

10-2-73

UNITED STATES OF AMERICA
BEFORE THE
ATOMIC ENERGY COMMISSION

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

APPLICANT'S ANSWER TO
DEPARTMENT'S MOTION TO COMPEL
POOL COMMITTEE MINUTES

Pursuant to Section 2.730(c) of the Commission's Rules of Practice, 10 C.F.R. Part 2, Consumers Power Company ("Applicant") opposes the Department of Justice's "Motion To Compel Production of Michigan Pool Committee Minutes", filed September 20, 1973.

In response to the Chairman's suggestion during a conference call yesterday, Applicant sought to reach an accommodation with the Department concerning its Motion, but was unsuccessful. We reiterate here our willingness to provide the Department with all of the Administrative and Planning Committee minutes or all minutes of all committees prepared since 1970. This proposal would significantly reduce the number of irrelevant documents which the Department seeks leave to inspect. However, for the reasons set forth in detail below, Applicant submits that Applicant should not be required to produce the thousands of pages which constitute all of the Pool minutes during the last eleven years.

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I. The Motion seeks to re-litigate previous rulings which Applicant has relied upon.

As all parties concede, Request No. 4 of the Joint Document Request of July 26, 1972, encompassed a demand for all Michigan Pool committee minutes. Applicant filed objections to the unspecificity of the request and, in response thereto, on November 28, 1972, the Board modified the request in the following language (p. 3):

The next matter relates to request no. 4, calling for minutes of pooling and coordination committee meetings. All parties agree that the requested documents include many which are irrelevant. 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. The request is hereby limited to those documents which deal with Applicant's power to grant or deny access to coordination, and those documents dealing with the use of this power against smaller utility systems. As so limited, Applicant is required to produce the documents.

In response to the Request No. 4, as modified by the November 28 order, Applicant made a time-consuming review of the thousands of document pages which make up the Pool committee minutes. Although not concurring with the Department's expansive definition of "coordination" as contained in the Joint Request, that definition was utilized in the file search and production process in response to modified request

no. 4. As a result, over 250 pages of documents were supplied to the Department and nearly all of the documents contained therein were Michigan Pool committee materials.^{1/}

If the Department was dissatisfied with the Board's ruling as to Request No. 4, it should have promptly moved for reconsideration prior to Applicant's review of the minutes. At this juncture, with less than two weeks remaining before exhibits are due, it would be unconscionable to require Applicant to re-examine these same thousands of pages under the new criteria proposed by the Department.^{2/}

^{1/} The documents produced were: Monthly Administrative Committee Report, February 1, 1965 (doc. nos. 7481-7484); Monthly Administrative Committee Report, March 1, 1965 (doc. nos. 7478-7480); Pool Administrative Committee Meeting Notes, April 9, 1965 (doc. nos. 7471-7475); Monthly Administrative Committee Report, April 1, 1965 (doc. nos. 7476-7477); Pool Administrative Committee Meeting Notes, April 19, 1965 (doc. nos. 7460-7470); Pool Administrative Committee Meeting Notes, May 25, 1965 (doc. nos. 7445-7459); Consumers-Edison Pool Administrative Committee Report, June 18, 1965 (doc. nos. 7438-7444); Pool Administrative Committee Meeting Notes, July 20, 1965 (doc. nos. 7431-7437); Administrative Committee Report, August 1, 1965 (doc. nos. 7429-7430); Pool Administrative Committee Meeting Notes, July 14, 1967 (doc. nos. 7381-7384); Pool Administrative Committee Meeting Notes, December 21, 1966 (doc. nos. 7421-7428); Administrative Committee Meeting Minutes, April 24, 1967 (doc. nos. 7415-7420); Letter from J.W. Kluberg to R.O. Wagner, May 5, 1967, regarding minutes of April 24, 1967, meeting (doc. Nos. 7410-7414); Revised Minutes of April 24, 1967, Administrative Committee Meeting, May 25, 1967 (doc. nos. 7403-7409); Pool Administrative Committee Meeting Notes, June 10, 1967 (doc. Nos. 7385-7402); Memorandum Regarding Agenda for July 14, 1967, Administrative Committee Meeting, July 13, 1967 (doc. no. 7380); Pool Administrative Committee Meeting Notes, November 30, 1967 (doc. nos. 7517-7532); Pool Executive Meeting Notes, August 2, 1966 (doc. nos. 23889-23892); Pool Executive Meeting Notes, September 12, 1967 (doc. nos. 23875-23888); Emergency Procedures, March 7, 1972 (doc. nos. 10060-10064); Operating Committee Meeting Notes, July 6, 1965 (doc. nos. 23314-23317); Consumers-Edison Electric Power Pool, 1967 Capacity and Demand Data (doc. nos. 17968-17969); Recommenda-

The Department itself stressed the need for finality with regard to discovery rulings in its efforts last November to secure the pool minutes. In its "Answer" to Applicant's objections, filed November 2, 1972, the Department stated that "any claim" relating to "a specific document or category of documents" should be "made at this time and the Board's decision thereon must control future production of that document or category of documents" (p. 4) (Emphasis supplied.) In a classic application of the double standard, the Department now proposes that the Board's decision in November be ignored and that it not "control future production".

From the very first prehearing conference, Applicant has stressed that "if we are going to have to search our files, [we should] have to do it only once" (Tr. 95). Counsel for the Department concurred in these sentiments and assured the Board that "second round" discovery would be narrowly confined to "such and such a document" (Tr. 97):

1/ [continued . . .]

tion to Pool Administrative Committee Regarding Interconnection Strengthening with Parties Outside the State of Michigan for the Years 1967 and 1968, August 19, 1964 (doc. nos. 384-397); Recommendation for Future Pool Sharing of Transmission Cost of Argenta-Verona Line, March 31, 1965 (doc. nos. 19716-19720); Pool Studies, April 25, 1962 (doc. nos. 17941-17962); Minutes of M110 Planning Committee Meeting No. 67-5, August 23, 1967 (doc. nos. 13185-13203); M110 Planning Committee Meeting No. 67-1, January 17, 1967 (doc. nos. 13219-13235).

2/ Of course, even if all of the minutes were submitted to the Department for inspection, Applicant's counsel has a professional obligation to examine all such materials prior to submission to opposing parties.

And so I suggest that there may be documents that we become aware of after we go past the first round of discovery -- in the course of the first round after we have gone through the documentary requests, into interrogatories, the interrogatories or in the depositions we will get a chance to ask whether such and such a document exists, and then we feel we should be allowed to do it. (Emphasis supplied.)

Despite such assurance and despite the fact that much of the Department's month-long Company depositions focused upon the Michigan Pool, this "second-round" request is much broader than first round request no. 4, as modified. Thus, favorable action upon the instant Motion would require precisely the type of duplicative document review that the Department assured the Board more than a year ago would not be required.

Applicant submits that it should not be burdened or otherwise prejudiced as a result of its reliance upon the Department's statements that the Board's November 28 order would "govern all future discovery" and upon its statement that "second round" discovery would specify the particular document or documents which it needed. The Board should, therefore, reject the Department's Motion to secure all of the Pool committee minutes.

II. The Motion seeks leave for a fishing expedition.

According to the Commission's Rules of Practice which govern the scope of discovery, document requests must

be limited to those which are "relevant to the subject matter involved in the proceeding", are "reasonably calculated to lead to the discovery of admissible evidence", and are designated with "reasonable particularity". Sections 2.740, 2.740(b) and 2.741 of the Commission's Rules of Practice. The Commission and the Board herein have made clear that this language should not be construed so as to permit "fishing" 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'"3/

The Chairman of the Hearing Board herein also made clear that at the first prehearing conference that a fishing expedition would not be tolerated in this proceeding (Tr. 51.).

The Department purports to have narrowed its discovery by limiting the request to minutes "relating to power pooling". Of course, this is no limitation at all since it is difficult to imagine minutes of power pooling committees which do not relate, at least indirectly, to power pooling.

3/ Section IV(a), Appendix A, 37 F.R. 15139.

It should be emphasized that power pooling is an arrangement that requires day-to-day cooperation and communication between the pooling partners. Thus, the Pool committees, particularly the Operating and Administrative committees, meet as often as once per week to discuss the day-to-day operations of the pooled systems. Minutes of these day-to-day concerns are not conceivably relevant to the issues raised in this proceeding and, thus, the Department's demand to inspect them is contrary to Rules 2.740(b)(1) and 2.741(c).

When reduced to basics, the Department's Motion argues that it should be permitted to all pooling minutes because some minutes may contain information relevant to this case. The identical hypothesis was advanced in the Department's answer of November 2, 1972 but was explicitly rejected in the Board's November 28 order.

The only new argument offered by the Department relates to the initiation of a revised pooling agreement between Applicant and Detroit Edison in May, 1973. However, it is difficult to understand the rationale for the Department's view that a change in an agreement in 1973 merits scrutiny of every committee meeting minute since 1962.^{4/}

^{4/} Any Pool committee minutes relating to the May, 1973 agreement would be contained in the documents which Applicant has already produced or is willing to produce, as set forth on page 1, supra.

Finally, it should be noted that no municipal or cooperative system has ever sought admission to the Michigan Pool and we do not read the opposing parties' prayer for relief in this proceeding to include compelling such admission. Thus, the Department's purported need to examine minutes relating to "denial of access" to the Pool (p. 7) misses the mark, since such access has never been sought and thus never denied. In any event, such documents would appear to be encompassed in the previously-cited materials already provided to the Department in response to modified Request No. 4.

WHEREFORE, the Department's Motion To Compel, filed September 20, 1973, should be denied.

Respectfully submitted,

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October 2, 1973

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CERTIFICATE OF SERVICE

I hereby certify that copies of APPLICANT'S ANSWER TO DEPARTMENT'S MOTION TO COMPEL POOL COMMITTEE MINUTES, dated October 2, 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 2nd day of October, 1973:

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