UNITED STATES OF AMERICA
BEFORE THE
ATOMIC ENERGY COMMISSION

9-6-73

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

Applicant's Response To
Motion To Limit Discovery And
Issues And For Summary Findings

Pursuant to Sections 2.730(c) and 2.711(a) of the Commission's Rules of Practice, Applicant responds to the "Motion To Limit Discovery and Issues . . . and/or Summary Findings" filed by the Intervenors on August 27, 1973.

A. Motion to Limit Discovery Reargues Issues Raised by Intervenors' Motion of August 16, 1973 and Should Be Denied.

On August 16, 1973, the Intervenors filed a Motion "For an Order Requiring Applicant To State the Facts Expected to Be Proved by Its Outstanding Discovery Requests". The Motion was founded upon the Intervenors' claim that the "issues raised by Applicant . . . do not constitute a defense and are extremely burdensome to try" (p. 2). The Intervenors' instant Motion, in essence, simply reargues these contentions concerning the burden and relevance of Applicant's discovery.

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With regard to burden, Applicant's "Response" of August 16, 1973, makes clear that Applicant is not responsible for the delay or the expansive scope of these proceedings and has made every effort to narrow the scope and expedite the hearing of the issues raised herein. We incorporate the aforementioned Response by reference as fully responsive to the Intervenors' claims that the delay for which they are responsible justifies their ignoring the Appeals Board's order to comply with Applicant's discovery.

The Motion To Limit Discovery also advances the time-worn claim that Applicant's discovery about "profitability" and "costs and revenues" of the municipal-cooperative systems "have no bearing on this case" (p. 6) and are "unnecessary" (p. 11). The municipals have litigated and relitigated this issue in this proceeding and their arguments have been rejected by both this Board and the Appeals Board. In this regard, the Appeals Board held:

> "..[W]hile the discovery allowed by the Licensing Board is obviously quite broad, so too is the scope of issues which may possibly have to be resolved by that Board. In its June 28, 1971 letter recommending an antitrust hearing, the Department of Justice asserted that the applicant might be using its market power to deny to competitors 'participation in coordinated bulk power supply to the extent necessary to maintain their long-term competitive viability' . . . ."

"It is idle, we think, to suggest that the information which the applicant seeks is not possibly relevant and material to the far-ranging issues embraced by the Department of Justice's theory of the case . . . .

"Further, we are disinclined to accept the appellants' [the municipals'] invitation to decide ourselves -- at this preliminary stage of the case and for no purpose other than to settle a discovery controversy -- whether the scope of the inquiry to be made by the Board below is significantly more limited than the Department of Justice (and presumably the intervenor electric systems) would have it.

"Similarly, we see no necessity for us now to pass upon the appellants' [the municipals'] claim that the information sought by the discovery would not assist the applicant's preparation of any valid defense which it might have to the charges made against it by the Department of Justice. Particularly in as complex a case as an antitrust proceeding, it would be clearly inappropriate to pronounce judgment -- prior even to the completion of discovery -- on what may or may not constitute valid defenses.

"In short, all we need consider at this juncture is whether the information sought bears a reasonable relation to defenses the applicant may wish to assert to claims which are being made by one or more of the parties and as to which, if only provisionally, the Licensing Board is permitting the receipt of evidence. As indicated in ALAB-118, we are satisfied that an affirmative answer is required." Decision (ALAB-122), May 16, 1973, pp. 13-15 (footnote omitted) [Emphasis supplied.]

Thus, the Appeals Board has, long ago, laid to rest the Intervenors' contentions that Applicant's discovery has "no bearing" upon this proceeding. We submit that this Board should reject the Intervenors' efforts to relitigate those issues and thus to delay compliance with discovery the Appeals Board has held to be "relevant" to this proceeding.

II. Intervenors' Motion For Summary Judgment Should Be Denied.

In the alternative, the Intervenors move for "summary findings" or judgment contrary to Applicant's interest in this proceeding. The Intervenors argue in their Motion that they "are threatened with long, drawn-out proceedings to relitigate . . . the substance" of the Otter Tail and Gulf States cases (p. 22). Applicant, of course, disagrees with this position and is prepared to demonstrate that the aforementioned cases have little direct bearing upon the instant proceeding -- except possibly in support of Applicant's position.

However, the Motion is defective under summary judgments principles and should be denied at this time. The Appeals Board has recognized that Applicant's defense in this proceeding rests, in part, upon factual showings for which discovery of the municipal and cooperative systems is required. Since there exist extensive disputed issues of fact underlying the movants complex mixed legal and factual allegations, summary findings cannot be made and partial summary judgment cannot be quoted. As the Appeals Board has held, "it would be clearly inappropriate to pronounce judgment -- prior even to the completion of discovery -- on what may or may not constitute valid defenses". ALAB-122, supra, p. 14. 1/

1/ The Supreme Court has often recognized that antitrust cases involving complex fact issues are particularly inappropriate for summary judgment. U.S. v. Diebold, 369 U.S. 654; Paller v. Columbia Broadcasting System, 368 U.S. 464; White Motor Co. v. U.S., 372 U.S. 253.

Even if the Board is not disposed to deny the Motion as ill-founded at this time, the legal and factual issues raised by the Intervenors are too complex to be adequately addressed in the five days established by the rules for response to procedural motions. Further, the Board has requested the parties to discuss such issues in pre-trial briefs to be submitted to the Board prior to the commencement of the hearing. In this brief, Applicant will present thorough legal and factual analysis of the issues set forth by the Board in its order of August 7, 1972 (p. 3), and this pleading will respond in full to the arguments contained in the instant Motion For Summary Finding.

Thus, should the Board decide for any reason not to deny the motion, Applicant requests leave to address such issues (and to respond to the Intervenors' Motion for Summary Findings) in its pre-trial brief.

There is good cause for permitting the requested extention of time. Requiring Applicant to respond at this juncture will divert its energies from review of discovery provided recently by the municipal-cooperative systems and from other activities essential to the timely preparation of its case. Our concern in this regard is particularly acute in light of the substantial diversion already necessitated by the six motions (and as many letters) from the Intervenors and the Department of Justice within the last three

weeks which have required considerable time and attention by counsel and Company officials.

Since Applicant's response to the Motion for Summary Findings will duplicate its pre-trial brief and since requiring such duplication at this juncture will jeopardize Applicant's ability to prepare for hearing by the date established by the Board, Applicant urges the Board to permit it to incorporate its response to the Motion in its pre-trial brief, should the Board not deny the motion.

WHEREFORE, Applicant respectfully urges the Board to deny the Motion To Limit Discovery and to deny the Motion For Summary Finding or alternatively, to extend until the due date of its pre-trial brief the time to respond to the Motion for Summary Finding.

Respectfully submitted,

Wm. Warfield Ross

September 6, 1973

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CERTIFICATE OF SERVICE

I hereby certify that copies of APPLICANT'S RESPONSE TO MOTION TO LIMIT DISCOVERY AND ISSUES AND FOR SUMMARY FINDING, dated September 6, 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 6th day of September, 1973:

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