3/22/73

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

REPLY OF THE DEPARTMENT OF JUSTICE
TO APPLICANT'S ANSWER TO MOTION TO COMPEL RESPONSE

Pursuant to Section 2.730(c) of the Commission's Rules of Practice, 10 C.F.R. Part 2, and permission granted by the Board in its Order of March 6, 1973, the Department of Justice replies to Applicant's Answer to Motion to Compel Response to Request for Admissions and Objections to Said Request, dated March 12, 1973. The Department believes Applicant's objections are wholly without merit and requests the Board to overrule them and to require Applicant to answer the request for admissions in full no later than ten days after the Board's order on the matter. */

The Department further requests that the Board direct oral argument to be heard on these matters, as permitted under Section 2.730(d) of the Rules. Although this reply fully sets out our legal arguments in support of the requested

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*/ Applicant has agreed to answer all requests not objected to no later than April 2, 1973.

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admissions, we believe oral argument would better enable the Board to deal with claims of ambiguity or irrelevance of particular requests.

Following the procedure of Section 2.742 of the Rules, the Department requested that Applicant either admit, deny, or detail the reasons why it can neither admit nor deny 235 relevant matters of fact in this proceeding. The Department made this request in the interest of expediting this already delayed proceeding by attempting to set out fundamental economic and engineering principles of electric power supply, straightforward historical facts of the development of Applicant and its relations with other electric utilities, and explanations of basic provisions of Applicant's contracts with such utilities. It was our belief that most, if not all of these facts were uncontroverted--that our dispute with Applicant centered on the application of antitrust law and policy to the facts, and not on the facts themselves--and that much time would be saved if the evidentiary hearing were limited to matters truly in dispute.

Yet Applicant, by apparently misconceiving the expediting function of admissions, defining narrowly the relevant matters in controversy, and reading each request with extreme technicality, has managed to conceive objections to answering--by admitting, denying, or saying why it can do neither--222 out of the 235 requested admissions. As most requests were

objected to on more than one theory, Applicant has in effect presented some 437 specific objections covering sixty pages. Taking into account the 407 words or phrases Applicant contends are routinely vague or ambiguous, the Department is faced with approximately 697 separate objections.

All of the specific objections, however, are supported by one of five bases for objection discussed in detail by Applicant. The Department will show each of these five bases to be without merit, and, thus, no support for maintenance of the specific objections.

OBJECTIONS ON GROUND OF IRRELEVANCY TO THIS PROCEEDING

Applicant alleges that many of the requested admissions are defectively irrelevant for two reasons: first, because they relate to matters occurring prior to 1960; and second, because the request does not confine itself totally to the "situation in lower Michigan."

Applicant begins by proposing an overly narrow standard of relevancy. While the Department believes its requested admissions are entirely relevant even under a standard of admissibility at hearing, relevancy for discovery purposes should not be so tightly defined. The purpose of a relevancy determination at the discovery stage is to restrict or keep within reasonable limits the scope of a hearing and to eliminate collateral issues. If the request for admission is within the conceivable scope of relevancy, an answer would

certainly not be prejudical, especially since the responding party has the option of asserting lack of knowledge. Further, if the responding party does answer, be it affirmatively or negatively, and at hearing it is determined that the fact is indeed irrelevant, he cannot be said to be prejudiced by having answered. If on the other hand, the admission is not answered, and the fact is later determined to be relevant, the requirement of formal proof will unduely burden the moving party as well as defeat the purpose of Section 2.742(b)--the proceeding will needlessly have been prolonged.

Requests Concerning Matters Occurring Prior to 1960

It is interesting to note with regard to Applicant's objection to requests concerning pre-1960 matters that primary, if not sole, reliance is placed on rulings of the Board on the scope of discovery, wherein the factor of burden of production was a vital consideration.*/ In the prehearing conference of July 12, 1972, Mr. Ross, in arguing for a 1960 cut-off for discovery, stressed the enormous burden of a file search. (Tr. 94-96) This consideration is obviously not present here, for Applicant can state that information

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*/ Prehearing Conference Order, dated August 7, 1972 (p. 4); Order Ruling on Objections, dated November 28, 1972 (p. 5); and Third Prehearing Conference Order, dated February 16, 1973 (p. 1).

is unavailable to it. Note particularly the holding of the Board: "The Applicant's present economic position and the nature of its recent activities can be shown adequately with documents dated on and after January 1, 1960." */ The Board did not hold, nor did it imply, that activities or occurrences prior to 1960 were irrelevant.

To hold that all matters occurring before 1960 are irrelevant, as Applicant apparently argues, would be inconsistent with prior rulings of the Board. The Board has ordered production of histories of Applicant, which, though prepared post-1960, contained material relating to pre-1960 events. **/ This is particularly significant in that these histories were the source of many of the requested Michigan historical admissions. Also, despite the Board's reluctance to order discovery of pre-1960 documents, it allowed discovery of pre-1960 documents which amplify or explain contracts executed subsequent to that date. ***/

Not only is Applicant's contention inconsistent with Board orders, it would be contrary to the scope of evidence traditionally examined by antitrust courts. As a general proposition, antitrust inquiry into pre-violation conduct of

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*/ August 7, 1972, Order.

**/ Board Order Ruling on Objections, dated November 28, 1972 (p. 6).

***/ Id. (p. 5).

a company and the development of the market structure of an industry is not only traditionally allowable, but usually necessary. For example, in Federal Trade Commission v. Cement Institute, 333 U.S. 683, 703 (1947), the Institute contended that evidence should not have been admitted showing the activities of the cement industry for many years prior to the period of charged antitrust violation. The complaint, filed before the Federal Trade Commission in July, 1937, alleged that the Cement Institute had maintained an illegal combination for more than eight years past." The government pleaded its case on the basis that the combination began in August, 1929, when the Cement Institute was organized. However, it introduced evidence, over the Institute's objections, which showed the activities of the cement industry for many years prior to 1929, including some activities as far back as 1902. It also introduced evidence as to the Institute's activities from 1933 to 1935, much of which related to the preparation and administration of the NRA Code for the cement industry pursuant to the National Industrial Recovery Act. The Supreme Court held all of the objected to evidence relevant despite the "antiquity" of some and despite the fact that Section 5 of Title I of the Recovery Act provided for an antitrust exemption. See also Standard Oil Co. v. United States, 221 U.S. 1, 46-47 (1910); United States v. Reading Co., 253 U.S. 26, 43-44 (1919); American Medical

Assn. v. United States, 130 F.2d 233, 250-252 (D. C. Cir. 1942), aff'd 317 U.S 519 (certiorari limited to other issues).

And finally, Applicant, though obviously not intending to do so, has in effect admitted the relevancy of the pre-1960 items by stating in its brief (p. 4) that some resort to prior conduct or market structure may be necessary to evaluate the situation claimed to be inconsistent with the antitrust laws. It agrees that prior conduct and structure are valid indicators of market conditions which presently exist. In other words, such matters are relevant. What Applicant is apparently complaining about with regard to pre-1960 requests is not relevancy, but rather that the matters sought to be admitted are so remote as to make them prejudical or confusing. This can hardly be the case, given the source upon which the requests are based--Applicant's histories--and the limited, general nature of these requests.

Thus, the Department submits that the requests which relate to matters prior to 1960 are indeed relevant and should be answered. They were advanced for the limited purpose of illuminating the present structure of the electric power industry in Michigan's lower peninsula by tracing its evolution, and not to show anticompetitive conduct on the part of Applicant. We believe they are essentially "common knowledge"; even if not, Applicant can avoid an onerous search by simple expedient of a good faith denial of knowledge.

Requests Allegedly Unrelated to the Situation in Lower Michigan

The apparent thrust of Applicant's objections under this heading is that to be relevant a requested admission must deal exclusively with something that has happened or is happening in the lower peninsula of Michigan. Applicant seems to base this assertion totally on the Board's Prehearing Conference Order of August 7, 1972, where, according to Staff, "the 'relevant matters in controversy' [were] confined, inter alia, to Applicant's power and use of any such power 'to grant or deny access to coordination' to smaller lower Michigan electric systems in an anticompetitive fasion (p. 3)." The "relevant matters in controversy," as set out by the Board in that Order are as follows:

(a) Applicant has the power to grant or deny access to coordination;

(b) Applicant has used this power in an anticompetitive fashion against the smaller utility systems;

(c) Applicant's said use of its power has brought into existence a situation inconsistent with the anti-trust laws, which situation would be maintained by activities under the license that Applicant seeks.

The controversy as set out by the Board revolves around the determination of these three issues. Does Applicant have what is tantamount to monopoly power? Has Applicant used

this power in an anticompetitive fashion, to wit, deny to smaller electric systems the benefits, if indeed there are any benefits, of interconnection and coordination? And, assuming the first two questions are answered in the affirmative, is this a situation inconsistent with the antitrust laws that will be maintained by the activities under the license?

The first two issues are critical, and their determination will facilitate the resolution of the third. But concepts of "monopoly power," and "benefits of coordination" cannot be analyzed in the vacuum of lower Michigan.

To understand this point, a review of the rationale for antitrust laws in general is desirable. Unless public policy toward industry, and the policy of the antitrust laws in particular, is to amount to little more than the whim of politician or bureaucrats, there must be a showing that interference with the pattern of industrial structure contributes more to a generally accepted objective than the unregulated pattern of industrial growth. */ This showing requires economic analysis. While there is some debate, most commentators agree that the basis for the antitrust laws is that under pure competition in the economic sense there is an optimal allocation of resources. Or, to state the corollary proposition, under monopoly or oligopoly there is a misallocation of scarce resources.

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*/ Douglas Needham, Economic Analysis and Industrial Structure, C. 10, Holt, Rinehart, and Winston, Inc., (1969).

To hold this belief in the purely competitive model irrelevant would be to ignore a valuable analytical tool; and indeed the courts have used the purely competitive model as a general principle for antitrust analysis. See, e.g., the Cellophane Wrapping Case, United States v. DuPont, 351 U.S. 377 (1956). Yet, in no sense of the word is there in existence today a market, or a segment of a market, which can meet the conditions of a purely competitive market. */ The function served by the purely competitive model is that of a measure of optimal economic conduct against which specific conduct may be compared.

Likewise, an inquiry restricted to conduct or situations which have occurred or existed exclusively in Michigan (or only since January 1, 1960) will be of limited analytical value in this proceeding. Just as there are economic principles basic to antitrust inquiry, there are engineering and economic principles basic to the generation and transmission of electric power. Without these general principles against which to measure the situation in Michigan's lower peninsula, the inquiry would be meaningless. Surely the Board must concern

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*/The purely competitive model contains four basic assumptions: (1) all firms produce a homogeneous commodity, and consumers are identical from the sellers' point of view; (2) both firms and consumers are numerous so that no one firm or consumer can affect price; (3) both firms and consumers possess perfect information about prevailing price; and (4) entry into and exist from the market is free for firms and consumers. Henderson & Quant, Microeconomic Theory: A Mathematical Approach, p. 104, McGraw-Hill, (1971).

itself with the general engineering and economic principles of the electric power industry to make its antitrust anaylsis.

Applicant is not, as it claims, being asked to analyze the needs of a system about which it has no knowledge, but rather to admit or deny (or claim lack of knowledge about) general principles of generation and transmission of electric power. These general principles are the foundation for the Department's economic and engineering expert testimony; if admitted, time need not be spent on them at the hearing.

The Department submits that these requests are both relevant and definite; and Applicant should be required to answer them--admitting general principle, denying it, or stating ignorance thereof. Applicant's contention that general engineering and economic principles are irrelevant is patently misconceived. The statements which Applicant refers to as "hypothetical" are no more hypothetical than the law of physics that an object will accelerate in a free fall at the rate of 32 feet per second.

OBJECTIONS ON GROUND THAT OPINIONS
OR CONCLUSIONS OF LAW ARE CALLED FOR

Despite Applicant's contention, requests for admissions are not improper because they call, inter alia, for legal conclusions. United States v. Smith, 42 FRD 338 (W.D.Mich. 1967). Even Applicant's cases, on their facts, do not support the absolute rule propounded by Applicant.

For example, in Baldwin v. Hartford Accident and Indemnity Co., 15 F.R.D. 84 (D.Ned. 1953), the court was faced with requests for admissions consisting of 27 numbered paragraphs covering 16 pages of typewritten material. The first proposed request was a 560 word narrative of operations over a 10-year period. While the court sustained the objections to the requests, it apparently did so on the grounds that the length and complexity of such requests made an answer impossible. The requesting party was given the opportunity to redraft the requests more concisely.

Lantz v. New York Central R. R. 37 F.R.D. 69 (N.D.Ohio 1963) also cited in Applicant's answer, is enlightening in that it supplies the rationale for whatever judicial authority there is to support Applicant's proposition. The request in that case was inappropriate "because of the sanctions imposed by Rule 37." FRCP Rule 37 provides in brief that the requesting party may recover the cost of proving a proposition unjustly denied pursuant to a request for admission. The fear exists that the moving party may, through requests for admission accompanied by the possibility of financial sanction, place the entire burden of proving his case on the party to whom the requests are directed. There is, however, no comparable provision in the Rules of Practice of the Atomic Energy Commission. Thus, the fear of misallocation of the burden of proof should not be present here.

In United States v. Smith 42 F.R.D. 338 (W.D.Mich. 1967), the defendant objected to plaintiffs' requests for admission contending two of them to be improper in that they called for legal conclusions. The requests in controversy read as follows:

> 6. Each of the said mortages referred to in Requests 4 and 5 hereof conveyed unto the plaintiff, the United States of America, all of the mortgagors' right, title, and interest in and to the crops planted, growing or to be planted or grown on the 'Hadder farm' as described in Request 3 hereof.
>
> 7. Defendant, Max E. Smith, did not at any time have the permission of the United States of America or any authorized agent thereof to take possession of any of the crops of V. Dean Hadder and Shirley Jane Hadder covered by the mortgages of May 9, 1961, and August 4, 1961.

The court directed defendant to answer the above requests, citing with approval an article by Professor Ted Finman, The Request for Admisstion in Federal Civil Procedure, 71 Yale L. J. 371 (1962).

The rationale for the Smith decision, as set out in Professor Finman's article can be summarized as follows. The drafters of FRCP Rule 36 knew full well that the term "fact" as used in pleading rules, and the attempt to distinguish "fact" from other types of assertions, had caused constant and fruitless litigation. Consequently, the drafters deliberately omitted this word from the pleading rules they formulated. It is almost inconceivable that the drafters intended to inject into the admission procedure the confusion

they so scrupulously avoided elsewhere. "A court would be on sound ground, therefore," according to Professor Finman, "in holding that Rule 36 does not call for an application of the fact-opinion and fact-law distinction." He goes on to point out that even if a court should feel compelled to apply these distinctions, no "magic formula" dictates that a proposition be classified as "opinion" or "law" rather than "fact." The spirit and purpose of the Rule is that undisputed contentions be admitted so as to limit the issues before reaching the trial stage. Mechanical fact-law and fact-opinion distinctions do not discriminate between that which is disputed and that which is undisputed. And once more we emphasize that, in addition to affirming or denying, Applicant has the option of claiming ignorance. As the court said in Smith, "If the validity of the contention propounded to defendant escapes him, let him admit the contention or state he is unable to honestly admit or deny it." 42 F.R.D. 338.

Mahoney v. Doering, 260 F. Supp. 1006 (E.D. Pa. 1966), relied on by Applicant, involved a request for admission that plaintiff had received in a prior action payment constituting "satisfaction in full." To have admitted the request would have terminated plaintiff's cause of action. Further, the issue arose on a motion for summary judgment--plaintiff had not answered or objected and the matter would be deemed admitted--so that to have held the fact-law distinction inapplicable would have foreclosed plaintiff from any relief.

Thus, assuming arguendo, that many of the Department's requests do call for "Applicant to provide (a) opinions about various circumstances, often hypothetical, and (b) conclusions or interpretations of law," this does not make the requests "fatally defective." And even where fact-opinion and fact-law distinctions are made, courts have held that any doubt should be resolved in favor of granting the request. Wirtz v. Texaco, Inc., 10 F.R.Serv. 2d 36a.21, Case 1 (N.D.Okla. 1966); Photon, Inc. v. Harris Intertype, Inc., 28 F.R.D. 327 (D.Mass. 1961).

Applicant has not only misconstrued the law in this area, it has apparently misread the Department's requests. For example, Applicant has, with remarkable consistency, objected to all requests which contain the phrase "Gainesville formula." Applicant seems to claim that mere use of the word "Gainesville" necessarily requires "a legal interpretation and conclusion of that case." This assumes that the formula approved by the Supreme Court in Gainesville Utilities Department v. Florida Power Corporation, 402 U.S. 515 (1971), is a matter of law. Applicant is not asked to comment upon, affirm, or deny any of the legal principles of that case, e.g., the sufficiency of evidence necessary to uphold a Federal Power Commission finding, or what is meant by the public benefit requirement of the Federal Power Act, but rather to address itself to the formula approved by the Court.

If the Court had instead cited or discussed the formula, "the area of a square is equal to the square of its side," reference to this formula by the nomenclature "Gainesville formula" could hardly be said to call for a conclusion of law. And even assuming that the Supreme Court, in setting out the formula in question in the Gainesville case, was sufficiently ambiguous to preclude Applicant from understanding the formula without interpretation, the Department defined the term "Gainesville formula" in requested admission 49.

To uphold Applicant's objection to all items in which the term "Gainesville formula" is found would be to rule that mere use of the name of a case, per se, calls for a legal conclusion. This rationale, logically extended, would compel the holding that a reference to the "Pythagorean Theorem" calls for an interpretation of the philosophies of Pythagoras. */

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*/ Another example of Applicant's confusion concerns request 229, where the Department in effects ask whether or not X, Y, and Z are "relevant product markets" in the electric power supply industry. Applicant's objection, notwithstanding, the definition of a relevant product market is indeed a factual matter. Admittedly, the determination of relevant market is often the critical determination in an antitrust controversy; but nevertheless, it is a factual determination. See, for example, United States v. DuPont, 251 U.S. 377 (1955), wherein the Supreme Court reviewed the district court's finding of relevant market, based on sophisticated cross-electricity analysis, as a finding of fact. "The record sustains these findings," the Court said. 251 U.S. at 400.

The Department of Justice submits that even if requests which involve or call for opinions or conclusion of laws are somehow objectionable, the admissions requested here are not. It is only Applicant's misreading of the requests, and not the requests themselves, that gives rise to its objections on this point.

OBJECTIONS ON GROUND OF AMBIGUITY

The thrust of Applicant's objections under this heading is apparently that, because of the construction of the requests and certain defective language, Applicant cannot answer categorically, but will be required to extensively qualify its answer.

The Department submits that even assuming that requests must be drafted in such a manner as to facilitate "yes," "no," or "I don't know" answers; the questions should be read as a whole, not word by word as apparently Applicant has done. In Wirtz v. Texaco, Inc., 10 F.R.Serv. 2d 36a.21, Case 1 (N.D.Okla. 1966), the plaintiff sought an admission to the following statement:

> That a substantial part of the oil and gas produced from Texaco's oil and gas wells in the State of Oklahoma is shipped or transported to points and places outside of the State of Oklahoma, either as crude oil or gas or as refined petroleum products.

The court overruled the defendant's objection on the ground of vagueness to the terms "substantial part" and "is shipped

or transported," saying: "There is no vagueness or indefiniteness when the request is considered in its entirety juxtaposed to the coverage issue." 10 F.R.Serv. 2d 36a.21, Case 1 at 1013.

The absurdity of Applicant's word by word reading of the request for admissions is shown by their objection to Item 89:

> 89. (1) . . . .
>
> (3) Not Specified: The words "sometime prior" are ambiguous and thus not susceptible to admission or denial.

Perhaps if the Department had indeed requested Applicant to admit or deny the words "sometime prior," Applicant's claim would have merit. However, what Applicant was requested to admit or deny was this entire statement:

> 89. Sometime prior to 1910 Mr. W. A. Foote was operating two or more central stations in parallel in Michigan's lower peninsula.

An admission would merely establish that sometime, at any time prior to 1910, Mr. Foote did operate two or more central stations in parallel in Michigan's lower peninsula. A denial would simply aver that at no time prior to 1910 did Mr. Foote operate such a power system. It is interesting to note that Applicant has not here claimed lack of knowledge, as it did in 30 other places. Thus, since the question is clear, and presumably Applicant has knowledge of the facts, we do not understand why, rather than object, Applicant cannot simply answer. Of course, this is not to imply bad faith or intentional delay on the part of Applicant.

Applicant also consistently objects to the phrase "high-voltage transmission" as being imprecise (e.g., requested admissions 85, 116, 217). Yet the term is defined in request 169. In total Applicant cited over 400 words or phrases as being unclear or ambiguous. The Department cannot contend that all of the requests are capable of one and only one meaning upon a critical semantic analysis. It is doubtful that the English language is capable of such precision. However, we do contend that all of the requests are so framed that Applicant can affirm, deny, or state lack of knowledge, if it reads them with a reasonable eye rather than an overly critical eye. For example, Applicant makes the following objection:

> 3. (1) . . . .
>
> (3) Not Specified: The request lacks specificity since the terms 'relatively close' and 'economically feasible' are sufficiently ambiguous to permit of admission or denial.

The exact meaning of the clause "sufficiently ambiguous to permit of admission or denial" if viewed in isolation, is totally up in the air. Nevertheless, a reasonable reading allows an answer to the objection. Of course the Department, after many critical readings of its requests, does not believe that there are any such enormous drafing errors. But the point remains. A reasonable reading, rather than a word by word reading, whould eliminate most if not all of Applicant's

objections; and we believe any problems still remaining can best be resolved in the course of oral argument.

OBJECTIONS ON THE GROUND OF LACK OF KNOWLEDGE

It is the position of the Department that if the request involves material beyond the knowledge of Applicant, Applicant should so state. This is the response specifically required by the Commission's Rules of Practice, Section 2.742(b).

The purpose of requests for admission, as enunciated by Professor Moore and expressed in a great many cases, is to expedite a proceeding by eliminating the necessity of formal proof of uncontroverted issues. The operative phrase of the function description is "expedite the proceeding." Since, if indeed a matter is not within the knowledge of the Applicant, he need only so state and explain why; an objection on this ground is unreasonable as well as improper. As Professor Finman points out, objections on the basis of lack of knowledge tend to obfuscate as well as lengthen the proceeding:

> The proper function of objections is to afford relief when it is unreasonable to require that the request be answered. . . . in short, no hearing should be given an objection if the objecting litigant's complaint is one he could adequately assert by answering the request. 71 Yale L. J. 371, 417.

Although denoting many objections as "(4)," its symbol for a lack-of-knowledge objection, Applicant often avoids actually claiming lack of knowledge. For example, Applicant's objection to request 140 on this ground reads:

(4) No Knowledge: The question concerns other systems and is better directed to officials thereof. (emphasis added)

Another example concerns the Department's request 177, which reads:

177. No other electric utility in Michigan's lower peninsula had a 1970 peak load exceeding 50 megawatts, except for subsidiaries of the American Electric Power System.

Applicant's lack-of-knowledge objection to this question states:

(4) No Knowledge: The question relates to the conduct of other systems, would require an independent investigation by the respondent, and is better directed to officials of the referenced systems. (emphasis added)

Impliedly, Applicant asserts that it cannot honestly admit or deny the peak load of any system or systems, other than its own, in Michigan's lower peninsula or elsewhere. If this is indeed the case, would it not be simpler and more expeditious, as well as clearly within the letter and spirit of Section 2.742, for Applicant to merely state that it cannot honestly affirm or deny the request?

Finally, Applicant's answer seems to confuse lack of knowledge with its claim of irrelevance when it says: "Those requests related to events prior to 1960 or to other electric utilities should be denied." (p. 11) This would seem to indicate that the universe of Applicant's knowledge begins on January 1, 1960, and that it has studiously avoided learning anything about its neighbor electric utilities. Of course, if this is the case, all Applicant need do is so state.

OBJECTIONS ON GROUND THAT REQUESTS DEAL WITH CONTROLLING DISPUTED ISSUES

Applicant states an absolute proposition that requests for admission are improper where they constitute a "comprehensive summary" of the plaintiff's case or deal with the central issues in controversy between the parties. For this proposition, Applicant cites Syracuse Broadcasting Corporation v. Newhouse, 271 F.2d 910 (2d Cir. 1959), and Lehmann v. Harner, 31 F.R.D. 303 (D. Md. 1962).

A study of these two cases indicates that the requests there in question are clearly unlike those to which Applicant objects here. In Syracuse, the plaintiff submitted a "compliance document" with appended exhibits. The document enumerated a series of more than 30 acts, and plaintiff claimed each one constituted violation of the antitrust laws. In Lehmann, the defendant objected to the following request:

> That the accident of August 20, 1960, which occurred at approximately 7:00 p.m. in Towson, Maryland, involving Karl E. Lehmann, Elke Lehmann, Rudyer Lehmann, and Uwe L. Lehmann, was caused solely by the negligence of Ernest Luke Harner.

It is doubtful that these cases, given their facts, actually support the validity of an "entire case" objection.

The courts apparently held the form of the requests objectionable. In neither case, however, did the court suggest that comprehensiveness per se made the requests improper. The Department has said that its requests cover substantially the entire case. We submit, however, that there are few, if any,

basic issues of fact in actual controversy in this proceeding; rather, the real issues are what legal conclusions must be drawn from the facts. The relevant matters in controversy herein, as defined by the Board, are whether or not:

(a) applicant has the power to grant or deny access to coordination;

(b) applicant has used this power in an anticompetitive fashion against the smaller utility systems;

(c) applicant's said use of its power has brought into existence a situation inconsistent with the antitrust laws, which would be maintained by activities under the license that applicant seeks. Prehearing Order of August 7, 1962.

To be objectionable as going to the ultimate issue, as Applicant contends, the Department's requests would have to be similar to the following examples in their content or thrust:

1. Applicant, through its substantial monopoly over high-voltage transmission of electricity in Michigan's lower peninsula has the power to grant or deny access to coordination to the Municipal-Cooperative Pool and smaller electric systems, and this gives it the power to expand its share of wholesale and retail electric power supply markets.

2. Applicant has misused this monopoly power by arbitrarily excluding the Municipal-Cooperative Pool and other electric utilities from reserve sharing, coordinated development, and other forms of coordination practiced among electric utilities so as to retain and expand its monopoly position in the wholesale and retail markets.

3. Applicant's monopoly power and misuse thereof constitutes a situation inconsistent with antitrust law and policy, and this situation would be maintained by granting an unconditioned license to operate the Midland units.

Clearly, the Department's requests objected to by Applicant on this ground do not in any way go to these ultimate

issues, but instead seek admissions as to the facts upon which the legal contentions and arguments must be based. Request 95 seeks admission of historical facts, not as Applicant apparently reads it, an admission of monopolization. Whether or not Applicant's arrangements with Detroit Edison give both parties "full access to the benefits of coordination" (Request 116) is strictly a matter of fact and hardly a central issue in the proceeding. The same is true with regard to Applicant's arrangements with Ontario Hydro (Requests 118 & 119) and the companies in Indiana and Illinois (Request 121). Requests 166 and 221 are purely factual; they deal with general principles of electric power supply. And relevant market definition is no more than a matter of fact (Requests 230-235).

And though the requests are extensive and do indeed cover practically the entire case, such is the proper objective of requests for admissions. Professor Finman makes this plain:

> On principle, there is no reason why requests should not "cover the entire case." A comprehensive use of requests may reveal that the primary dispute between the parties is one of law rather than fact and thus facilitate a quick resolution of the controversy. Nor is there any grounds for holding that requests should not relate to "every item of evidence," i.e., to specific propositions probative of the overall contentions in a case. 71 Yale L.J. 371, 402.

The Department's requested admissions are not objectionable on this ground.

CONCLUSION

Applicant has propounded a mass of objections covering nearly every admission requested by the Department, and many of them more than once. It seeks to evade answering --by either admitting, denying, or claiming lack of knowledge-- requested admissions of relevant matters of fact that make up the whole framework of the Department's contemplated showing that the activities under the licenses applied for will maintain a situation inconsistent with the antitrust laws. It would exclude discovery of much relevant information--everything occurring before 1960 or outside lower Michigan. It sees requests for opinions and conclusions of law where none exist. It reads requests technically, seizing upon the least hint of ambiguity. It implies no knowledge of matters occurring before 1960 or beyond its own system and objects on that basis to responding, rather than answering directly that it truthfully cannot admit or deny particular requests. It would limit admissions to peripheral issues of fact and is quick to find central, controlling issues in basic factual requests.

The Department has shown the baseless nature of Applicant's objections. Applicant cannot be permitted thus to avoid our proper discovery and possibly delay this hearing.

It must be required now to come to grips with the facts to be heard by answering the Department's request for admissions.

Respectfully submitted,

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March 22, 1973
Washington, D. C.