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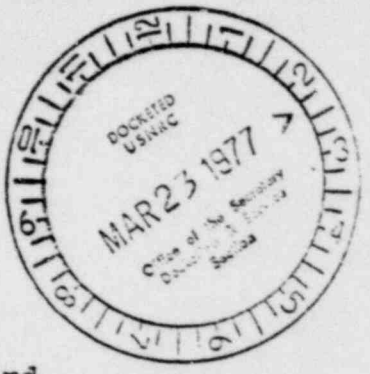

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

RESPONSE OF CONSUMERS POWER COMPANY
TO OBJECTION OF INTERVENORS TO
PRESENTATION OF FURTHER TESTIMONY

On March 13, 1977, Intervenors filed their objections to the presentation by Licensee of the following testimony:

1. David A. Lapinski in response to the testimony of Intervenors' witness Timm on the effects of a Midland delay on system reliability and the cost of replacement power for Midland;

2. Walter R. Boris on Consumers Power Company's financing of the Midland project;

3. Robert P. Wilkinson on the projected cost of coal;

4. Daniel M. Noble, Jerry F. Holwerda, Frederick W. Buckman and James R. Schepers on the future generating capability of the Palisades plant;

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5. Dr. Howard Cook of M.A.C., Inc., an outside consultant on the validity of Consumers Power Company's probability encoding methodology for use in load forecasting and on the validity of its results;

6. R. J. Ringlee of Power Technology, Inc., an outside consultant, responding to witness Timm's testimony on the validity of Consumers Power Company's capacity planning methodology and its Loss of Load Probability criterion, and on the availability of purchase power;

7. Richard F. Brzezinski on the cost comparison of Dow's generating alternatives; and

8. Gordon L. Heins on energy sales to interconnected entities, such as the City of Lansing, and how such sales are accounted for.

This testimony was filed by Licensee on March 2, 1977, along with a motion in support of its presentation as required by an oral order of this Board at Tr. 3856-3857.

With regard to the legal principles that govern the presentation of additional testimony (either rebuttal or direct), Intervenors have not disputed Licensee's propositions that:

> (1) Rebuttal testimony is admissible as a matter of right, and not subject to discretionary exclusion, U.S. v. Montgomery, 126 F.2d 151, 153 (3rd Cir., 1942), cert. denied, 316 U.S. 681 (1942); 6 Wigmore, Evidence § 1873, p. 678 (Chadbourne rev., 1976); and

(2) Relevant evidence may only be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Federal Rules of Evidence, Rule 403.

Instead, Intervenors argue that the Board should not admit the testimony submitted by Licensee because it is (1) cumulative or repetitive and/or (2) the evidence could have been prepared earlier and thus, good cause cannot be shown for filing the testimony at this point in the proceeding.* Intervenors' Objection pp. 2-3. The first argument presents a factual question which must be decided by the Board, based on the content of the submissions. With regard to the second argument, such a standard is obviously not applicable to rebuttal testimony, and as to the additional direct testimony, a party is certainly not required to put in all the evidence it possesses on any particular point at the beginning of a case. This is especially true where, as in the instant proceeding, there was no establishment of what issues were in dispute, other than general guidance by the Commission, until cross-examination had begun. Prevailing standards of trial procedure allow presentations by additional witnesses

*Licensee has responded to Intervenors' allegations of collusion regarding the Wilkinson and Feld testimony in its Opposition to Consolidation (3/18/77), and will not repeat that discussion here.

to clear up obscurity or to emphasize a disputed point upon which substantial contest had not been anticipated. 6 Wigmore, Evidence § 1873, p. 678 (Chadbourne rev., 1976). The fact that Licensee may have had additional information on a matter when testimony was initially filed (November 5, 1976), does not support the exclusion of the additional testimony now offered on that subject.

Intervenors apparently misconceive the testimony of Messrs. Brzezinski, Boris, Wilkinson and Noble as not in the nature of rebuttal since the Board has allowed Intervenors' prospective witness Timm to review it. However, Licensee otherwise explained the distinction between this testimony and that of Messrs. Ringlee, Lapinski and Cook in distributing it on March 2, 1977. The former was provided to Intervenors at the hearing, prior to the Board's order restricting Dr. Timm's access to rebuttal testimony.*

Licensee responds to Intervenors' factual assertions as to the content of the testimony as follows:

1. The testimony of David A. Lapinski is proper rebuttal to Dr. Timm. The entire presentation is focused on the analysis, methodology and assumptions set forth in Dr. Timm's testimony. The fact that some of the issues may have been the subject of redirect cannot be used as a basis

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*The Licensee did provide Dr. Timm with a copy of Mr. Heins' testimony even though it does serve as rebuttal because it was in direct response to the Board's questions to the staff.

to exclude rebuttal on those subjects. 6 Wigmore, Evidence § 1873 p. 679 (Chadbourne rev., 1976). Nor is the fact that Mr. Heins had read Dr. Timm's testimony prior to his redirect a basis for excluding Mr. Lapinski's testimony since Heins' redirect discussed his own assumptions and not those of Dr. Timm.

2. The testimony of Walter R. Boris is both proper rebuttal to Dr. Timm and proper additional direct. Intervenors' first objection that the testimony responds to "one sentence" of the Timm testimony is incorrect. See pp. 22, 34, 87 and 88 of the Timm testimony. Intervenors' second objection that the testimony is cumulative because the substance of the Boris testimony is contained in Licensee's interrogatory answers and these answers are "already in the record", is based on a misinterpretation of evidentiary rules. Rule 33 of the Federal Rules of Civil Procedure states that answers to interrogatories may only be used to the extent permitted by the rules of evidence. As such, they are not pleadings; they cannot be relied upon in ultimate findings unless introduced into evidence, and they cannot be introduced into evidence by the answering party without the opportunity for cross-examination. 4 Moore's Federal Practice § 33.29, pp. 33-158 and 33-173. Intervenors' final objection that Licensee had prior knowledge of the substance of the testimony is also unpersuasive. Even assuming the proposition to be true,

policy considerations favor admissibility of the evidence in order to achieve a complete exploration of the facts. 10 Moore's Federal Practice § 403.13. This policy is particularly relevant in the instant proceeding because the issue was raised by Intervenors' cross-examination, and Mr. Boris was then identified as the appropriate person to address it. Tr. 1327. Importantly, Intervenors never provide authority for the proposition, employed numerous times in their objections, that evidence may not be later admitted if its substance was within the knowledge of the parties at the commencement of the direct case. Licensee knows of no support for such a "standard", and, in view of other authority cited herein, does not consider it at all persuasive.

3. The testimony of Mr. Wilkinson is also proper rebuttal. Intervenors' objection to it includes no response to Licensee's previous characterization of the testimony as rebuttal to the testimony of Staff witness, Sidney Feld. Based on this omission alone, the Board should allow presentation of the Wilkinson testimony. Also, the standard of "previous availability" relied upon by Intervenors is simply not applicable. See discussion in No. 2, above.

4. The testimony of Messrs. Noble, Holwerda, Buckman and Schepers (Noble, et al) is objected to on the ground that there is already sufficient information in the record on these issues for the Board to make a judgment.

This position is blatantly inconsistent with Intervenors' successful attempts, over Licensee's objections, to extensively question Mr. Heins on the technical bases for his planning decisions. Tr. 1668-1673, 1675-1684, 1693-1699, 1838-1841 and 1849-1858. Mr. Heins testified that he had in part relied on Mr. Noble's technical judgment in forming these decisions. Tr. 1677. Thus, as the record now stands, Intervenors' position is in the record, and if the presentation of the testimony of Mr. Noble, et al is not allowed, the record will remain incomplete, i.e., with only Intervenors' point of view stated, a result which would be inequitable. It is also important to note that the testimony serves to rebut that of Dr. Timm (pp. 29-32), a point conveniently ignored in Intervenors' objections.

5. Intervenors pose a number of objections to the testimony of Dr. Howard Cook. The first is that it is repetitive of the Heins and Mosely testimony, and is cumulative. This is a mischaracterization of its substance, as Messrs. Mosely and Heins testified as to how the probability encoding technique was used by Licensee and Dr. Cook will testify more generally to the validity of this method of analysis, a subject not discussed by either Mosely or Heins, but brought up by the Board in its questioning of Dr. Feld. Tr. 4471-4474.

Intervenors' other objection is that probability encoding became an issue when the Heins testimony was tendered and Licensee knew of its use at that time. Again, Licensee's prior knowledge is not a basis to deny presentation of the testimony. See discussions under No. 2. As to whether probability encoding became an issue when the Heins testimony was submitted, it should be noted that probability encoding was only one of the methods used in determining Licensee's forecast and, as such, the mere filing of testimony could not make that specific point an issue in this proceeding.

Finally, Intervenors ignore the fact that the testimony of Dr. Timm discusses the validity of probability encoding as a forecasting technique (pp. 50(a)-50(c)), and therefore the Cook testimony is proper rebuttal.

6. Intervenors' principal objection to the testimony of Dr. Ringlee is that it is not new information since it concentrates on Dr. Timm's analysis which purportedly relies on information known to Licensee at the time testimony was originally filed. As previously discussed, prior availability is irrelevant and it is certainly not a valid objection to rebuttal testimony. In addition, the information is actually new, as Dr. Timm has used Licensee's data and changed certain assumptions, necessitating further calculations to reach his own conclusions. Dr. Ringlee has analyzed those changed assumptions and resulting calculations, and described where they are in error. This analysis is properly presented in rebuttal testimony.

7. Intervenors' objection to the testimony of Richard F. Brzezinski is based on the fact that it is rebuttal to testimony by Dow personnel, who Intervenors allege are Licensee's witnesses. Mr. Temple was in fact originally sponsored by Licensee, but that was prior to the time the Board ordered Dow to participate as a full party. Mr. Orrefice testified pursuant to Intervenors' request and was tendered and sponsored solely by Dow. Mr. Brzezinski's testimony also serves to rebut Dr. Timm's independent analysis of alternatives to the Midland facility (pp. 83-89).

8. Intervenors object to the Heins testimony on the ground that he previously testified about Licensee's relationships with the municipalities and the cooperatives. Again, this is not a valid objection to rebuttal testimony. See discussions under No. 2. Intervenors also ignore the fact that this subject was brought out by the Board in its questioning of Staff witness Feld, after Heins had completed his original testimony. Tr. 4477-4480, 4489-4490. Thus, the Board must allow the testimony of Mr. Heins to clarify the record.

The only remaining question raised by Intervenors is whether the receipt of this testimony is in general prejudicial to the parties. Intervenors assert prejudice, but offer no concrete examples, and indeed cannot, since all the testimony relates directly either to the testimony of

Dr. Timm, questions by the Board, or areas covered by Intervenors' own cross-examination. Indeed, Intervenors' main objection appears to be that they lack finances. As discussed in Licensee's original motion and memorandum in support of the testimony, evidence should not be excluded because of time considerations (at p. 6), and this certainly holds true where the time considerations are only those of one party. Moreover, it is inequitable for Intervenors to be allowed to raise issues in their direct testimony or in cross-examination and then request that the record be closed without allowing the other parties to respond. Such a prohibition would be prejudicial -- not to Intervenors -- but to Licensee.

Based on the foregoing, Licensee respectfully requests that it be permitted to present the testimony of Messrs. Lapinski, Boris, Wilkinson, Noble, et al, Cook, Ringlee, Brzezinski and Heins.

Respectfully submitted,

David J. Rosso

R. Rex Renfrow III

Caryl A. Bartelman

CERTIFICATE OF SERVICE

Roseann Farina, being first duly sworn on oath, deposes and states that she caused copies of the foregoing Response of Consumers Power Company to Objection of Intervenors to Presentation of Further Testimony to be hand delivered to Messrs. Coufal, Luebke, Venn Leeds, Brenner, Nute and Cherry at their respective addresses on March 21, 1977:

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Roseann Farina

Subscribed and sworn to
before me this 21st day
of March, 1977

Margaret Russo
Notary Public

CERTIFICATE OF SERVICE

Roseann Farina, being first duly sworn on oath, deposes and states that she caused copies of the foregoing Response of Consumers Power Company to Objection of Intervenors to Presentation of Further Testimony to be mailed to the appropriate parties in this proceeding from the mail chute at One First National Plaza, Chicago, Illinois on March 21, 1977.

Roseann Farina

Subscribed and sworn to
before me this 21st day of
March, 1977

Margaret Russo
Notary Public