Intervenors' demand is at least as broad and open-ended as the document discovery efforts declared unconstitutional in the aforementioned cases. The Board should therefore deny the Motion to Compel as improper under the Fourth Amendment.

CONCLUSION

The Intervenors' Motion to Reconsider a Board

order promulgated more than seven months ago and the Motion to Compel access to the files of Applicant's Washington counsel are patently unreasonable and improper and should be summarily denied.

Respectfully submitted,

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