UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

2/3/78

In the Matter of

Consumers Power Company) Docket Nos. 50-329A
(Midland Plant, Units 1 and 2)) 50-330A

RESPONSE OF MUNIS/CO-OPS TO COMMENTS OF CONSUMERS POWER COMPANY

Consumers Power Company ("Consumers Power") favors immediate review of ALAB-452. In accordance with the Commission's January 13, 1978 Order, Munis/Co-ops respond:

1. Consumers Power Company states (Comments, pp. 1-2):

> "Since 1970, numerous legal and policy issues have arisen concerning the Commission's responsibilities under section 105(c). . . .Immediate review of ALAB-452 will help alleviate the present uncertainty about the Commission's antitrust authority and responsibility which currently prevails."

Consumers Power has chosen to litigate virtually every legal and policy issue relating to the Commission's antitrust jurisdiction. There is little uncertainty concerning the Commission's statutory "responsibilities"; there is litigation over how they will be applied. 1/

THIS DOCUMENT CONTAINS
POOR QUALITY PAGES

1/ In the second pre-hearing conference, back in October of 1972, counsel for Consumers Power Company noted:

> "It may be helpful to the Board to keep in mind that we do have a fairly significant event hanging over this proceeding, which is the possibility of a decision of the Supreme Court in two cases, particularly the Otter Tail case now pending before them, which could have a definite bearing on the state of the law which would control, in part at least, the issues being raised by the Intervenors and the Department of Justice." (Tr. 103-104).

The first case was Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); the second was Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973). Consumers Power Company was correct that the cases are "significant" to this proceeding. It appears not to have noticed that the cases were decided contrary to the Company's positions.

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2. Consumers Power Company states (Comments, p. 3):

> "Deferral of review would needlessly waste not only administrative resources but also the resources of lower Michigan's rate-payers. The Company and the intervenors herein are electric utilities whose costs--including legal expenses to pursue the instant litigation--are borne by their customers."

To be blunt, immediate review would likely do no more than string out the litigation process, delay effective relief and militate against any realistic hopes of settlement. It will not likely result in faster resolution of issues. The Midland plants have been "grandfathered" so that construction could commence concurrently with antitrust review. Thus, there has been little incentive for Consumers Power to reach reasonable agreement. With regard to the cost of litigation, Munis/Co-ops can assure the Commission that such costs are of greater concern to them than to Consumers Power Company. Indeed, according to its counsel, Consumers Power has spent over $1 million on this litigation, which well illustrates the practical problems by smaller entities litigating against large companies. See Attachment A. Piecemeal litigation will only add to the burden.

3. Consumers Power Company states (Comments, p. 4), review is necessary because "many utilities will be making final 'go or no go' decisions whether to proceed with construction of presently-deferred nuclear units. . ." What Consumers Power appears to be saying is that if it actively pursues its antitrust jurisdiction, the Commission could deter applicants from investing in nuclear units. Considering that the purpose of section 105 of the Atomic Energy Act, 42 U.S.C. §2135, is to provide for meaningful application of antitrust principles to licensees in connection with their licensed activities, this is a strange statement. Is Consumers Power saying that utilities will not construct plants if they are forced to obey the law? We note

that this implicit threat that effective exercise of the Commission's antitrust jurisdiction will delay or prevent plant construction seems to be shared by only a handful of utilities, since most have settled their antitrust obligations.

4. Consumers Power Company states (Comments, p. 5) that immediate review of the findings of the Appeal Board "besmirch" its good name. The Appeal Board decision speaks for itself. If it does not have persuasiveness, Consumers Power need not worry. However, Munis/Co-ops suggest that Consumers Power's concern is that the decision _is_ convincing. In that event, there is nothing that can eliminate its persuasiveness. Finally, Consumers Power has made a complete record for all to make whatever judgments they choose concerning its good name. If the Commission desires to pursue the question of Consumers Power's "good name" at this time, in addition to the Appeal Board's decision, it might peruse the documents and deposition material attached to Munis/Co-ops' "Motion to Limit Discovery and Issues and Alternatively For Summary Finding Requiring Imposition of License Conditions," filed August 28, 1973 in this docket. Among those documents is one document expressing that "[t]he first goal of our Marketing activities or program concerning other utilities in our service area, is, of course, to acquire these systems" (Appendix H), and another, stating the Company's "expressed goal to eliminate the possible participation of undesirable third parties" from the Michigan Power Pool. (Appendix G).

Ultimately, whether it will review ALAB-452 is a matter for Commission judgment. However, a reading of the decision itself demonstrates it is likely to withstand review. Although Munis/Co-ops have always believed that the issues were much less complicated than

Consumers Power would make them appear, Consumers Power's motion would imply that the issues are many, broad and complicated. In this context, intermediate or premature review would not appear to be called for for the reasons expressed in the Comments of Munis/Co-ops, the Department of Justice, the Nuclear Regulatory Commission Staff pleadings and for the reasons discussed by the Commission, as well, in its brief to the United States Court of Appeals in Central Power & Light Company v. Nuclear Regulatory Commission and United States of America, CADC No. 77-1464, et al. (January 20, 1978).

Respectfully submitted,

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February 3, 1978

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Consumers Power in Effect Is Told to Sell A Part of Nuclear Plant to Competitors

By JERRY LANDAUER
Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON—In a ruling that seems sure to send shock waves through the electric utility industry, a federal appeal board in effect commanded Consumers Power Co. to sell part of the company's huge nuclear power plant in Midland, Mich., to small utilities nearby.

This determination was issued quietly at the beginning of the holiday weekend by the Nuclear Regulatory Commission's Atomic Safety and Licensing Appeal Board. It is based on findings by the three-member board that Consumers Power violated antitrust laws, particularly in dealings with two electric cooperatives in Michigan and five municipally owned power systems. The unanimous finding also could severely handicap the company in defending against anticipated antitrust suits.

Consumers Power received permission in September to continue work on the partly built facility, slated for completion in 1982, but the unit still faces a number of challenges before it can begin operating. That decision came after several hearings to decide whether construction should be halted. The cost of the plant has soared to $1.67 billion from an initial target of $350 million.

Besides generating electricity for the utility's customers, the plant also is supposed to produce large amounts of processed steam. Dow Chemical Co. has contracts to purchase the steam for use at its giant complex near Midland.

The appeal board's most recent opinion constitutes the first appellate-level interpretation of what Congress meant in 1970 when it gave the Nuclear Regulatory Commission board authority to impose antitrust conditions on government licenses to build nuclear power plants. Congress acted to authorize antitrust restraints because lawmakers, such as former Sen. George Aiken (R., Vt.), feared that nuclear technology—most of it taxpayer-financed—could foster monopoly control of the electric-power industry.

Because the Consumers Power case could become a precedent for other cases referred by lower-level licensing panels, appeal board member Richard S. Salzman wrote an inch-thick opinion replete with 137 footnotes. William Warfield Ross, the lead lawyer for Consumers Power, labeled the opinion "very extreme" and said he is considering all possible ways to reverse it.

The Consumers Power attorney wouldn't speculate on his chances of success, but some other observers doubt whether the regulatory commission or the federal courts will overturn the appeal board: Consumers Power already has spent $1 million or more to litigate the licensing case, which began in 1972.

As Mr. Ross sees it, the appeal board strayed far beyond Congress's intent. Its opinion is a "smashing defeat," he said, for Consumers Power and for many other utilities that are building or planning nuclear reactors.

"This opinion mandates access by any utility in the U.S., no matter what its size, to the benefits of nuclear power," Mr. Ross complained. [illegible] in the U.S. is going to have to let in anyone else who isn't able to build his own power reactor."

What's more, Mr. Ross said, "this decision greatly favors the subsidized portion of the industry, the co-ops and municipals. It will help them to thrive in competition with the nonsubsidized, taxpaying portions of the industry."

Actually, the appeal board didn't specify what Consumers Power must do to remedy the finding of antitrust violations. In part because the hearing record is out of date and in part because the utility has changed its position about selling an ownership interest in the trouble-plagued $1.7 billion Midland plant, the appeal panel instructed a licensing board to reopen the record and thereafter to fashion specific antitrust remedies. But though the appeal board didn't issue specific instructions, Mr. Ross said "one of the conditions almost certainly would be to sell part of the plant."

In fashioning antitrust remedies, the appeal panel wrote toward the close of its 432-page opinion, the licensing board shouldn't seek to "restructure" the electric utility industry. But it added:

"We believe that no type of license condition—be it a requirement for wheeling, coordination, unit power access, or sale of an interest in [illegible]—is necessarily foreclosed [illegible] of relief."

Wh[illegible] to the use of one utility's lines to transmit electricity from outside sources to another utility; Consumers Power's alleged refusal to wheel for smaller competitors is among the antitrust violations cited by the appeal board. Assertedly, too, as the Justice Department argues and as the appeal board found, Consumers illegally refused to "coordinate" the exchange of power with certain small utilities that are "landlocked" within Consumers' service area.

"These actions by Consumers have effectively prevented the small systems—Consumers' competitors in many instances—from turning to the most economical sources and making the most efficient uses of base load power," Mr. Salzman's lengthy opinion concluded.

"The result is to give Consumers a competitive edge over the small utilities—an edge attributable to its exercise of monopoly power, rather than its efficient operations.

"Now Consumers wishes to increase its efficiency by installing large nuclear-powered generating units. Manifestly this will exacerbate the anticompetitive situation . . . the tremendous costs of developing the technology underlying nuclear plants was borne by the Treasury . . . and Congress didn't intend that public expenditure to benefit only the few . . . but unless we step in that is precisely what will happen in this case."

Ironically, the appeal board suggestions that Consumers must sell part of the Midland plant may no longer be especially onerous for the big utility.

To the lower-level licensing board, which declined to impose antitrust restrictions on use of the plant, Consumers has argued that [illegible] contrary to the public interest, besides costing the company as much as $140 million.

More recently, though, as a spokesman confirmed, Consumers appears willing to sell, perhaps because of financing problems in completing the plant. According to the appeal board, Consumers is now "actively negotiating" the possible sale of a 12% ownership interest to the two cooperatives in Michigan that have been fighting the big utility for years.

Justice Agency Urges ICC to Postpone Rise In Intercity Bus Fares

By a WALL STREET JOURNAL *Staff Reporter*

WASHINGTON—The Justice Department urged the Interstate Commerce Commission to postpone a 10% increase in intercity bus fares scheduled to take effect this Friday.

The department's Antitrust Division said the fare boost, the seventh in the past three years, should be suspended until the ICC completes an investigation of the bus industry and its performance.

The fare increase has been sought by the National Bus Traffic Association, the rate-setting organization for the intercity bus industry, which contends the industry is in perilous financial condition. In comments with the ICC, the Antitrust Division acknowledged that bus ridership has declined, but it also contended the ICC lacks adequate information about the industry and its revenue needs to determine whether higher rates are justified.

The division also criticized ICC approval of joint rate-making in the bus industry through the National Bus Traffic Association because, it said, revenues of Greyhound Corp.'s Greyhound Lines Inc. and Continental Trailways Inc., a Holiday Inns Inc. unit, account for more than 80% of industry revenues. The rate bureau system, the division said, allows financially sound bus companies to be lumped with less efficient concerns, which may distort the actual economic condition of the bus industry.

The Council on Wage and Price Stability previously had opposed the increase.

Duke Power Receives Permit

CHARLOTTE, N.C.(AP) — Duke Power Co. has received a construction permit from the Nuclear Regulatory Commission for its proposed $2.5 billion Cherokee nuclear station, a spokesman for the utility said.

The final permit was issued Friday upon approval by the NRC's Atomic Safety and Licensing Board, according to a Duke Power spokesman.

The three-unit facility will be built on the Board River 10 miles southeast of Gaffney in the western part of the state.

Duke received a limited work authorization from the board in May 1976 and limited site work has been under way since. But actual construction of the plant has been delayed pending final NRC approval of the construction permit.

The first of the three 1,280,000-kilowatt units is scheduled to begin operation in the mid-1980s, with completion of the other two

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served the foregoing RESPONSE OF MUNIS/CO-OPS TO COMMENTS OF CONSUMERS POWER COMPANY, by deposit in the United States mail, upon the following persons:

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Dated at Washington, D.C., this 3rd day of February, 1978.

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