AUG 7 1972

50-269

ANTI-TRUST

FINDINGS PURSUANT TO SECTION 105c (8) OF THE ATOMIC ENERGY ACT OF 1954, AS AMENDED

After consultation with the Attorney-General, and upon determination that such action is necessary in the public interest to avoid unnecessary delay, I have determined with regard to the following applications that pursuant to Section 105c (8) of the Atomic Energy Act of 1954, as amended, construction permits or operating licenses, as appropriate, may be issued in advance of consideration of, and findings with respect to, antitrust matters:

Operating License Applicants

Docket	Applicant	Facility
✓50-269 50-270 50-287	Duke Power Company	Oconee 1, 2, and 3
50-293	Boston Edison Company	Pilgrim

Construction Permit Applicants

Docket	Applicant	Facility
50-329 50-330	Consumers Power Company	Midland 1 and 2
50-346	Toledo Edison Company	Davis-Besse
50-361 50-362	Southern California Edison Company	San Onofre 2 and 3
50-363	Jersey Central Power and Light Company	Forked River 1

ANTI-TRUST

OFFICE ▶						
SURNAME ▶						
DATE ▶						

The Director of Licensing shall place in construction permits or operating licenses so issued, such appropriate conditions as to assure that any subsequent findings and orders of the Commission with respect to antitrust matters will be given full force and effect.

(signed) L. Manning Muntzing

L. Manning Muntzing
Director of Regulation

cc: Director of Licensing

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OFFICE ▶	L:OAI	OGC	L:OAI	DDL	DL	DR
SURNAME ▶	JSaltzman:cd		ABraitman	ECase	JO'Leary	LMMuntzing
DATE ▶	7/31/72	8-1-72	8/2/72			8/4/72

Docket No. 50-269

AUG 7 1972

ANTI-TRUST

FINDINGS PURSUANT TO SECTION 105c (8) OF THE ATOMIC ENERGY ACT OF 1954, AS AMENDED

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ANTI-TRUST

The Director of Licensing shall place in construction permits or operating licenses so issued, such appropriate conditions as to assure that any subsequent findings and orders of the Commission with respect to antitrust matters will be given full force and effect.

(signed) L. Manning Muntzing

L. Manning Muntzing
Director of Regulation

cc: Director of Licensing

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L:OAI File

OFFICE ▶	L:OAI	OGC	L:OAI	DDL	DL	DR
SURNAME ▶	JSaltzman:cd		ABraitman	ECase	JO'Leary	LMuntzing
DATE ▶	7/31/72	8-1-72	8/2/72			8/4/72

UNITED STATES
ATOMIC ENERGY COMMISSION
WASHINGTON, D.C. 20545

AUG 7 1972

FINDINGS PURSUANT TO SECTION 105c (8) OF THE ATOMIC ENERGY ACT OF 1954, AS AMENDED

After consultation with the Attorney-General, and upon determination that such action is necessary in the public interest to avoid unnecessary delay, I have determined with regard to the following applications that pursuant to Section 105c (8) of the Atomic Energy Act of 1954, as amended, construction permits or operating licenses, as appropriate, may be issued in advance of consideration of, and findings with respect to, antitrust matters:

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50-363	Jersey Central Power and Light Company	Forked River 1

The Director of Licensing shall place in construction permits or operating licenses so issued, such appropriate conditions as to assure that any subsequent findings and orders of the Commission with respect to antitrust matters will be given full force and effect.

L. Manning Muntzing
Director of Regulation

cc: Director of Licensing

UNITED STATES
ATOMIC ENERGY COMMISSION
WASHINGTON, D.C. 20545

September 8, 1971

Files

ANTI-TRUST

FEDERAL REGISTER NOTICE

Description: DOCKET NOS. 50-269A, 50-270A, and 50-287A, DUKE POWER CO., Notice of Receipt of Advice and Time for Filing of Petitions to Intervene on Antitrust Matters

Citation: 36 F.R. 17883

Date Filed: September 3, 1971

Date Published: September 4, 1971

Action Date: October 5, 1971 (30 days after publication)

Nancy Lee Dube/mjk

Nancy Lee Dube
Division of Reactor Licensing

cc: NBrown, RL
Chrono File, RL

A.T.

UNITED STATES
ATOMIC ENERGY COMMISSION
WASHINGTON, D.C. 20545

AUG 3 1 1971

ANTI-TRUST

Director
Office of the Federal Register
National Archives & Records Service
Washington, D. C. 20408

Dear Sir:

Attached for publication in the Federal Register are an original and two certified copies of a document entitled:

DUKE POWER COMPANY

Docket Nos. 50-269A, 50-270A, and 50-287A

NOTICE OF RECEIPT OF ATTORNEY GENERAL'S ADVICE AND TIME FOR FILING OF PETITIONS TO INTERVENE ON ANTITRUST MATTERS

(with attachment)

Publication of the above document at the earliest possible date would be appreciated.

Sincerely yours,

W. B. McCool
Secretary of the Commission

Enclosures:
Original and 2
certified copies

bcc: Docket Clerk (Dir. of Reg.)
Public Information
Robert Liedquist, OGC
Abraham Braitman, SLR
Congressional Liaison
Joseph J. Saunders,
Dept. of Justice
Public Proceedings Branch (SECY)
DC Files (SECY)
GT Files (SECY)

ATOMIC ENERGY COMMISSION

DOCKET NOS. 50-269A, 50-270A, and 50-287A

DUKE POWER COMPANY

NOTICE OF RECEIPT OF ATTORNEY GENERAL'S ADVICE AND TIME FOR FILING OF PETITIONS TO INTERVENE ON ANTITRUST MATTERS

The Commission has received, pursuant to section 105c. of the Atomic Energy Act of 1954, as amended (the Act), a letter of advice from the Attorney General of the United States, dated August 2, 1971, a copy of which is attached as Appendix A.

Any person whose interest may be affected by this proceeding may, pursuant to section 2.714 of the Commission's "Rules of Practice," 10 CFR Part 2, file a petition for leave to intervene and request a hearing on the antitrust aspects of the application. Petitions for leave to intervene and requests for hearing shall be filed within thirty (30) days after publication of this notice in the FEDERAL REGISTER.

FOR THE ATOMIC ENERGY COMMISSION

Lyall Johnson, Director
Division of State and Licensee Relations

APPENDIX "A"

DUKE POWER COMPANY
OCONEE UNITS 1, 2 AND 3
Docket Nos. 50-269, 50-270 and 50-287

You have requested our advice pursuant to the provisions of Section 105 of the Atomic Energy Act of 1954, 68 Stat. 919, 42 U.S.C. 2011-2296 as recently amended by P.L. 91-560, 84 Stat. 1472 (December 19, 1970), in regard to the above cited application.

Applicant

Applicant is one of the major electric utilities in the eastern United States. I am advised that its electric system serves the Piedmont Carolinas, in an area about 100 miles wide and 260 miles long, extending from Virginia on the northeast to Georgia on the southwest, having a total area of about 20,000 square miles and serving a population of about 3,300,000. Its total assets as of December 31, 1970 exceeded $1 3/4 billion. Its electric operating revenues for 1970 were $386,138,000. Its total utility plant exceeded $2 billion before depreciation and its net utility plant was $1,628,677,000. In 1970 it had a total generating capacity of 6,743,789 kw consisting of about 5,650,000 kw of steam capacity, 860,000 kw of hydro-electric generating capacity and relatively smaller amounts of gas turbine capacity and internal combustion capacity. Its 1970 system peak demand was 6,284,000 kw. Of this, approximately 700,000 kw was supplied to 58 independent distribution systems serving at retail in the general area described above.

Duke's many generating stations are integrated into a single bulk power supply system by a high voltage transmission network which includes 1,535 circuit miles of 230 kv, 5,130 circuit miles of 100 kv, and 2,591 circuit miles of 44 kv. Its total high voltage transmission as of December 31, 1970 was 9,481 circuit miles. It is also vertically integrated, distributing electric power at retail throughout most of this area. It presently operates over 43,000 pole miles of distribution lines.

Duke's bulk power supply system is further interconnected and coordinated with other major systems on its periphery. These include high voltage ties to the American Electric Power System through Appalachian Power Company on its north, to Carolina Power and Light on the east, to South Carolina Electric and Gas on the south, and to the Southern System on the southwest through Georgia Power Company, and also ties with projects of the Southeastern Power Administration on the Savannah River. It is also interconnected with Yadkin, Inc., an industrial power supply.

History and Structure

Duke's early base was in the development of water powers on the Catawba and Wateree Rivers which are in the Santee Basin in the Carolinas. It soon added steam generation which it integrated with its hydro generation by high voltage transmission lines. Its evolution can be traced through a series of amalgamations and purchases which had the effect of providing it control over many of the water powers in the area. At about the same time a similar company called Southern Public Utilities Company was developing along parallel lines but operating extensive retail distribution properties, and the interests of these companies were first closely associated and then completely joined.

Duke now owns or controls substantially all the water powers in its area. Since Duke owns virtually all of the water power projects on economically attractive sites in its area, other electric entities seeking entry into bulk power supply cannot resort to hydro-electric production which can be economically developed as isolated projects not requiring interconnection with other generating sources.

Duke also owns and controls all high voltage transmission in the area, and owns or controls substantially all thermal generation in the same area. Hence, it has the market power to grant or deny access to coordination which is essential for a competitive thermal bulk power supply

in today's power economy. This is spelled out in some detail in our letter of June 28, 1971 regarding Consumers Power Co.

Anticompetitive Conduct

From almost its inception, Southern Power Company's and Duke's contracts contained market allocations which allocated larger customers to Duke. Duke claims these allocations never resulted in precluding its purchasers in bulk from selling to any customer, and in November 1964, removed the provisions from all its rates schedules filed with the Federal Power Commission, see Docket No. E-7122, 30 FPC 524, 32 FPC 594 (1964) and 32 FPC 1253. Shortly thereafter, on January 1, 1965 Duke filed changed rate schedules modifying its rate design, with the possible effect of perpetuating the market allocation effected by the earlier provisions. Wholesale customers of Duke are now making substantially this claim to the Federal Power Commission, Before the Federal Power Commission Docket No. E-7557. Duke denies that its wholesale rate design has this effect or was instituted with this intent.

While its earlier rates schedules had other features which may have been anticompetitive, its present schedules contain a feature of ratcheted demand, which could serve effectively to discourage installation of thermal generating capacity by its wholesale customers. Lack of any provision for reserve sharing could also serve to discourage entry into self generation.

Duke claims it has never refused a proposal to coordinate. On the other hand, it takes the somewhat conflicting position that should it coordinate with any actual or potential competitor, its survival would be threatened because of the tax and financing advantages enjoyed by many of the smaller systems in its area which are municipally owned, or which are borrowers from the Rural Electrification Administration. At present it refuses to coordinate its nuclear generation expansion program with nine municipalities, proposed interveners herein, which wish to participate in that program by purchasing an interest in or power supply from the Oconee units. Such a purchase could serve to give them ownership and hence control over a portion of their bulk power supply costs.

A group entitled Electric Power In Carolinas (EPIC) which is proposed and under study by a number of municipals and cooperatives in the Carolinas also desires to coordinate

its power supply plans and operations with those of Duke. Duke spokesmen have reportedly stated publicly that they would oppose Duke's interconnecting its system with EPIC for the joint meeting of emergency load needs as it does with other electric systems. There were indications that Duke might utilize its substantial resources in a legislative campaign and before regulatory and judicial tribunals to frustrate EPIC's entry into the power business. Evidence available to us tends to indicate that on occasion Duke has bluntly warned North Carolina municipal electric systems that the efforts and funds that the latter could expend in seeking relief before regulatory agencies would be overwhelmed by Duke's resources and resistance.

An electric power system's refusals to deal and its dealing on discriminatory terms with its retail competitors is conduct that may well fall within the purview of Section 2 of the Sherman Act as discussed in greater detail in our recent letters to you on the applications of Virginia Electric and Power Company (AEC Docket Nos. 50-338A and 50-339A) and Southern California Edison Company (AEC Docket Nos. 50-361-A and 50-362-A). 1/

Conclusion

As a result of the foregoing, we concluded that the facts revealed by our preliminary study of the instant application indicate substantial questions regarding the applicant's activities and probable activities under the license which would need to be resolved by a hearing before your Commission. When we informed Duke that our advice to the Commission would be to this effect, Duke, although denying that its conduct had contravened antitrust principles,

---

1/ Applicant's conduct of consistently opposing applications of other utilities for project licenses and its alleged threats to engage in extensive litigation to block such projects could with evidence of other conduct constitute proof of intent to unlawfully monopolize even if much of the former conduct is itself protected from prosecution by the First Amendment. United Mine Workers of America v. Pennington et al., 381 U.S. 657, 670 fn. 3 (1964). A pattern of vexatious litigation may form part of conduct proscribed by the antitrust laws. See Trucking Unlimited v. California Motor Transport Co., 432 F.2d 755 (CA 9, 1970) cert. granted June 7, 1971.

represented to us that it will henceforth hold itself out to interconnect and coordinate with EPIC and any other entities where the possibilities for interconnection and coordination exist. However, this undertaking does not include all the kinds of coordination which Duke has heretofore carried out with other electric systems in the Southeast. It would exclude joint ownership of Oconee units and unit power sales from Oconee on terms under which unit power sales are normally made in the electric power industry, namely, at the cost of new power supply. While Duke has made power sales from new units at new unit costs in the past, it now advises that it has changed its policy in this regard. The fact that this change in policy comes at a time when small systems are pressing for coordination with Duke may itself have anticompetitive implications.

We therefore recommend that a hearing be held to determine whether the licensee's proposed activities under the license will create or maintain a situation inconsistent with the policies of the antitrust laws.

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Docket Nos. 50-269A
-270A
-287A

AUG 27 1971

S. Robinson, Chief
Public Filings & Proceedings Branch
Office of the Secretary

FEDERAL REGISTER NOTICE

Two signed originals of a Federal Register Notice identified as follows are enclosed for your transmittal to the Office of the Federal Register for filing and publication:

ATOMIC ENERGY COMMISSION

DOCKET NOS. 50-269A, 50-270A, and 50-287A

DUKE POWER COMPANY

NOTICE OF RECEIPT OF ATTORNEY GENERAL'S ADVICE AND TIME FOR FILING OF PETITIONS TO INTERVENE ON ANTITRUST MATTERS

Twelve additional conformed copies of the notice are enclosed for your use.

Lyall Johnson, Director
Division of State and
Licensee Relations

Enclosure:
As stated above

	SLR	SLR	OGC			
OFFICE ▶	ABraitman/hh	LJohnson	RELiedquist			
SURNAME ▶	8/27/71	8/27/71	8/27/71			
DATE ▶						

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of DUKE POWER COMPANY (Oconee Units 1, 2, and 3 McGuire Units 1 and 2)	)	Docket Nos. 50-269A, 50-270A, 50-287A 50-369A, 50-370A

CERTIFICATE OF SERVICE

I hereby certify that copies of ORDER EXTENDING TIME FOR FILING OBJECTIONS TO JOINT DOCUMENT REQUEST dated September 28, 1972, issued by the Board in the captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 29th day of September 1972:

Walter W. K. Bennett, Esq., Chairman
Atomic Safety and LicensingBoard
P. O. Box 185
Pinehurst, North Carolina 28374

John B. Farmakides, Esq.
Atomic Safety and Licensing Board Panel
U. S. Atomic Energy Commission
Washington, D. C. 20545

Mr. Joseph F. Tubridy
4100 Cathedral Avenue, N. W.
Washington, D. C. 20016

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Keith S. Watson, Esq.
Toni K. Golden, Esq.
Wald, Harkrader, Nicholson and Ross
1320 Nineteenth Street, N. W.
Washington, D. C. 20036

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Duke Power Company
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422 South Church Street
Charlotte, North Carolina 28201

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Regulatory Staff Counsel
U. S. Atomic Energy Commission
Washington, D. C. 20545

Mr. Abraham Braitman, Chief
Office of the Antitrust and Indemnity
Directorate of Licensing
U. S. Atomic Energy Commission
Washington, D. C. 20545

Benjamin H. Volger, Esq.
Assistant Antitrust Counsel
Regulatory Staff Counsel
U. S.Atomic Energy Commission
Washington, D. C. 20545

Honorable Thomas E. Kauper
Assistant Attorney General
Antitrust Division
U. S. Department of Justice
Washington, D. C. 20530

Joseph J. Saunders, Esq., Chief
Public Counsel and Legislative
Section
Antitrust Division
U. S. Department of Justice
Washington, D. C. 20530

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J. O. Tally, Jr., Esq.
Tally, Tally and Bouknight
Home Federal Building
P. O. Drawer 1660
Fayetteville, North Carolina 28302

Mr. H. W. Oetinger
2420 Rosewell Avenue, Apt. 503
Charlotte, North Carolina 28209

Public Library of Charlotte
and Mecklenburg County
310 North Tryon Street
Charlotte, North Carolina 28202

Miss Louise Marcum, Librarian
Oconee County Library
301 South Spring Street
Walhalla, South Carolina 29691

Attorney General, State of
North Carolina
Raleigh, North Carolina 27601

Attorney General, State of
South Carolina
Columbia, South Carolina 29201

Wallace E. Brand, Esq.
U. S. Department of Justice
P. O. Box 7513
Washington, D. C. 20044

William T. Clabault, Esq.
David A. Leckie, Esq.
Antitrust Division
P. O. Box 7513
Washington, D. C. 20044

Office of the Secretary of the Commission

cc: Mr. Bennett
Mr. Rutberg
Mr. Braitman
Reg. Files
AS&LBP

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-269A, 50-270A
Duke Power Company	)	50-287A
	)	50-369A, 50-370A
(Oconee Units 1, 2, & 3, McGuire Units 1 & 2)	)	

ORDER EXTENDING TIME FOR FILING
OBJECTIONS TO JOINT DOCUMENT REQUEST

Upon Applicant's motion dated September 26, 1972 for an extension of time showing good cause therefor and upon the affidavit of Keith S. Watson verified the same day and attached thereto, and on counsel's assurance that the other parties have no objection thereto;

It is ordered that Applicant's time to file objections to the Joint Document Request is extended to and including October 12, 1972 and the Prehearing Conference Order of this Board dated September 7, 1972 is amended accordingly.

BY ORDER OF THE ATOMIC SAFETY
AND LICENSING BOARD

John B. Farmakides, Member

Joseph F. Tubridy, Member

Walter W. K. Bennett, Chairman

Issued at Washington, D. C.
this 28th day of September 1972.

9-26-72

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

Antitrust File

In the Matter of	)	
	)	Docket Nos. 50-269A, 50-270A
Duke Power Company	)	50-287A
(Oconee Units 1, 2 &3	)	50-369A, 50-370A
McGuire Units 1 & 2)	)	

To the Atomic Safety and Licensing Board:

APPLICANT'S MOTION FOR EXTENSION OF TIME FOR FILING OBJECTION TO JOINT DOCUMENT REQUEST

Pursuant to Section 2.711 of the Commission's Rules of Practice, 10 C.F.R. Part 2, Duke Power Company (hereinafter "Applicant") moves the Atomic Safety and Licensing Board ("Board") for an order extending the time to file objections, pursuant to Section 2.741(d) of the Rules, to the Joint Document Request served upon Applicant on September 6, 1972. Applicant requests that such time be extended for two weeks, to and including October 12, 1972.

In its order following the pre-hearing Conference, dated September 7, 1972 (pp. 4-5), the Board stated that Applicant should file its objections to the Joint Document Request within 21 days, i.e., by September 28, 1972. However, the Board's order also stated that extensions of time would be granted upon a showing of "good cause" (p.5).

The Joint Document Request raises a number of serious problems. It requires response to 131 separate categories of document descriptions, encompassing nearly every aspect of Applicant's former, present, and future operations as a public

utility. Some of the requests on their face require production of tens of thousands of documents, the utility of which seems highly questionable.[1/] Accepting such requests as the basis for response would only burden all parties with extraneous material and jeopardize Applicant's ability to complete discovery within a reasonable period of time.

In accordance with the Board's expressed wishes, we have undertaken to resolve these problems, to the maximum extent possible, through agreements of counsel.[2/] Such agreements will, of course, greatly conserve the time of the Board and will expedite this proceeding.

Applicant's counsel initially met with counsel for the Justice Department, the Commission staff, and the intervenors, on September 19, 1972. The discussions initiated at that meeting have already produced concrete results. Opposing counsel have proposed limiting language with respect to some

---

1/ For example, request 4(c) requires the production of every document relating to expansion or addition to Applicant's generating capacity or transmission system for the past twelve years. Similarly, request 6(i) requires production of every document relating to Applicant's efforts to "obtain favorable action of any kind" by any federal, state, or local governmental entity during the past twelve years.

2/ Comparable discussions are also underway with regard to Applicant's interrogatories, which were served on the intervenor on September 13, 1972.

requests. In addition, opposing counsel have taken under advisement suggestions by Applicant's counsel for reduction or modification of a number of other specific demands. Because of the complexity of the subject matter, these discussions have necessarily also been concerned with clarification of the demands to assure against misunderstanding as to what is required. Such clarification has been a necessary preliminary to permit evaluation by Applicant of both the scope and relevance of some demands.

The proposals set forth in the course of these discussions are currently being considered by Applicant and opposing counsel. Evaluation of many of the disputed items requires consultation with Applicant's employees representing a variety of specialized departments and disciplines. Despite the limited availability of such personnel because of other pressing Company activities, including hearings before the Federal Power Commission (E-7720),[3/] Applicant was prepared to, and did, discuss the proposals at a second meeting of counsel, on September 25, 1972. One additional meeting of counsel may be necessary to resolve the matters

---

3/ The North Carolina municipal intervenors in that case, which concerns Applicant's fuel adjustment clause, are represented by intervenor's counsel herein. Hearings in that case commence on September 26, 1972.

under discussion.

These discussions will almost certainly be concluded no later than October 5, 1972, and Applicant will require seven days thereafter to prepare and file with the Board its objections to questions left unresolved by the discussions. There is good cause, therefore, to extend time to file objections for two weeks, in order to afford counsel an opportunity to complete their discussions.[4/]

We are authorized to state that counsel for the other parties to this proceeding have no objection to the requested extension of time.

4/ According to the Board's Pre-Conference Order, motions for extension of time will be granted only on affidavit (p.5). Since the facts alleged in this pleading are within the knowledge of Applicant's counsel in this proceeding, the affidavit of Keith S. Watson is attached hereto.

WHEREFORE, Applicant requests that Applicant's time to file objections to the Joint Document Request be extended to and including October 12, 1972.

Respectfully submitted,

Wm. Warfield Ross

George A. Avery

Keith S. Watson

Toni K. Golden

Of Counsel:

William H. Grigg
Vice President and
General Counsel
Duke Power Company
P. O. Box 2178
Charlotte, North Carolina 28201

September 26, 1972

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-269A, 50-270A
Duke Power Company	)	50-287A
(Oconee Units 1, 2 &3	)	50-369A, 50-370A
McGuire Units 1 & 2)	)	

A F F I D A V I T

District of Columbia) ss.

I am counsel to Duke Power Company, Applicant in the above-captioned proceeding. I have read the foregoing Applicant's Motion for Extension of Time for Filing Objection to Joint Document Request.

I am familiar with the facts set forth in the Applicant's Motion. All such facts set forth therein are true and correct to the best of my own personal knowledge and belief.

Keith S. Watson

Subscribed and sworn to before me this 26th day of September, 1972.

Carol G. Troiano
Notary Public
My Commission Expires September 14, 1976

UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A
	)	50-287A
(Oconee Units 1, 2 & 3	)	50-369A, 50-370A
McGuire Units 1 & 2	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of APPLICANT'S MOTION FOR EXTENSION OF TIME TO FILE OBJECTIONS TO JOINT DOCUMENT REQUEST, dated September 26, 1972, in the above captioned matter have been served on the following by deposit in the United States Mail, first class or air mail, this 26th day of September, 1972:

Walter W. K. Bennett, Esquire
Post Office Box 185
Pinehurst, North Carolina 28374

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Board Panel
U. S. Atomic Energy Commission
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Atomic Safety and Licensing
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Special Assistant for
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Mr. Frank W. Karas
Chief, Public Proceedings Branch
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Wald, Harkrader & Ross

By: Keith S Watson

Attorneys for Duke Power Company

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Washington, D. C. 20036

DOCKET NUMBER 50-269A, 270A, 287A,
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UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the Division Indicated and Refer to Initials and Number

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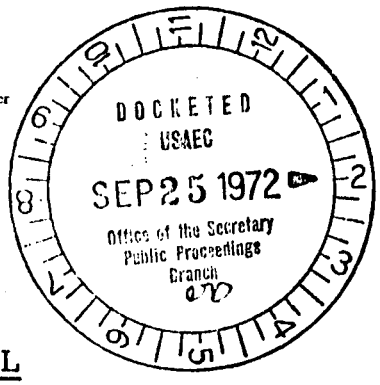
60-415-27
60-415-33



SEP 20 1972

AIR MAIL

Honorable Walter W. K. Bennett
Chairman, Atomic Safety and
Licensing Board
Post Office Box 185
Pinehurst, North Carolina 28374

Re: Duke Power Company, Oconee Units 1, 2 & 3
McGuire Units 1 & 2, AEC Docket Nos.
50-269A, 50-270A, 50-287A, 50-369A, 50-370A,
Department of Justice File Nos. 60-415-27
and 60-415-33

Dear Mr. Chairman:

In the prehearing conference of September 6 (Tr. 130) I received permission to supply citations referred to in my responses to questions of the Board. These are supplied herein.

Eastern Railroad President's Conference v. Noerr-Motor Freight, 365 U.S. 127 (1961) [Tr. 44 line 16]

United Mine Workers v. Pennington, 381 U.S. 657 (1965) [Tr. 44 line 16] footnote 3 at 670 [Tr. 45 line 1]

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972) [Tr. 44 line 24]

Household Goods Carrier's Bureau v. Terrell, 452 F. 2d 152, 158 (1971) [Tr. 45 line 1]

91st Cong., 1st Sess., Joint Committee on Atomic Energy, Hearings on Prelicensing Antitrust Review of Nuclear Power Plants, Part 2 (1970) p. 318 [Tr. 45 line 24]

Section 202(a) of the Federal Power Act, 16 U.S.C.A. 824a(a) [Tr. 53 line 6]

Contracts are filed under Section 205, 16 U.S.C.A. 824(d)(a) [Tr. 53 line 8]

Bureau of Land Management, Principles and Procedures, Power Transmission Lines, 43 CFR 2851.1 (a)(5)(ii) [Tr. 53 line 15, Tr. 56 line 18]

Federal Power Commission v. Idaho Power Co., 344 U.S. 17 (1952), 16 U.S.C. 797(e); 16 U.S.C.A. 797(e) [Tr. 55 line 4, Tr. 56 line 13]

Florida Power & Light and Florida Public Service Company, 2 FPC 991 (1941) [Tr. 55 line 5, Tr. 56 line 15]

Florida Power & Light and City of Jacksonville, Florida, 3 FPC 712 (1942) [Tr. 55 line 5, Tr. 56 line 15]

Hecht v. Pro-Football, Inc., 444 F. 2d 931, 934-935 (1971) [Tr. 55 line 20]

"Keating Proviso" see e.g. 65 Stat. 255; 66 Stat. 451; 85 Stat. 369 [Tr. 56 line 19]

Sincerely yours,

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

By: Wallace E. Brand
Attorney
Department of Justice

cc: Honorable Joseph F. Tubridy
Honorable John B. Farmakides
All parties on the service list

DOCKET NUMBER
PROD. & UTIL. 50-269A 50-270A 50-287A 50-369A 50-370A

UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

In the Matter of DUKE POWER COMPANY (Oconee Units 1, 2 & 3, McGuire Units 1 & 2)	)	Docket Nos. 50-269A, 50-270A 50-287A 50-369A, 50-370A

CERTIFICATE OF SERVICE

I hereby certify that copies of the ATTACHED LETTER, dated September 20, 1972, in the above captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 20th day of September 1972:

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Mr. Frank W. Karas
Chief, Public Proceedings Branc
Office of the Secretary of the
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U. S. Atomic Energy Commission
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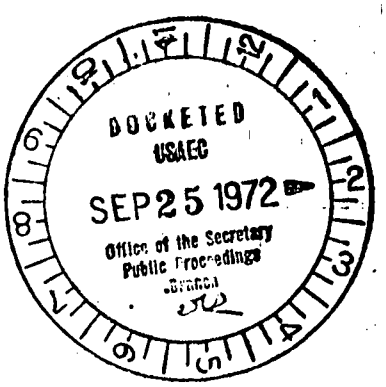

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Miss Louise Marcum, Librarian
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301 South Spring Street
Walhalla, South Carolina 29691

Office of the Secretary of the Commission

cc: Mr. Bennett
Mr. Rutberg
Mr. Braitman
AS&LBP
Reg. Files

Reg. Files

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

ANTI-TRUST

9-20-72.

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	
(Oconee Nuclear Stations Units	)	
1, 2, and 3; William B. McGuire	)	Docket Nos. 50-269A, 50-270A
Nuclear Station Units 1 and 2)	)	50-287A, 50-369A
	)	50-370A
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of ORDER SETTING FORTH MATTERS IN CONTROVERSY dated September 20, 1972, issued by the Board, with JOINT RECITAL OF CONTESTED ISSUES OF FACT AND LAW (third draft), in the captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 21st day of September 1972:

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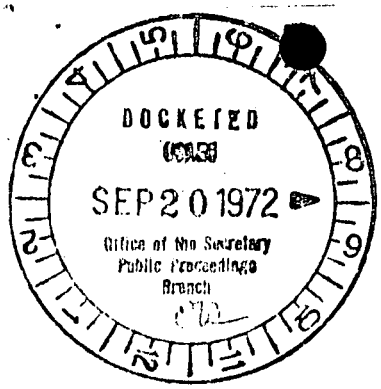
ANTI-TRUST



DOCKET NUMBER 50-269A, 270A, 287A
PROD. & UTIL. FAC. 369A, 370A

UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-269A, 50-270A
DUKE POWER COMPANY	)	50-287A
	)	50-369A, 50-370A
(Oconee Units 1, 2, and 3; McGuire Units 1 and 2)	)	

ORDER SETTING FORTH MATTERS IN CONTROVERSY

The Parties having agreed to the enclosed third draft joint recital of contested issues of fact and law,

It is hereby Ordered:

That said joint recital of contested issues of fact and law is hereby accepted by the Board for purposes only of determining the relevancy of discovery, and,

It is further Ordered:

That upon completion of discovery, each of the parties shall submit a recast statement eliminating

such matters that discovery has rendered no longer appropriate.

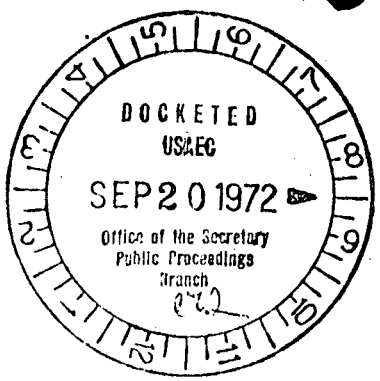
BY ORDER OF THE ATOMIC SAFETY
AND LICENSING BOARD

John B. Farmakides, Member

Joseph F. Tubridy, Member

Walter W. K. Bennett, Chairman

Issued at Washington, D. C.
this 20th day of September, 1972.



THIRD DRAFT

UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-269A, 50-270A
DUKE POWER COMPANY	)	50-287A
	)	50-369A, 50-370A
(Oconee Units 1, 2 & 3	)	
McGuire Units 1 & 2)	)	

JOINT RECITAL OF CONTESTED ISSUES OF FACT AND LAW

The parties and the proposed intervenors in this proceeding jointly submit the following recital of contested issues of fact and law, without prejudice to the right of any party to submit later additions or modifications thereto and without prejudice to the right of any party to contend that a particular issue is not lawfully or properly before the Commission or Hearing Board:

I. Is there a situation inconsistent with the antitrust laws in a major area of the Piedmont Carolinas? If so, is Applicant culpable for such situation?

1. Have Applicant's activities violated the antitrust laws as specified in Section 105(a) of the Atomic Energy Act of 1954? In view of the statutory test of "inconsistent with the antitrust laws," [explained in the legislative history to include inconsistency with the "policies clearly underlying those laws,"] are Applicant's activities "inconsistent with

the antitrust laws" if they impair the competitive opportunities of others, whether or not violation of the antitrust laws is established?

2. What are the relevant product and geographic markets? Does Applicant have substantial monopoly power in, or has it monopolized, bulk electric power supply in the relevant market(s)? (Applicant believes issues 11 and 12 should follow immediately.)

3. Does Applicant own or control all or substantially all generation in the relevant market(s)? Has Applicant attempted to prevent the establishment of alternative bulk power facilities or systems, including federal hydroelectric projects, in competition with it?

4. Does Applicant own or control all or substantially all [high-voltage and/or extra-high voltage] transmission in the relevant market(s)? If so, is that control a source of its alleged monopoly power in or monopolization of bulk power supply?

5. Is Applicant abusing its alleged control over transmission to retain and extend its alleged bulk power supply monopoly? Can Applicant use such alleged monopoly to retain and extend its alleged monopoly in the retail distribution markets?

6. Has Applicant, through practices not economically inevitable, prevented arrangements which would allow municipal and cooperative systems to utilize Applicant's transmission facilities to obtain access to coordination of generation with

other utilities? Has Applicant unnecessarily refused coordination of generation between Applicant and such systems? Has Applicant erected unnatural barriers to exclude competition by engaging in such coordination with others while denying participation to smaller systems? Is it relevant that many smaller systems do not have or no longer have generation or transmission facilities in determining whether Applicant's actions in regard to coordination or to any other activity are inconsistent with the antitrust laws? See issue number 11.

7. Was Applicant's abandonment of the CARVA pool and entry into new arrangements for coordinated development and other forms of power pooling with other large utility systems in its area such as Carolina Power & Light Company, South Carolina Electric & Gas Company, etc., entered into with the purpose or effect of placing small utility systems in the Piedmont Carolinas at a competitive disadvantage?

8. Has Applicant engaged in other activities, such as attempts to influence government action, which may form part of a monopolization scheme or a combination to monopolize -- or evidence an intent of Applicant to restrain competition or show the anticompetitive character of Applicant's course of conduct? Are any such activities constitutionally protected? If so, are they immune from antitrust investigation?

9. Would an arrangement providing for equal percentage of reserves as a percentage of peak load between Applicant and some or all municipals and cooperatives in its area be economically or technically unsound or unfair to Applicant or its customers or be unlawful under the laws of the States of

North and South Carolina or the Federal Power Act? If Applicant has entered into such arrangements with others, does Applicant discriminate against the aforementioned systems when it refuses to do so with them?

10. Is a market structure requiring purchase by a small system (such as one of the proposed intervenors) of bulk power supply from its vertically integrated retail competitor a situation conducive to effective retail competition? Does acceptance for filing and/or approval of a wholesale rate schedule by Federal Power Commission insure against all anticompetitive conduct which could arise? Has Applicant imposed a price squeeze upon its wholesale customers -- retail competitors? Does regulation of Applicant's rates and practices by the Federal Power Commission and state regulatory agencies limit this Commission's ability to inquire into those matters?

11. Do Applicant's wholesale rate schedules provide adequate access to the benefits of large-scale generation and transmission, if any, for the proposed intervenors and Applicant's other municipal wholesale customers? If not, are other alternatives offering comparable benefits available to such systems?

12. To what extent do federal, state and local law, and other government regulation prohibit municipal, cooperative or privately owned electric systems from competing with other utilities in any phase of either the wholesale or retail power market(s) or contemplate such competition? Is there existing

or potential competition in the relevant bulk power supply market(s) and the retail distribution market(s); what is the effect of government regulation upon competition in these markets?

13. Have the municipal, cooperative, and small privately owned utilities in Applicant's general area displayed a history over the years indicating competitive viability? If so, has the alleged absence of access to coordination had any effect on such competitive viability? Have these small systems been able to compete effectively against Applicant in terms of their ability to attract new customers and their ability to operate efficiently and at reasonable profit margins? Were those that failed to survive, if any, able to secure bulk power supplies to retain their market share? -- to increase it? Has Applicant acquired, or sought to acquire, small distribution systems?

14. Are any alleged anticompetitive activities of the proposed intervenors or other wholesale customers of Applicant relevant to the determination whether Applicant is culpable for a situation inconsistent with the antitrust laws? If so, do alleged tieing and other activities of the proposed intervenors and Applicant's other municipal wholesale customers permit them to compete unfairly with Applicant?

15. Is it relevant that the Government provides subsidies and tax and financing advantages to municipal and electric cooperative systems in determining whether a situation inconsistent with the antitrust laws exists? If the answer is in the affirmative, is it not equally relevant to consider

whether the situation inconsistent with the antitrust laws restrains competition from small privately owned electric utilities, and whether Applicant receives or is eligible for government subsidies, or tax and financing advantages?

16. Do any existing governmental subsidies or tax and financing advantages of the proposed intervenors and Applicant's other municipal wholesale customers, operating separately or in a joint venture, place them in a position to compete unfairly with Applicant for wholesale or retail power loads? Should the Commission take account of such advantages in determining whether or not a situation inconsistent with the antitrust laws exists? Or is Congress the proper forum for the trial of these issues?

17. What is the scope of the Commission's antitrust review? To what extent did the 1970 amendments change the scope of review established in the Atomic Energy Act of 1954? (Applicant believes this issue should precede issue I.)

18. Is the Department of Justice requesting per se applications of the antitrust laws in this proceeding? If so, can the criteria of Section 1 and 2 of the Sherman Act be applied mechanically to the electric power industry?

II. If the answer to issue I is affirmative, will Applicant's proposed activities under the license(s) in installing large nuclear units and marketing power from them in competition with small systems maintain or exacerbate this situation? Or will said activities, when combined with the existing situation, in effect create a new situation inconsistent with the antitrust laws?

1. What is the relationship between Applicant's general system activities which are allegedly inconsistent with the

antitrust laws and the proposed licensing of the Oconee and McGuire units; to what extent are issues relating to such activities (e.g., sales contracts, coordination arrangements) relevant to this proceeding?

2. Will power from the Oconee and McGuire units be marketed as part of the output of Applicant's bulk power supply system or will it be marketed separately from other power generated by Applicant?

3. Will the Oconee and McGuire units be operated as an integral part of Applicant's bulk power supply system, i.e., will operation of the Oconee and McGuire units be coordinated with other units of Applicant's system in order to provide insurance against the risk of forced outage of the Oconee and/or McGuire units and vice versa?

4. Was the economic feasibility of the Oconee and McGuire units determined by planning on their integration and operation as part of Applicant's bulk power supply system?

5. Is the economic feasibility of the Oconee and McGuire units dependent on their coordination with units of other utilities or dependent on coordination of Applicant's load growth with load growth of other utilities? Is the feasibility of installing and marketing large unit nuclear generation in the Piedmont Carolinas dependent on obtaining such coordination arrangements?

6. Does Applicant's installation of the Oconee and McGuire units continue the situation in which Applicant can market low cost power from large units and preclude its competitors from doing so? Do Applicant's competitors have any

assurance of obtaining any benefits from Applicant's low-cost power from large units in competition for new loads?

7. To what extent are there physical or financial advantages from Applicant's Oconee and McGuire units? Are any physical or financial advantages of nuclear generation so great as to radically change the competitive advantage enjoyed by Applicant?

8. To what extent in the near term and the long term will nuclear generation comprise the base load capacity in Applicant's bulk power supply system?

9. Can it be said that the opportunities to use nuclear power, when combined with the existing situation, in effect create a new situation inconsistent with the antitrust laws?

III. If the Commission makes affirmative findings as to I and II, is it not required to condition Applicant's license to remedy the anticompetitive situation which Applicant's activities under the license would create or maintain?

1. Assuming a finding that Applicant's activities under the license would maintain a situation inconsistent with the antitrust laws, should the license be granted as applied for, without conditions; or should the Applicant be required, as a condition to the grant of the license, to make available to the proposed intervenors any or all of the following:

(a) ownership of an appropriate portion of the Oconee and McGuire units or power therefrom on an equivalent basis;

(b) the necessary transmission services to transmit this power on a nondiscriminatory basis;

(c) the necessary transmission services to transmit coordinating power and energy on a nondiscriminatory basis, based only on fair compensation to Applicant and technical

feasibility of the arrangement, so as to allow small systems to install their own large units;

(d) other forms of coordinated development other than (a) above which would give proposed intervenors and other small systems (1) the opportunity to construct and operate large nuclear generating units -- such as compulsory purchases of power from smaller systems in a program of staggered development; and (2) the opportunity to construct or use a large scale transmission system ancillary to the foregoing -- such as by joint transmission arrangements or wheeling;

(e) emergency power and maintenance power on bases similar to those utilized in its arrangements with other adjacent utilities or that ordered by the Federal Power Commission in Gainesville Utilities Department v. Florida Power Corporation;

(f) other forms of coordinating arrangements, and

(g) specified coordination terms to accomplish the foregoing?

2. Do these forms of relief complement remedies available under state and Federal regulatory laws, or , to the contrary, do they conflict with those laws, i.e.:

(a) Would an arrangement granting some of Applicant's customers an ownership interest in, or other forms of access to, the Oconee or McGuire units be unfair, discriminatory or unlawful under the laws of the states of North or South Carolina or the Federal Power Act?

(b) Would the sale of unit power to, or

participation in the Oconee or McGuire plants, by some or all of the proposed intervenors or other municipal wholesale customers be unfair to Applicant or its customers, or be unlawful under the laws of the states of North or South Carolina or the Federal Power Act?

3. Are the proposed license conditions "appropriate" to carry out the purposes of the Act as provided in Section 105 (c)(6) of the Act?

4. Is it relevant in determining whether to grant or condition the license that the Government provides subsidies and tax and financing advantages to municipal and cooperative systems? If so, is it not equally relevant to consider whether the situation inconsistent with the antitrust laws restrains competition from small privately owned electric utilities, and whether Applicant receives or is eligible for government subsidies, or tax and financing advantages?

5. Do any existing governmental subsidies or tax and financing advantages of the proposed intervenors and Applicant's other municipal wholesale customers, operating separately or in a joint venture, place them in a position to compete unfairly with Applicant for wholesale or retail power loads? Should the Commission take account of such advantages in determining to grant or condition the licenses involved in these proceedings? Or is Congress the proper forum for the trial of these issues?

Reg. Files

9-8-72

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 270A,
(Oconee Units 1, 2 & 3,	)	287A, 369A, 370A
McGuire Units 1 & 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of Prehearing Conference Order of the Atomic Safety and Licensing Board dated September 7, 1972 in the captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 8th day of September 1972:

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Ella D. Holmes
Office of the Secretary of the Commission

cc: Mr. Bennett
Mr. Rutberg
Mr. Braitman
ASLBP
Reg. Files

DOCKET NUMBER 50-269A, 270A, 287A
PROD. & UTIL. FAC. 369A, 370A

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A 50-287A 50-369A, 50-370A
	)	
(Oconee Units 1, 2 & 3, McGuire Units 1 & 2)	)	

PREHEARING CONFERENCE ORDER
OF THE ATOMIC SAFETY AND LICENSING BOARD

This Atomic Safety and Licensing Board (Board) held a prehearing conference on September 6, 1972, pursuant to a Notice of Order for Prehearing Conference, dated July 14, 1972. Counsel for all the parties were present and participated in said prehearing conference in which the following action was taken:

A. THE PETITIONS TO INTERVENE

Timely petitions were filed by the following North Carolina Municipalities, the Cities of Statesville, High Point, Lexington, Monroe, Shelby and Albemarle; and the Towns of Cornelius, Drexel, Granite Falls, Landis, Lincolnton, and Newton. All parties agreed to the intervention. The Board order permitted the joint intervenors to participate in all aspects of this antitrust hearing subject to the following conditions: That one attorney will speak for all the intervenors on any single day;

there will be one cross-examination and one direct examination for all intervenors; there will be one set of objections, one brief, and one submission of proposed findings; and discovery by the intervenors will be coordinated with the Department of Justice and the AEC Staff so that there is no duplication.

B. THE ISSUE TO BE CONSIDERED

The ultimate issue to be considered by this Board under the notice of hearing of the Atomic Energy Commission dated June 28, 1972, is whether the activities of the applicant under the permits and licenses respectively in question would create or maintain a situation inconsistent with the antitrust laws as specified in Subsection 105c of the Atomic Energy Act of 1954.

The Department of Justice, when questioned whether or not it intended to contend that the granting of the permits and licenses would create a situation inconsistent with the antitrust laws, took the position that there was a pre-existing situation inconsistent with such laws which would be maintained and aggravated by the activities under the licenses and permits in question; and that also the extent of the nuclear energy activity which the applicant proposed to engage in was such that

this might be regarded as the creation of a new situation also inconsistent with such laws. The Department stated that it was not attacking the market structure of the applicant but the use of the power which it possessed for activity of an anti-competitive nature.

The intervenors took the position that they thought that the granting of the licenses and permits in this case would tend to create as well as to maintain a situation inconsistent with the antitrust laws.

C. RELEVANT MATTERS IN CONTROVERSY

The Board reiterated that it was the purpose of the prehearing conference to establish a clear and particularized identification of those matters related to the issue in this proceeding which are in controversy. The parties reported that they had met in accordance with the notice and order for prehearing conference; that several attempts had been made to agree upon the specific issues; and, that a draft had been agreed to by the Department of Justice, the Intervenors, and the Atomic Energy Commission's Staff. This was then presented to the Board and given to counsel for the applicant. Counsel for the applicant indicated that he had received information concerning the proposed draft but that he would require a few days to go over it to see whether or not he then could agree to it. The Board accordingly ruled that

the applicant should either agree to the proposed draft or state its position of disagreement within seven (7) days from the date of the hearing. If no agreement is reached, the Board will determine on the basis of the proposals of the parties what the issues are, of both fact and law, and promulgate an order to that effect.

There was extended discussion on the basis of the issues apparently raised in the answer to the notice of hearing and in the replies thereto which were compared with information contained in a proceeding before the Federal Power Commission in order to assist the parties in the final formation of the issues or matters in controversy.

D. DISCOVERY

The Department of Justice filed its first joint request of Department of Justice--AEC Regulatory Staff, and Intervenors, for production of documents by applicant for period since January 1, 1960, pursuant to an agreement among the parties reach July 26, 1972. The applicant indicated it required additional time to examine the request and attempt to clarify or limit the same by conference. The Board directed that he undertake to do this within the next two weeks and if there were areas

of disagreement or matters which must be brought to the attention of this Board by way of limitation he would do so within twenty-one (21) days from the date of this order. It was determined that applicant should have ninety (90) days from the date of this order to complete the production of documents called for thereby; and that a second request for additional documents would be made and completed within thirty (30) days thereafter; and that other means of discovery such as, interrogatories or depositions addressed to the applicant, would also be accomplished within 120 days from the date of this order. Extensions of time would be granted only on affidavit showing good cause.

Applicant stated that he desired to issue interrogatories and a request for document production to the intervenors within the next week. The Board granted the intervenors two weeks after the receipt of such request to attempt to clarify and limit the same by conference and one week thereafter within which to move either to suppress or limit such request.

The Board has taken the position that it will require a complete record before it determines whether or not Section 105c (5) of the amended Atomic Energy Act permits a review of applic nt's activities prior to or unrelated to its constructio and operation of the plants in question. Accordingly, it will not rule on that matter

until the close of the proceeding. The parties agreed that they would attempt to resolve any disputes which might arise in connection with the requested discovery before requesting resolution of such disputes by the Board.

Copies of all discovery requests and responses thereto will be furnished the Board Members.

A second prehearing conference to determine the status of the discovery process will be held at a date and time to be later fixed by the Board.

E. STIPULATIONS

It was stipulated that the authenticity of material filed by the applicant with any regulatory agency would be admitted, as would be all documents received from its files. The applicant, however, reserves the right to object on grounds of competency and relevancy. The applicant agrees to the authenticity of the documents filed in a binder entitled "Exhibits to the Initial Prehearing Statement of the Municipalities of High Point, Lexington, Monroe, Shelby, Albemarle, Drexel, Granite Falls, Landis and Lincolnton, North Carolina", but reserves the right to object to the relevancy or competency of any such documents.

F. SCHEDULES FOR FURTHER PREHEARING AND HEARING

It is contemplated by the Board that a further prehearing will be held on or about January 10, 1973, and that the evidentiary hearing will commence on or about February 7, 1973, at a place and time to be later designated by order of the Board.

G. CONDUCT OF HEARING

The following determinations were made by the Board and agreed to by the Parties.

1. The new AEC Rules (10 CFR Part 2, amended July 23, 1972) are to be applied in connection with all matters arising in the future.
2. Cross-examination will be limited to matters which have been raised on direct examination.
3. One attorney will conduct the examination or cross-examination on behalf of each party.
4. Receipt of evidence will conform to the normal Federal rules in non-jury proceedings.
5. Requests for official notice of Government reports, State laws, Municipal laws, and other documents must be accompanied with copies of such documents in such quantities as are necessary to comply with the service requirements of Sections 2.701 and 2.708 of the Rules of Practice of the Atomic Energy Commission.

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UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

50-269A, 270A, 287A,
369A, 370A

Address Reply to the Division Indicated and Refer to Initials and Number

TEK:JJS:WEB
60-415-27
60-415-33

September 5, 1972

William Warfield Ross, Esquire
Wald, Harkrader & Ross
1320 Nineteenth Street, N. W.
Washington, D. C. 20036

Re: Duke Power Company; Oconee Units 1, 2 & 3
McGuire Units 1 & 2, AEC Docket Nos.
50-269A, 50-270A, 50-287A, 50-369A, 50-370A,
Department of Justice File Nos. 60-415-27
and 60-415-33

Dear Mr. Ross:

Transmitted herewith is a first joint request of the Department of Justice, AEC Regulatory Staff and Intervenors for documentary production by Applicant.

If you have any questions pertaining to any document requested, please let me know. If it is not a document request originated by the Department, I will undertake to coordinate the response. Further, if there are difficulties with interpretation of the scope of the request, or particular voluminous categories of materials that we may exclude by sampling, agreements on "typical" documents, or any other way to reduce the production under the request, please let me know.

Sincerely yours,

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

By: Wallace E. Brand
Attorney, Department
of Justice

Enclosure

DISTRIBUTION LIST

Walter K. Bennett, Esquire

Joseph F. Tubridy, Esquire

John B. Farmakides, Esquire

Carl Horn, Esquire

William H. Grigg, Esquire

Keith S. Watson, Esquire

Toni K. Golden, Esquire

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J. A. Bouknight, Jr., Esquire

Troy B. Conner, Esquire

Joseph Rutberg, Esquire

Benjamin H. Vogler, Esquire

Atomic Safety and Licensing Board Panel

Frank W. Karas

Abraham Braitman, Esquire

DOCKET [illegible] 50-269A, 270A, 287A,
PROD. & UTIL. FAC. 369A, 370A

UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A
	)	50-287A
(Oconee Units 1, 2 & 3,	)	50-369A, 50-370A
McGuire Units 1 & 2)	)	

FIRST JOINT REQUEST OF DEPARTMENT OF JUSTICE, AEC REGULATORY STAFF, AND INTERVENORS FOR PRODUCTION OF DOCUMENTS BY APPLICANT FOR PERIOD SINCE JANUARY 1, 1960

Pursuant to agreement among the parties reached on 26 July 1972, the Department of Justice, the Atomic Energy Commission Regulatory Staff, and the Intervenors (hereinafter "joint discoverers") hereby submit a joint request for the production of documents from the files and records of the Applicant.

Unless otherwise indicated, the documents for which production is sought shall include all documents dated, prepared, sent or received during the period January 1, 1960 to date. Pursuant to agreement, requests for documentary production outside that period will be made by separate motions to the Board. It is further requested that production commence as promptly as possible and the production be completed by November 6, 1972, as to those requests to which there is no objection made by Applicant. Furthermore,

it is requested that several categories of documents necessary for completion of engineering/economic studies be supplied in advance of other production, as soon as possible, but in no event later than October 6, 1972. These are indicated by asterisk in the schedule. The joint discoverers request that objections to production be made to the Board by September 21, 1972. Further, as to those requests upheld by ruling of the Board, the joint discoverers ask that production be completed by Applicant either by the dates specified above, or within 10 days from the date of the Board's ruling for documents requested by October 6 and 30 days from the date of the ruling for documents requested by November 6.

It is requested that any documents within the categories in the attached schedule withheld by Applicant by reason of any assertion of privilege be identified individually by listing the person(s) preparing, sending or receiving the same, the subject and date thereof and a brief statement on the basis for asserting privilege as to each document.

It is understood that all parties contemplate a round of discovery additional to these requests. These requests should not be construed as limiting in any way the scope or method of that further discovery; and, specifically, further discovery may include a request to search certain categories of files.

SCHEDULE

A. Definitions.

1. "Company" means Duke Power Company, its subsidiaries or affiliates, predecessor companies and any entities providing electric service at wholesale or retail, the properties or assets of which have been acquired by Duke Power Company.

2. "Documents" means all writings and records of every type in the possession, control or custody of the company, its directors, officers, employees or agents, including but not limited to memoranda, correspondence, reports, surveys, tabulations, charts, books, pamphlets, photographs, maps, bulletins, minutes, notes, diaries, log sheets, ledgers, transcripts, microfilm, computer printouts, vouchers, accounting statements, engineering diagrams ("one-line" diagrams), mechanical and electrical recordings, telephone and telegraphic communication, speeches, and all other records, written, electrical, mechanical or otherwise.

"Documents" shall also mean copies of documents, even though the originals thereof are not in the possession, custody or control of the Company, and every copy of a document which contains handwritten or other notations or which otherwise does not duplicate the original or any other copy.

3. "Electric utility" means a private corporation, rural electric cooperative, municipality, or any political subdivision, agency or instrumentality of the Federal or any State or municipal

government which owns or controls, or proposes to own or control, facilities for the generation, transmission or distribution of electric power and energy.

4. "Coordination" and "coordinating" shall include, but are not limited to, reserve sharing, economic dispatch or economy interchange, and pooling of load growth for joint or staggered additions of generating or transmission facilities.

"Coordination" and "coordinating" shall also mean joint ventures or the sharing of participation in the ownership, operation or output of generating facilities and the sharing of ownership, construction or use of transmission facilities.

B. Documents No Longer in Company's Possession, Custody or Control.

If any document described in this schedule was, on or after December 17, 1970 (date of enactment of P.L. 91-560), but is no longer, in the Company's possession, or subject to the Company's control, or in existence, state whether (a) it is missing or lost, (b) has been destroyed, (c) has been transferred, voluntarily or involuntarily, to others, or (d) has been otherwise disposed of. In each instance, explain the circumstances surrounding such disposition and identify the person(s) directing or authorizing same, and the date(s) thereof. Identify each such document by listing its author and addressee, type (e.g., letter, memorandum, telegram, chart, photograph, etc.), date, subject matter, present location(s) and custodian(s), if the document (or copies) are still in existence.

C. Documents Requested.

1. Documents showing the Company's corporate organization since January 1, 1960, including:

(a) names of departments, divisions and subunits and dates of their organization and reorganization;

(b) names of all directors, corporate officers, department or division managers and the dates of their service in each office held (Indicate date of election or appointment, if prior to January 1, 1960, for each individual serving in such capacity as of that date);

(c) function and responsibilities of each officer, manager and department or division listed in (a) and (b) above and the dates of any changes therein;

(d) name or identification, period of existence, function of, and persons comprising each committee reporting to company officers or the Board of Directors on a regular or ad hoc basis. (Charts, tabulations or lists setting forth the above information and verified by a company officer may be furnished in lieu of the foregoing documents).

2. All file indexes and documents describing the filing system utilized by the Company, its departments, divisions and subunits, pertaining to active, inactive or stored files and records.

3. Any narrative history (or histories) of the Company.

4. Documents including minutes of meetings of the Board of Directors and the executive committee of the Company, documents prepared in advance of meetings (e.g., agenda, memos in summary or critique of plans, costs, proposals or status of negotiations), and letters and memoranda to or from Company officers, relating to:

(a) interconnection plans, proposals or agreements with other electric utilities;

(b) termination of the CARVA pooling agreement on October 20, 1970;

(c) expansion of or additions to generating capacity or transmission system to be (1) owned and utilized solely by the Company or (2) shared on any basis with one or more electric utilities;

(d) competition at wholesale and retail;

(e) acquisitions by Company of electric utility properties and proposals for such acquisition or invitations to purchase electric utility properties;

(f) legislation and constitutional revision affecting the ability of electric utilities to own, finance, construct facilities and to sell electricity;

(g)* wholesale and retail electric rates and proposals for rate changes;

(h) elections in any municipality operating an electric distribution system;

(i) Piedmont Electric Cities Association (PECA); EPIC, Inc.; ElectriCities of North Carolina;

(j) purchase by Company of land on the Green River comprising a part of the proposed site of FPC Project No. 2700;

(k) consideration of the request of intervenor to participate, through ownership of an entitlement share or otherwise, in the present units;

(l) litigation, actual and considered, before courts or agencies in opposition to construction of competing generation or transmission facilities, including but not limited to FPC Project No. 2700.

5. Minutes of meetings and reports of each committee established under pooling or coordination agreements to which Company is a party, those of each subcommittee or task force thereof, and documents relating thereto prepared or circulated within the Company.

6. Documents relating to the following:

(a) new electrical loads, area growth or development and locations available for sites for commercial or industrial development in areas in which such electrical loads might be served by electric utilities other than Company;

(b) electric service franchises for service by Company at retail, and any applications, renewals or terminations thereof;

(c) action, or contemplated action, by Company in response to failure by any municipality to renew any electric service franchise;

(d) franchises held by any other supplier of electric service within the Company's general service area;

(e) policies or practices, understandings or arrangements with other electric utilities as to allocation of wholesale or retail service areas;

(f) inquiries, invitations, negotiations, evaluations and proposals for the acquisition of electric power facilities of municipalities, electric cooperatives or other electric utilities including (1) offers to serve at wholesale; (2) communications to or about elected officials, councils, and boards; and (3) sponsorship, support or opposition by the Company of activities of citizen or taxpayer committees, community advisory councils, or the like;

(g) acquisition of Company facilities by purchase or condemnation;

(h) cost analyses or estimates of other North Carolina and South Carolina electric utilities' (present or proposed) system operations; comparisons of costs, rates or services of the Company vis-a-vis other electric utilities serving or able to serve in contiguous areas of North Carolina and South Carolina at wholesale or retail;

(i) activities by the Company to obtain for itself subsidies, exemptions, waivers, loans or construction funds or other favorable action of any kind by any agency, political subdivision or instrumentality of Federal, State or local governments, benefiting the Company including but not limited to actions relating to:

(i) Oconee nuclear generating project;

(ii) McGuire nuclear project;

(iii) Catawba nuclear project;

(iv) transmission line construction or relocation;

(v) construction, improvement or maintenance of water facilities such as docks, wharfs, river, stream or estuary dredging; recreation facilities;

(vi) air or water pollution control;

(vii) tax rulings, state or federal;

(viii) Federal or State tax legislation or regulations thereunder;

(ix) Federal or State regulatory legislation pertaining to electric utilities, including but not limited to amendments to the Federal Power Act, the Atomic Energy Act and North Carolina and South Carolina Public Utilities and Municipal Corporations Laws -- and including

but not limited to bills restricting the availability for power development of any waterway in or adjacent to Company's service area, authorizing, appropriating funds for, or otherwise affecting Federally-owned electric generating or transmission facilities in or adjacent to Company's service area, affecting the jurisdiction or organization of any governmental agency charged with licensing, supervising, or regulating Company's facilities, rates or services, or affecting the ability of municipal or cooperative systems to acquire or own facilities or render electric service;

(x) efforts in opposition to the authorization or construction of competing generation or transmission;

(j) studies of joint ownership or other participation considered, proposed or agreed upon between the Company and other electric utilities with respect to nuclear, fossil-fuel or hydroelectric generating facilities and transmission facilities;

(k) Company's exchange of information on any facet of its system operations in a cooperative endeavor with any wholesale customer;

(l) requests or indications of interests by third parties in power pooling arrangements with Company, the CARVA pool or participants in the VACAR arrangements;

(m) present and future planned interconnections with other utilities, and their proposed capacity and status (tentative or assured);

(n) studies or analyses of full generation and/or transmission integration or coordination between Company and any other electric utility;

(o) the Company's line extension policy, including any modifications or interpretations thereof;

(p) FPC Project No. 2700 (Green River) and the site thereof;

(q) activities of Company to affect the cost of fuel for electric power generation by other persons in North and South Carolina;

(r) the outage time in 1971 per customer per year in each of Company's districts and the number of outages per customer per year (In lieu of such documents, a verified summary of such information may be supplied).

7. Correspondence between the Company and Edison Electric Institute or any committee thereof; the National Association of Electric Companies; Bozell & Jacobs; Central Surveys of Shenandoah, Iowa; Hofer and Sons of Portland, Oregon; Cargill, Wilson & Acree, Inc. of Charlotte, North Carolina (or R. L. Ward); any other

consultant or independent contractor; and any electric utilities; and documents referring to these entities and persons relating to:

(a) system construction, financing, ownership, operation of electric generation, transmission or distribution facilities by any municipal and electric cooperative utility, including acquisitions of any such utility by the Company, or competition between any such utility and the Company;

(b) wholesale power supply to municipal and cooperative utilities;

(c) coordination, interconnection or pooling arrangements with municipal and cooperative systems;

(d) wholesale or retail territorial or customer allocations.

8. Documents showing the names and addresses of all attorneys retained by the Company and describing the basis for such retainers. (In lieu of the foregoing, a verified list containing the information would be acceptable.)

9. Documents pertaining to the following subjects located in the files of those individuals who by job or title are now or have been since January 1, 1960, responsible for, prepare analysis of, or forecast the effects of those subjects:

(a) long-term competitive aspects of the Company's relationship with other electric utilities serving or able to serve at wholesale or retail in areas overlapping or in close proximity to the Company's service area;

(b) interconnection arrangements with other electric utilities;

(c) coordinated system operation, generation and transmission facilities expansion, and pooling arrangements involving other electric utilities.

10. Documents referring or relating to communications between the Company and Carolina Power & Light Company (CP&L), Virginia Electric and Power Company (VEPCO) and South Carolina Electric and Gas Company (SCE&G) and among Company personnel in connection with the CARVA Pool agreement;

(a) its formulation and the evaluation of any advantages or disadvantages thereof;

(b) participation by third parties and limitations thereof;

(c) its dissolution, including but not limited to estimates of the cost impact of dissolution on the Company.

11. Documents referring or relating to communications between the Company, CP&L, VEPCO and SCE&G and among Company personnel in connection with the "VACAR" agreements;

(a) their formulation and the evaluation of any advantages or disadvantages thereof;

(b) participation by third parties and limitations thereof.

12. Documents relating to the Southeastern Electric Reliability Council (SERC), its formation and activities and Company's participation therein, including, but not limited to, any documents pertaining to the decisions setting qualifications for membership and full participation.

13. Documents comprising the Company's individual files pertaining to each wholesale electric customer of the Company (excluding billing data) including but not limited to

(a) files identified by specific customer name;

(b) files relating to any elected or appointed official of any municipal wholesale customer;

(c) retail or wholesale competition relating to such customers;

(d) interconnections or coordination with and sale or purchase of electric power or facilities to or from each customer;

(e) analysis or study of each customer's system operations, rates, finances, expansion proposals and programs; including but not limited to any maps and diagrams of customer's transmission system;

(f) communications with officials or members of boards of directors of wholesale customers which are or were cooperatives or private corporations, and with managers and persons in elective or appointive office,

who are or were responsible for the operations of each municipal wholesale customer;

(g) communications to or from, or internal documents concerning any taxpayers' committee or any similar group or newspaper, and any action taken or proposed to be taken by such committee or group or newspaper with respect to matters affecting a wholesale customer.

14. A set of all rate schedules (currently, effective or otherwise) filed by Company with the FPC. (If schedules are identical, one such schedule and a list of the parties to which it applies (applied) may be furnished in lieu of all the individual schedules. If schedules are almost identical, one of them plus a list indicating the differences in the others will suffice.)

15. Documents reflecting changes in any rate schedule, tariff, contract, agreement, or terms and conditions of service, or the effect on Company revenues (in dollar or percentage terms) of any such change.

16. Documents (including records of expenditures) regarding any advertisements, public-relations campaigns, or other means employed by Company to elicit support for its views in or in connection with any municipal or state election in North Carolina or South Carolina.

17. Documents comprising the Company's individual files pertaining to ElectriCities of North Carolina (or its predecessor,

North Carolina Municipally Owned Electric Systems Association); EPIC, Inc.; and Piedmont Electric Cities Association, including but not limited to copies of releases by Company's public relations office regarding those entities, and letters concerning them addressed to any municipality or electric cooperative.

18.* One small scale and one large scale copy of the most recent geographic one-line diagram or map of the Company's electric generation and bulk transmission system and points of interconnection with other electric utilities indicating transmission or sub-transmission facilities of 23 kv. and above, delivery points and supply voltages for municipalities and cooperatives; further, large scale maps of SERC, the CARVA pool, and the area covered by the VACAR agreements.

19.* The most recent electrical one-line diagrams showing the generation and transmission systems corresponding to the diagrams requested in paragraph 18.

20.* A copy of the maps or diagrams for each planning period or year through 1985 corresponding to those requested in paragraphs 18 and 19.

21.* Yearly peak power flow diagrams through 1985 for Company's system, and for such larger bulk power supply system areas as may be studied by any power planning or operating groups in which Company participates by furnishing personnel, data or otherwise.

22. The operating manuals or equivalent documents for the CARVA pool and for the present VACAR arrangements.

23. Each press release or article containing data supplied by the Company, or any internal document describing the Company's bulk power supply control center, or the major features thereof, such as equipment for load-frequency control, economic dispatch, security monitoring, systems diagram board, remote supervisory equipment, information brought in to the control center from remote points, and the like.

24.* Documents relating to pooling agreements or interchange arrangements in which the Company is a participant, directly or indirectly, which show:

(a) the method(s) used to interpret and determine any installed, spinning or operating reserve requirement(s) under the terms of such agreements;

(b) the method(s) and bases whereby payments are made, receipts disbursed and the manner in which funds flow among the participants in determining any settlement of balances for such reserve obligations.

25.* Reports and analyses (excluding load flow diagrams not a part of any such report or analysis except as requested in (d) below) pertaining to:

(a) joint transmission studies with VEPCO, CP&L and SCE&G, or any of them;

(b) joint transmission studies with Georgia Power Co. or the Southern System;

(c) joint transmission studies with Appalachian Power Co. or the American Electric Power Co.;

(d) Company transmission; in addition, all transmission load flow studies (plotted on a system one-line diagram of 100 kv and above) for Company's complete system relating to planned bulk power additions for the period 1970-1985;

(e) comparative or alternative programs of generation and transmission expansion for Company, CARVA pool, or any other coordinating group, and letters or memoranda pertaining thereto.

26.* Documents containing or pertaining to capital and operation and maintenance cost estimating factors utilized by Company for:

(a) transmission facilities (by varying voltages and range of capacities for each voltage) per mile or per hundred miles;

(b) ancillary substation facilities (by major cost components) and right of way;

(c) generation (by types) and ancillary facilities (provide breakdown by major components for both generation and ancillary facilities where available);

(d) escalation factors relating to (a), (b) and (c) of this paragraph, and for fossil fuel, nuclear fuel and other expenses, including but not limited to labor and administrative and general.

27. Documents indicating:

(a) the most recent nuclear unit cost estimates, in accordance with the FPC Uniform System of Accounts, showing separately the rate of return used;

(b) the total demand and energy cost of the nuclear units as of December 31, 1978, showing as a distinct factor the escalation percentages adopted for cost projection purposes.

28. Documents concerning any legal definition of or restriction on the Company's authority to:

(a) construct system facilities within a municipality;

(b) render wholesale service to a municipality which is already purchasing power from another power supplier;

(c) construct bulk power supply transmission lines in areas where other electric systems have installed bulk power supply transmission lines;

(d) render service within a municipality which has its own electric system;

(e) share the ownership of electric facilities with any other utility or entity;

(f) interconnect with any other utility or entity;

(g) coordinate or integrate in any other way with any other utility or entity;

(h) wheel power from other electric systems to the Company's wholesale customers.

29. Documents concerning the authority or lack thereof of the North Carolina Utilities Commission or South Carolina Public Service Commission to regulate the construction of generating facilities, transmission lines or distribution lines by any other supplier of electric service within Company's service area.

30. Documents in which the Company has asserted that any of its activities are, or are not, subject to the Federal Power Act or North Carolina or South Carolina Public Utilities Law.

31. Duplicate tax returns filed by Company.

32. Copy of the Company's Accounting Manual.

33. Monthly accounting summaries, reconciliations, or billing statements in use for interconnection settlements between Company and CP&L, SCE&G and VEPCO, between Company and Georgia Power Co., and between Company and Appalachian Power Co., which indicate the manner in which power, energy, or transmission service is exchanged or otherwise accounted for, and how compensation is determined as between the parties. Copies for 1970 and 1971 are requested, along with comparable summaries, reconciliations or billing statements used under the CARVA pool in 1969 and 1970. Furnish all statistical summaries and documents necessary to apprise joint discoverers of the accounting methods by which entries on log sheets containing power and energy data are ultimately converted into monetary settlements. Furnish also each of all other bulk power supply energy, or power, or transmission service accounting

forms for the peak day of the peak month of 1972, including weekly or monthly summaries including amounts for such day -- and all such forms for the peak day of the peak month of 1970 under the CARVA pool.

34. Any contract for the sale or exchange of electric power between Company and any other electric utility, and a copy of any power pooling arrangement under consideration but not yet entered into.

35. Documents regarding:

(a) cost studies of nuclear vs. fossil-fueled generation;

(b) planning studies made in the period 1960 to date, alone or jointly with other utilities;

(c) transmission load flow studies made in the period 1960 to date which have been used in planning;

(d) discussions with other utilities regarding the allocation of responsibility for, the location of, and the timing of transmission construction.

36. Documents, including internal memoranda, regarding the ability of municipal and cooperative systems to purchase bulk power at Company's wholesale rates and resell to retail customers at rates equal or comparable to Company's retail rates.

37. Rate design studies, documents relating to the decision to file, all correspondence, memoranda, etc., regarding the filing with respect to the wholesale fuel adjustment clause (FPC Docket No. E-7720).

38. As to all nuclear facilities, experimental or operational, documents relating to information, advice, participation and assistance rendered by any agency of the United States Government (including the AEC) to Company, or to any other entity through which any of such was provided to Company or for the benefit of Company. Please respond as to the time periods prior and subsequent to 1960. (Referral to documents in the public files of the AEC will be acceptable.)

39. Documents describing the economic condition of the area served by Company, projections of future economic conditions, or the prospect for attracting commercial and industrial customers, or other potential stimuli of economic growth, to the area.

40. Documents including but not limited to advertising material prepared for the purpose of encouraging commercial and industrial customers to locate in the Company's service area or for the purpose of encouraging increased use of electricity in that service area, and documents concerning Company's approach to, discussion or other contact with any commercial or industrial customer (actual or potential) for either of these two purposes.

41.* Documents showing the following with respect to each existing generating unit on Company's system and estimates thereof with respect to each unit under construction:

(a) incremental costs at various levels of unit output including incremental fuel cost and variable operation and maintenance cost;

(b) no-load running cost of each unit including fixed fuel cost;

(c) start-up costs in dollars following a (1) four-hour shutdown, (2) 12-hour shutdown, (3) 24-hour shutdown;

(d) average annual fixed costs for each unit including:

(1) fixed operation and maintenance;

(2) fixed charges, including a breakdown of fixed charge rate by all components;

(3) other fixed costs, including administrative and general expense allocable to each unit;

(e) original investment cost and date of commercial operation;

(f) incremental heat rate and total heat rate throughout normal net loading range;

(g) average annual fuel cost in cents/mmBtu for each year 1970-1985;

(h) minimum and maximum net output in mw;

(i) normal annual amount of time for scheduled maintenance and refueling;

(j) for future nuclear units, documents describing how amortization of the initial fuel core is handled in the above costs and providing a breakdown of total capital cost and unit cost amounts for each unit;

42.* Documents showing all actual and proposed power purchases and sales for the period 1970-1985, indicating mw and mwh quantities and fixed and variable charges for each such transaction.

43.* All cost of service studies relating to wheeling or

transmission service on Company's system for the period 1962-1972 and for the future in the period 1972-1985.

David A. Leckie

Wallace A. Brand
William T. Clabault
Attorneys, Antitrust Division
Department of Justice
Washington, D. C. 20530

For the Joint Discoverers

September 5, 1972

UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

ANTI-TRUST

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A
	)	50-287A
(Oconee Units 1, 2 & 3,	)	50-369A, 50-370A
McGuire Units 1 & 2)	)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with §2.713, 10 CFR Part 2, the following information is provided:

Name:	Joseph O. Tally, Jr.
Address:	Tally, Tally & Bouknight Box 1660 Fayetteville, North Carolina 28302 429 N Street, S.W. S 311 Washington, D.C. 20024
Telephone Number:	Fayetteville Office: Area Code 919, 483-4175 Washington, D.C. Office Area Code 202, 554-3835
Admission:	Supreme Court of North Carolina and United States District Court for the District of Columbia
Name of Party:	The Municipalities of High Point, Lexington, Monroe, Shelby, Albemarle, Drexel, Granite Falls, Lincolnton and Landis, North Carolina

Joseph O. Tally, Jr.
Attorney, Municipal Intervenors

Fayetteville, North Carolina 28302
August 28, 1972

ANTI-TRUST

UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A
	)	50-287A
(Oconee Units 1, 2 & 3,	)	50-369A, 50-370A
McGuire Units 1 & 2)	)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with §2.713, 10 CFR Part 2, the following information is provided:

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Telephone Number:	Fayetteville Office: Area Code 919, 483-4175 Washington, D.C. Office Area Code 202, 554-3835
Admission:	Supreme Court of North Carolina
Name of Party:	The Municipalities of High Point, Lexington, Monroe, Shelby, Albemarle, Drexel, Granite Falls, Lincolnton and Landis, North Carolina

J. A. Bouknight, Jr.
Attorney, Municipal Intervenors

Fayetteville, North Carolina 28302
August 28, 1972

UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A
	)	50-287A
(Oconee Units 1, 2 & 3,	)	50-369A, 50-370A
McGuire Units 1 & 2)	)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with §2.713, 10 CFR Part 2, the following information is provided:

Name	David F. Stover
Address:	Tally, Tally & Bouknight Box 1660 Fayetteville, North Carolina 28302 429 N Street, S.W. S 311 Washington, D.C. 20024
Telephone Number:	Fayetteville Office: Area Code 919, 483-4175 Washington, D.C. Office Area Code 202, 554-3835
Admission:	United States District Court for the District of Columbia
Name of Party:	The Municipalities of High Point, Lexington, Monroe, Shelby, Albemarle, Drexel, Granite Falls, Lincolnton and Landis, North Carolina

David F. Stover

David F. Stover
Attorney, Municipal Intervenors

Fayetteville, North Carolina 28302
August 28, 1972

UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A
	)	50-287A
(Oconee Units 1, 2 & 3,	)	50-369A, 50-370A
McGuire Units 1 & 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of NOTICES OF APPEARANCE for Joseph O. Tally, Jr., J. A. Bouknight, Jr., and David F. Stover, dated August 28, 1972, in the above captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 28th day of August 1972:

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P. O. Box 185
Pinehurst, North Carolina 28374

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Washington, D. C. 20545

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Reid & Priest
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Atomic Safety and Licensing
Board Panel
U.S. Atomic Energy Commission
Washington, D. C. 20530

Mr. Frank W. Karas
Chief, Public Proceedings Branch
Office of the Secretary of the
Commission
U.S. Atomic Energy Commission
Washington, D. C. 20545

Wallace E. Brand, Esq.
Antitrust Division
Department of Justice
Washington, D. C. 20530

Benjamin H. Vogler, Esq.
Joseph Rutberg, Esq.
U.S. Atomic Energy Commission
Washington, D. C. 20545

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Wallace E. Brand, Esq.
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William T. Clabault, Esq.
P. O. Box 7513
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David A. Leckie
P. O. Box 7513
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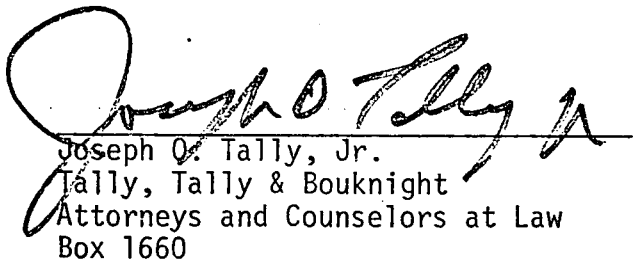

Joseph O. Tally, Jr.
Tally, Tally & Bouknight
Attorneys and Counselors at Law
Box 1660
Fayetteville, North Carolina 28302

UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

DOCKET NUMBER 50-269A, 270A, 287A,
PROD. & UTIL. FAC. 369A, 370A

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A
	)	50-287A
(Oconee Units 1, 2 & 3	)	50-369A, 50-370A
McGuire Units 1 & 2)	)	

ORDER

On Answer and Notice of Motion served July 24, 1972, by the Applicant, presumably under Section 2.730; and, having considered the responses thereto; and, it appearing to the Board that should this Board determine that there are novel, complex and fundamental issues for which there is no precedent, this Board is empowered to certify such questions to the Atomic Safety and Licensing Appeals Board and that Board in turn is authorized to certify such matters as it feels beyond its authority to the Commission; and, it further appearing that this Licensing Board is not empowered to "reconsider" the decision of the Commission; and, that at present the issues have not yet been formulated:

IT IS ORDERED that Applicant's motion to reconsider the delegation of review authority be and the same hereby is denied.

BY ORDER OF THE ATOMIC SAFETY & LICENSING BOARD

WKBennett

Walter W. K. Bennett, Chairman
For the Atomic Safety & Licensing Board

Issued at Washington, D.C.

this 24th day of August, 1972

Reg. Files

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

ANTI-TRUST

8-24-72.

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	
(Oconee Units 1, 2 and 3)	)	Docket Nos. 50-269A, 270A, 287A, 369A, 370A
McGuire Units 1 and 2)	)	
	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of ORDER dated August 24, 1972, in the captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 25th day of August 1972:

Walter W. K. Bennett, Esq., Chairman
Atomic Safety and Licensing Board
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Pinehurst, North Carolina 28374

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U. S. Atomic Energy Commission
Washington, D. C. 20545

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Mr. Abraham Braitman, Chief
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Directorate of Licensing
U. S. Atomic Energy Commission
Washington, D.C. 20545

ANTI-TRUST

Benjamin H. Volger, Esq.
Assistant Antitrust Counsel
Regulatory Staff Counsel
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Honorable Thomas E. Kauper
Assistant Attorney General
Antitrust Division
U. S. Department of Justice
Washington, D. C. 20530

Joseph J. Saunders, Esq., Chief
Public Counsel and Legislative Section
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Washington, D. C. 20530

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Miss Louise Marcum, Librarian
Oconee County Library
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Walhalla, South Carolina 29691

J. A. Bouknight, Jr., Esq.
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Tally, Tally and Bouknight
Home Federal Building
P. O. Drawer 1660
Fayetteville, North Carolina 28302

Attorney General, State of North Carolina
Raleigh, North Carolina 27601

Attorney General, State of South Carolina
Columbia, South Carolina 29201

Wallace E. Brand, Esq.
U. S. Department of Justice
P. O. Box 7513
Washington, D.C. 20044

Public Library of Charlotte and Mecklenburg County
310 North Tryon Street
Charlotte, North Carolina 28202

C. R. Stephens

Office of the Secretary of the Commission

cc: Mr. Bennett
Mr. Rutberg
Mr. Braitman
ASLBP
Reg. Files

UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

ANTI-TRUST

In the Matter of	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A 50-287A
(Oconee Units 1, 2 & 3, McGuire Units 1 & 2)	)	50-369A, 50-370A

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with §2.713, 10 CFR Part 2, the following information is provided:

Name:	Joseph J. Saunders
Address:	Antitrust Division Department of Justice Washington, D. C. 20530
Telephone Number:	Area Code 202, 739-2515
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Name of Party:	United States Department of Justice Washington, D. C. 20530

Joseph J. Saunders
Attorney, Antitrust Division
Washington, D. C. 20530

Washington, D. C. 20530
August 10, 1972

ANTI-TRUST

UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

In the Matter of DUKE POWER COMPANY (Oconee Units 1, 2 & 3, McGuire Units 1 & 2)	)	Docket Nos. 50-269A, 50-270A 50-287A 50-369A, 50-370A

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with §2.713, 10 CFR Part 2, the following information is provided:

Name:	Wallace E. Brand
Address:	Post Office Box 7513 Washington, D. C. 20044
Telephone Number:	Area Code 202, 739-3254
Admission:	Supreme Court of California
Name of Party:	United States Department of Justice Washington, D. C. 20530

Wallace E. Brand
Attorney, Antitrust Division
Washington, D. C. 20530

Washington, D. C. 20530
August 10, 1972

UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A
	)	50-287A
(Oconee Units 1, 2 & 3,	)	50-369A, 50-370A
McGuire Units 1 & 2)	)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorneys herewith enter an appearance in the captioned matter. In accordance with §2.713, 10 CFR Part 2, the following information is provided:

Name:	William T. Clabault David A. Leckie
Address:	Post Office Box 7513 Washington, D. C. 20044
Telephone Number:	Area Code 202, 739-2673 739-2519
Admission:	Mr. Clabault: Supreme Judicial Court of Massachusetts Mr. Leckie: United States District Court for the District of Columbia
Name of Party:	United States Department of Justice Washington, D. C. 20530

William T. Clabault

William T. Clabault

David A. Leckie

David A. Leckie

Attorneys, Antitrust Division
Washington, D. C. 20530

Washington, D. C. 20530
August 10, 1972

UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A
	)	50-287A
(Oconee Units 1, 2 & 3,	)	50-369A, 50-370A
McGuire Units 1 & 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of NOTICES OF APPEARANCE for Joseph J. Saunders, Wallace E. Brand, William T. Clabault and David A. Leckie, dated August 10, 1972, in the above captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 10th day of August 1972:

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John B. Farmakides, Esquire
Atomic Safety and Licensing
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Carl Horn, Esquire
President, Duke Power Company
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William H. Grigg, Esquire
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U. S. Atomic Energy Commission
Washington, D. C. 20545

Mr. Frank W. Karas
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Office of the Secretary of the
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U. S. Atomic Energy Commission
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Abraham Braitman, Esquire
Special Assistant for
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Office of Antitrust and
Indemnity
U. S. Atomic Energy Commission
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David A. Leckie
Attorney, Antitrust Division
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Washington, D. C. 20530

AUG 8 1972

Antitrust

ANTI-TRUST

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Washington, D. C. 20545

In the Matter of Duke Power Company
Oconee Units 1, 2 & 3, and McGuire Units 1 & 2
Docket Nos. 50-269A, 50-270A, 50-287A, 50-369A, 50-370A

Gentlemen:

On July 26, 1972 Counsel for the applicant, Department of Justice, Atomic Energy Commission and the proposed intervenors met in conference at the office of Wallace E. Brand, Department of Justice, and discussed the issues and related matters set forth in the Notice and Order for Prehearing Conference, issued on July 14, 1972.

Parties discussed all of the matters raised by the Notice and Order and reached the following conclusions:

1. With respect to paragraph A.(1) and (2) of the Order, the parties and the petitioner to intervene believe that the answer and replies to the notice will set forth the legal theory concerning the question as to whether the issuance of the permit applied for would create or maintain a situation inconsistent with the antitrust laws. But the parties and the petitioner to intervene are not able to present detailed facts on which such legal theory is based until discovery is completed.

2. With respect to paragraph B. of the Order, the parties and the petitioner to intervene have reached the following agreements:

a. Settlement:

Counsel for the applicant and counsel for the proposed intervenors agreed to meet with the applicant and discuss the prospects of settlement and to keep the Department of Justice and the AEC staffs advised.

ANTI-TRUST

b. Stipulation:

The parties agreed to stipulate wherever possible. Counsel for the applicant indicated that it would stipulate to all of applicant's forms on

OFFICE ▶	OGC	OGC				
SURNAME ▶	BVogler:rs	JRutberg				
DATE ▶	8/8/72	8/ /72				

file with the Federal Power Commission, the North Carolina and South Carolina Regulatory Commissions. Applicant's counsel will stipulate to the authenticity of documents in its files and will consider other requests to stipulate on the merits and relevancy of the specific request.

3. Intervention. There would be no objection to the petition to intervene for antitrust purposes.

4. Issues:

The parties agreed to attempt to present the Board a joint statement of the issues of facts and law. Each party agreed that this should be accomplished as soon as possible. The applicant's counsel agreed to initiate this procedure and to present its draft of the issues of facts and law to the other parties and the proposed intervenors in seven days. The proposed intervenors will prepare and integrate its draft of the issues of facts and law within seven days of the receipt of the applicant's draft and furnish it to the parties, and the Department of Justice and the AEC staffs will furnish the Board with a joint statement representing the positions of all the parties. All parties reserve the right to a final review of the joint statement before its submission to the Board.

5. Discovery:

All parties agreed that extensive document discovery, interrogatories and depositions would be required. Due to the extensive nature of the discovery it is expected that discovery will consist of two rounds. Discovery requests are to be in writing and conducted on an informal basis with specific discovery problems referred to the Board. The applicant's counsel requested that the intervenors, the Department of Justice and the Atomic Energy Commission present one joint request for document discovery similar to the procedure being followed in the Consumers Power Company case. This procedure was agreed to by all of the parties. Therefore, the parties agreed to make every effort to be as inclusive as possible in their first document request so that if a second round of document discovery becomes mandatory, it will be as brief as possible. The proposed intervenors indicated that they need extensive discovery along the lines they had requested in FPC Docket E75-57 plus additional information. The proposed intervenors also requested open access to the applicant's files to conduct the document search. This approach was rejected by applicant's counsel. However, applicant's counsel indicated that requested documents would be made available when the request was confined to specified categories and the materiality and relevancy of the requested documents have been established. The proposed intervenors agreed to initiate the discovery procedure in this matter by serving the parties with a copy of that portion of the record in FPC Docket E75-57 that contains the intervenor's discovery request and a list of any additional documents needed within two weeks. Mr. Brand stated that upon receipt of the discovery request from the

proposed intervenors, he would be willing to coordinate with the Atomic Energy Commission and prepare a joint discovery request for presentation to the applicant. All the parties hoped that the joint discovery request could be presented to the applicant before the prehearing conference on September 6, 1972.

6. Miscellaneous:

The Department of Justice requested that a courtesy copy of all documents filed in this matter be sent to P. O. Box 7513, Washington, D. C. 20044, because of problems with mail delivery. The applicant requested that Mr. William H. Grigg, Vice President and General Counsel, Duke Power Company, P. O. Box 2178, Charlotte, North Carolina 28201, be served with a copy of all documents circulated in this matter.

The attorneys present at the meeting were: William Warfield Ross, Keith S. Watson, Toni K. Golden, Counsel for the applicant; J. O. Tally, J. A. Bouknight and David F. Stover, Counsel for the proposed intervenors; Wallace E. Brand, Attorney, Department of Justice; Joseph Rutberg and Benjamin H. Vogler, Attorneys, Atomic Energy Commission.

Sincerely,

Joseph Rutberg
Antitrust Counsel for
AEC Regulatory Staff

cc: William Warfield Ross (2)
Wallace E. Brand (2)
J. A. Bouknight, Jr. &
J. O. Tally, Jr. (2)

bcc: B. Vogler, OGC (2)
OGC Reading File
OGC Gmtn File
REG Central File

OFFICE ▶						
SURNAME ▶						
DATE ▶						

UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

ANTI-TRUST

8-3-72,

In the Matter of Duke Power Company (Oconee Nuclear Station Units 1, 2 and 3 and McGuire Nuclear Station Units 1 and 2)	)	Docket Nos. 50-269A, 50-270A, 50-287A, ~~50-369A,~~ 50-369A And 50-370A

REPLY OF THE DEPARTMENT OF JUSTICE TO APPLICANT'S ANSWER AND MOTION OF JULY 24, 1972

Pursuant to the provisions of 10 CFR Section 2.706, of the Commission's Rules of Practice, the United States Department of Justice files this Reply to Applicant's July 24, 1972, Answer to Notice of Antitrust Hearing and Motion to Reconsider Delegation in the above-captioned proceeding.

I. THE DEPARTMENT TAKES ISSUE WITH APPLICANT'S BASIC POSITION

The Department of Justice takes issue with Applicant Duke Power Company's fundamental position in this proceeding "that the activities under the permits in question would not create or maintain a situation inconsistent with the antitrust laws." It is the belief of the Department that Applicant's activities under the licenses sought would maintain, and likely enhance or aggravate, a situation inconsistent with the antitrust laws, and

ANTI-TRUST

that the evidence to be presented in the forthcoming hearing will require such a finding by the Commission.

The Department will therefore propose license conditions "appropriate" to carry out the purposes of Section 105 of the Act, in accordance with the policies set forth in Sections 1(b), 3(d), 105(c)(6), and 183 of the Act, as amended. 42 U.S.C. §§2011(b), 2013(d), 2135(c)(6), and 2233. 1/ The legislative history of the 1970 Amendment clearly indicates that issuing the

---

1/ Section 1: Atomic energy is capable of application for peaceful as well as military purposes. It is therefore declared to be the policy of the United States that -- (b) the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise.

Section 3: It is the purpose of this chapter to effectuate the policies set forth above by providing for -- (d) a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public.

Section 105(c)(6): In the event the Commission's finding under paragraph (5) is in the affirmative, the Commission shall also consider, in determining whether the license should be issued or continued, such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest. On the basis of its findings, the Commission shall have the authority to issue or continue a license as applied for, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate.

Section 183: Each license shall be in such form and contain such terms and conditions as the Commission may, by rule or regulation, prescribe to effectuate the provisions of this chapter . . . . (emphasis supplied in all instances)

license appropriately conditioned would be the usual outcome of Section 105(c)(6) consideration following an affirmative Section 105(c)(5) finding. 2/

II. APPLICANT MISCONCEIVES THE SCOPE OF PRELICENSING ANTITRUST REVIEW

The Applicant contends in its Answer, pages 2 and 3, that the issues set forth in the Department's advice letter of August 2, 1971, "are irrelevant to the inquiry which the statute contemplates and should not be considered in this proceeding." Applicant would limit the Commission's scrutiny to "the possible effects of the 'activities under the license,' and only those activities," and this would, in its view, preclude any concern "with the operation of Applicant's system in a broader context, including other generation or transmission facilities, sales contracts, coordination arrangements and the like."

In taking this position, Applicant has misconstrued the statutory test -- the Commission must determine "whether the activities under the license would create or maintain a situation

---

2/ "The committee believes that, except in an extraordinary situation, Commission-imposed conditions should be able to eliminate the concerns entailed in any affirmative finding under paragraph (5) while, at the same time, accommodating the other public interest concerns found pursuant to paragraph (6). Normally, the committee expects the Commission's actions under paragraphs (5) and (6) will harmonize both antitrust and such other public interest considerations as may be involved." H.R. Report No. 91-1470 and S. Report No. 91-1247, Report by the Joint Committee on Atomic Energy, Amending the Atomic Energy Act of 1954, etc. (1970), at 31.

inconsistent with the antitrust laws." [Emphasis supplied] Section 105(c)(5) of the Act; 42 U.S.C. §2135(c)(5). Applicant's position flies in the face of the clear statutory language, the recorded legislative purpose, and the factual impossibility and legal incorrectness of separating the activities under the license from the system-wide operations, power pooling activities, and other marketing practices of which power from the licensed units would be a part.

This question was previously discussed in detail in the Department's Reply of June 9, 1972, to the Answer of Consumers Power Company in a similar proceeding; pages 1-30 and Appendices A and B of that Reply are incorporated herein by reference. For the convenience of the Board, copies are furnished as Annex A hereto. In addition, a Supplement to Annex A contains the Department's comments upon Applicant's detailed discussion of its position (Appendix A of Applicant's Answer). The Department concludes that the Atomic Safety and Licensing Board and the Commission must reject as erroneous the atomistic approach to the scope of prelicensing antitrust review urged by Applicant.

III. APPLICANT'S CLAIM THAT GOVERNMENT REGULATION OF THE ELECTRIC POWER INDUSTRY SUPERSEDES THE ANTITRUST LAWS IS BOTH INCORRECT AND IRRELEVANT

Applicant suggests that pervasive government regulation severely limits application of the antitrust laws to the electric power industry. It maintains that neighboring utilities already have access to the benefits of large scale generation and transmission through wholesale purchase and are financially viable and competitively viable to the extent contemplated by federal and state law. Further, it charges the States of North and South Carolina with all responsibility for existing impediments to competition and concludes that their pervasive regulation of its activities immunizes the practices challenged by the Department from scrutiny under the antitrust laws (pages 3 and 4 of the Answer).

Applicant's immunity claim must be rejected. The antitrust laws and their underlying policies clearly do apply to the practices of Applicant which the Department challenged in its letter of advice.

Competition is the fundamental economic policy of the nation. United States v. Philadelphia National Bank, 374 U.S. 321, 372 (1963). Its preservation and enforcement through the medium of the antitrust laws is the general rule, and exemption from the application of those laws is never lightly implied. Even federal regulation of an industry does not immunize the activities of its members from antitrust sanction, for regulation and competition are not mutually exclusive schemes but rather are recognized as complementary

means to the same goal of proper resource allocation and distribution. Northern Natural Gas Co. v. F.P.C., 399 F. 2d 953, 959 (D.C. Cir. 1968). In fact, maintaining the play of competition may well prove more important when an industry is highly regulated, not less so. United States v. Philadelphia National Bank, supra at 372.

The Atomic Energy Act has explicitly reaffirmed this fundamental national policy by charging the Commission to develop the use of atomic energy so as to "strengthen free competition in private enterprise." Section 1(b), 42 U.S.C. §2011(b). Not only does the Act express this procompetitive policy, it requires that a license applicant's practices be scrutinized and pass muster according to the standards of the antitrust laws and their underlying policies. Section 105(c), 42 U.S.C. §2135(c). The regulatory scheme specifically incorporates the antitrust laws. It is in the face of this clear mandate of Congress to apply the basic national economic policy of antitrust to nuclear facility licensing that Applicant now claims immunity of its practices from such scrutiny.

Of course, the Atomic Energy Act is not the only federal regulatory scheme that must be considered in determining whether government regulation has approved and immunized any of Applicant's anticompetitive practices. The Federal Power Commission, under the Federal Power Act, also regulates certain aspects of Applicant's business. As already mentioned, however, the mere fact of

regulation cannot deny the antitrust role. Nothing in the Power Act, or in decisional law interpreting the Act, purports to make its regime exclusive, although the FPC has proposed such legislation. S. 3136, 89th Cong. (1966) and S. 1934 and H.R. 10727, 90th Cong. (1968). See FPC Annual Report, 1970 at 7-8. The antitrust laws have long been held to apply to electric utilities, both directly through court actions and through the actions of the Power Commission as well.

Proper statutory interpretation will recognize that the Federal Power Act operates side-by-side with the antitrust laws so that both serve as complementary forms of economic control. Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963); Woods Exploration and Producing Co. v. Aluminum Co. of America, 438 F. 2d 1286, (5th Cir. 1971). In harmonizing the two statutory regimens, the fundamental policy of antitrust must be given effect except in cases where it would be plainly repugnant to specific provisions of the Power Act or to accomplishment of Congress' regulatory purpose. Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 217-218 (1966); Thill Securities Corp. v. New York Stock Exchange, 433 F. 2d 264, 270 (7th Cir. 1971); cf. Pan American World Airways v. United States, 371 U.S. 296 (1963).

No such plain repugnancy exists here. Although the Federal Power Commission approves the wholesale rates of electric utilities, and regulates some aspects of the integration and coordination among them, its powers in this area are limited, and there remains

considerable scope for operation of the antitrust laws. The Power Commission may order an electric utility to enter into a reserve sharing agreement with another; it recently compelled the Florida Power Corporation to interconnect and share reserves on an equitable basis with the City of Gainesville, and the Supreme Court upheld its jurisdiction to do so. Gainesville Utilities Department v. Florida Power Corporation, 402 F. 2d 515 (1971). However, the FPC is limited in compelling coordination by a statutory provision restricting a utility's obligation to coordinate to transactions which can be accomplished without increasing its generating capacity. Section 202(b) of the Federal Power Act, 16 U.S.C. §824a(b). This provision renders unavailable from the FPC the type of coordination known as "coordinated development" in which the participating utilities pool load growth to justify installation of larger generating units and enhance their ability to sell low cost power.

A 1967 amendment to Section 202(b) would have made such coordinated development compulsory for all interstate electric utilities. Section 411 of S. 1934, 91st Cong., 1st Sess. (the proposed Electric Power Reliability Act of 1967). Congress chose, however, not to give the FPC that jurisdiction; instead, in 1970, it provided for prelicensing review of nuclear facilities in the Atomic Energy Commission -- with application of the standards of the antitrust laws, and thereby opened the way to compel coordinated development by means of appropriate license conditions.

Further, the FPC has disclaimed jurisdiction to order the wheeling of electric power for one utility over the transmission lines of another except in very limited circumstances. City of Paris, Kentucky v. Kentucky Utilities, 70 PUR 3d 45 (1967) and 80 PUR 3d 331 (1969).

The very crux of the Department's contentions in this proceeding is that Applicant has refused and refuses to coordinate its nuclear generation expansion program with its neighboring competitor utilities on nondiscriminatory terms. The determination of whether Applicant's practices create or maintain a situation inconsistent with the antitrust laws, and the framing of license conditions to correct such situation, if found to exist, will in no way work at cross purposes with the Federal Power Act. On the contrary, the possibility for compelling wheeling and coordinated development beyond jurisdiction of the FPC can only complement and further its regulatory scheme -- Section 202(a) of the Power Act makes it the Commission's duty to promote and encourage interconnection and coordination -- and would not interfere with its rate-making function.

While Applicant mentions federal regulation as a basis for inapplicability of the antitrust laws to its activities, its immunity argument places primary reliance on "a pervasive scheme of state regulation in both North Carolina and South Carolina." Applicant's reliance, however, is misplaced. Its regulation by North and South Carolina provides no support for the claimed immunity.

The concept of antitrust immunity for state action was, of course, enunciated in Parker v. Brown, 317 U.S. 341 (1943), when the Supreme Court said that the Sherman Act was directed at private action and was not intended to restrain "a state or its officers or agents from activities directed by its legislature" in the exercise of its police powers, 317 U.S. at 350-351, and accordingly held that California's Agricultural Prorate Act, which contained restrictions on terms of sale and provided for the setting of a minimum price at which producers could legally sell, did not contravene the antitrust laws. The Court, however, was careful to find, after lengthy discussion, that the California statute harmonized with and furthered federal policy on the same subject, as expressed in the Agricultural Adjustment Act. 317 U.S. at 352-368. Absent this federal statute derogating from antitrust policy, California's action would have been constitutionally invalid. Its validity depended entirely upon Congress's clearly expressed determination to impose specific agricultural marketing regulation plainly repugnant to the fundamental economic policy of antitrust.

The mere fact of state action, then, does not insure antitrust immunity. The state action must also be valid, and it cannot be valid when in contravention of federal law, or when Congress has occupied a legislative field. Hecht v. Pro-Football, Inc., 444 F. 2d 931, 935 (D.C. Cir. 1971).

In this proceeding, the very activities with which the Department is most concerned -- Applicant's refusals to coordinate with the neighboring small utilities with which it competes -- necessarily involve wholesale sales of electric energy in interstate commerce, and such sales have since 1927 been held a forbidden subject for state regulation because of the Commerce Clause of the Constitution. Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927). It was to fill the jurisdictional gap resulting from Attleboro that Congress passed the Federal Power Act in 1935. As the Supreme Court subsequently stated, "[w]hat Congress did was to adopt the test developed in the Attleboro line which denied state power to regulate a sale 'at wholesale to local distributing companies' and allowed state regulation of a sale at 'local retail rates to ultimate customers.'" Federal Power Commission v. Southern California Edison Co., 376 U.S. 205, 214 (1964). With no jurisdiction in the states to regulate wholesale interstate sales (and the Department is not aware of any efforts by North and South Carolina to regulate them) there clearly can be no antitrust immunity resulting from such state regulation. Cf. Gas Light Co. of Columbus v. Georgia Power Company, 440 F. 2d 1135 (5th Cir. 1971); Washington Gas Light Co. v. Virginia Electric and Power Co., 438 F. 2d 248 (4th Cir. 1971).

In any event, the Committee Report on P.L. 91-560 makes clear (p. 14) that the statutory test of "inconsistent with the antitrust laws" refers not only to violations of the antitrust

laws but also to inconsistency with "policies clearly underlying these laws." Accordingly, it would be a useless exercise to debate whether particular acts or practices which are alleged to create or maintain a situation inconsistent with the antitrust laws are technically exempt from antitrust prosecution in the courts since notwithstanding this they may be inconsistent with policies "clearly underlying the antitrust laws." i.e., avoidance of monopolies and restraints on freedom of competition. 3/

3/ E.g.: "The purposes was . . . to make . . . a competitive business economy." United States v. South-Eastern Underwaters Ass'n, 322 U.S. 533, 559 (1944); "The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent." Standard Oil Co. v. F.T.C., 340 U.S. 231, 248-49 (1951); "Basic to the faith that a free economy best promotes the public wealth is that goods must stand the cold test of competition; that the public, acting through the market's impersonal judgment, shall allocate the nation's resources and thus direct the course its economic development will take." Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605 (1953).

IV. APPLICANT'S ALLEGATIONS THAT THE DEPARTMENT WOULD COMPEL IT TO DISCRIMINATE AGAINST CERTAIN CUSTOMERS AND PLACE SMALL SYSTEMS IN A POSITION TO COMPETE UNFAIRLY WITH APPLICANT ARE GROUNDLESS

Applicant expresses concern that license conditions to be proposed by the Department "would grant some of its customers a preferential form of access to its generation and transmission system [and thereby] be unfair and discriminatory" to other of its customers in violation of federal and state law. (Pages 4 and 5 of the Answer)

The Department will show that Applicant, through its control over generation and transmission has the power to exclude actual or potential competitors from substantial bulk power supply markets (and thereby to dominate and possibly exclude others from retail markets as well) and that the power exchanges and other remedies the Department will recommend as license conditions would be compatible with and complement Applicant's obligations as a public utility under those regulatory statutes to which it may be subject. In its inquiry and recommendation of license conditions, the Department would certainly have the intention of prohibiting unreasonable discrimination, rather than promoting it. For example, one specific subject of concern would be whether the arrangements which replaced the CARVA pool were made with the purpose of enabling Applicant to unreasonably discriminate against smaller utilities.

Applicant also argues that "tax and other advantages" enjoyed by certain small systems would enable them to compete unfairly with it in the event anticipated license conditions would be imposed. The Department believes that any tax or other advantages

which may be lawfully enjoyed by municipal and cooperative systems do not excuse anticompetitive conduct on Applicant's part and are irrelevant in this proceeding. Applicant must simply take its competitors as it finds them. However, if the Commission nevertheless believes consideration of such purported advantages is relevant, it should also inquire fully into comparable competitive advantages that Applicant may possess, including the type and dollar amount thereof.

V. APPLICANT'S EFFORTS BEFORE LEGISLATIVE AND OTHER GOVERNMENTAL BODIES ARE A PROPER SUBJECT OF INQUIRY IN THIS PROCEEDING

The Department disagrees with Applicant's contention (page 5 of the Answer) that its efforts before legislative and other governmental bodies regarding the proposed Electric Power In Carolinas (EPIC) project may not be introduced as evidence in this proceeding.

Certain conduct in attempting to influence governmental action has undoubtedly been held exempt from the application of the antitrust laws, and concern with protection of the First Amendment right of petition was a basis for so holding. Eastern Railroad Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965). Noerr, however, carved out an exception to its rule: The antitrust laws would apply to "situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to interfere directly with the business relationships of a competitor."

365 U.S. at 144. Most recently, in California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), the Supreme Court gave content to this "sham" exception by holding that a combination "to harass and deter . . . competitors from having free and unlimited access' to the agencies and courts, to defeat that right by massive, concerted and purposeful activities of the group" would violate the antitrust laws. 404 U.S. at 515. The Court further cautioned that antitrust violations could well result from other abuses of administrative or judicial processes. 404 U.S. at 512-513. Recent lower federal court decisions have reached similar results. See Woods Exploration and Producing Co. v. Aluminum Co. of America, 438 F. 2d 1286 (5th Cir. 1971), cert. denied, Jan. 17, 1972, 40 U.S.L.W. 3330; United States v. Otter Tail Power Co., 331 F. Supp. 54, 62 (D. Minn. 1971), prob. juris. noted, May 22, 1972, 40 U.S.L.W. 3553.

Even those activities which, under Noerr and Pennington, cannot be found to violate the antitrust laws may nevertheless be evidence of such violation or of a situation inconsistent with those laws. A footnote to the Pennington opinion made this quite clear:

> It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under the established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis of a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny. 381 U.S. at 670 n.3. See also Household Goods Carrier's Bureau v. Terrell, 452 F. 2d 152 (1971).

The failure to obtain particular desired action from a legislature, court or administrative agency could be an important part of the background explaining a decision to resort to other measures violating the antitrust laws or inconsistent with their policies. The attempts to influence government may shed light on the purpose and character of prior and contemporaneous conduct -- and perhaps even give form to an overall plan of monopolization. See American Medical Ass'n v. United States, 130 F. 2d 233, 250-252 (D.C. Cir. 1942)

At this point, the Department does not know whether Applicant's attempts to influence governmental action were a "sham" so as to violate the antitrust laws, or contribute to a situation inconsistent therewith, or even whether they would be evidence of the bad purpose and character of other conduct. Clearly, however, inquiry into these activities is within the proper scope of discovery in this proceeding, and we do not read Applicant's Answer to contend otherwise. Even were they to be deemed neither violative of the antitrust laws nor admissible in evidence such activities are "relevant to the subject matter involved in the pending action" and information concerning them is "reasonably calculated to lead to the discovery of admissible evidence," and the prerequisites for discovery are satisfied. 10 C.F.R. Section 2.741, of the Commission's Rules of Practice. See Federal Rule of Civil Procedure 26(b)(1). Such discovery would neither punish, nor enjoin (as was sought in Noerr), nor indirectly restrain First

Amendment protected speech or conduct. No case holds to the contrary. See Southwestern Electric Power Co. v. F.P.C., 304 F. 2d 29, 47 (5th Cir. 1962), cert. denied, 371 U.S. 924.

VI. REPLY TO APPLICANT'S SPECIFICATION OF ISSUES AND FACTS

The Department has outlined the relevant facts in its letters of advice dated August 16, 1971, and September 29, 1971. These facts indicate that: (1) Applicant Duke Power Company is culpable for a situation inconsistent with the antitrust laws which now exists in the area of the Piedmont Carolinas that it serves, which gives Applicant the power to preclude its smaller competitors from developing hydroelectric power and installing and using large, low cost thermal generating units and obtaining the benefits of economies of scale therefrom; and (2) that Applicant's proposed activities under the licenses sought, in installing large nuclear units and marketing power from them, would maintain this situation and likely enhance or aggravate it. The Department will propose license conditions appropriate to remedy the anticompetitive situation which Applicant's activities under the license would maintain.

VII. THE DEPARTMENT TAKES NO POSITION ON APPLICANT'S OPPOSITION TO DELEGATION OF REVIEW AUTHORITY

The Department of Justice neither opposes nor concurs in Applicant's opposition to, and motion for reconsideration of, the Commission's delegation of final authority, including the review function, to the Atomic Safety and Licensing Appeals Board.

However, the Commission's established procedure, incorporated in its rules of practice, reserving final authority in specified cases is believed adequate to deal with this situation. 10 C.F.R. §§ 2.785-2.786.

Respectfully submitted,

WALLACE EDWARD BRAND

DAVID A. LECKIE

Attorneys, Department of Justice
Washington, D. C. 20530

August 3, 1972

SUPPLEMENT TO ANNEX A

COMMENTS OF THE DEPARTMENT OF JUSTICE
ON APPENDIX A TO THE ANSWER AND MOTION
OF APPLICANT DUKE POWER COMPANY

The Department of Justice supplements its detailed discussion of the scope of prelicensing antitrust review (Reply to the Answer of Consumers Power Company, relevant portions of which are incorporated by reference herein [Annex A]) with the following specific comments upon Applicant's detailed discussion of its position (Appendix A to Applicant's Answer and Motion):

1. On page 2 of Appendix A, Applicant quotes City of Lafayette v. S.E.C. to the effect that "there must be a reasonable nexus between the matters subject to [the agency's] surveillance and those under attack on anticompetitive grounds." The District of Columbia Circuit indeed found such a nexus, in the F.P.C. portion of that case (which involved Gulf States Utilities), between financing the facilities to be constructed and the general system activities of Gulf States -- far less of a nexus than exists in the present proceeding between construction and operation of the nuclear facility and Applicant's overall system operations.

2. On page 3, Applicant quotes at length from City of Statesville v. A.E.C. concerning the Commission's narrow scope of antitrust review. The material quoted concerns licensing determinations under Section 104 of the Atomic Energy Act -- noncommercial reactors at the construction permit stage. The court warned that

it would find a nexus at the operating license stage even under Section 104 review. The present proceeding, however, deals with Section 105 review of Section 103 commercial licenses, which is an entirely different matter.

3. (Page 4, second paragraph) Contrary to Applicant's contention, the Department's proposed scope of antitrust review would not require the Board to construe Section 105(c) as if the words "activities under the license" had been deleted. Those words, however, must be considered in the context of the remainder of that statutory provision -- by relating the activities under the license to the maintenance of a situation inconsistent with the antitrust laws.

4. (Page 5) Neither the cited page 125 of the Joint Committee Hearings nor pages 136-137 of those Hearings (where Mr. Comegys made his alternate proposal) contains support for Applicant's conclusion here. Mr. Comegys' proposal used the language "issuance of the license or activities for which the license is sought" -- which is no different than the phrase "activities under the license" which was finally used. His proposal did not vary in scope from that enacted; it differed only in the timing of the issuance of advice.

5. On pages 11 and 12, Applicant quotes Acting Assistant Attorney General Comegys, citing page 366 of the Joint Committee on Atomic Energy Hearings. The citation is to an out-of-context excerpt of Mr. Comegys' testimony, which was taken from page 142 of the

Senate Antitrust and Monopoly Subcommittee Hearings on Competitive Aspects of the Energy Industry (91st Cong., 2d Sess., May 1970). In context, Mr. Comegys said the following:

> We do not consider such a licensing proceeding as an appropriate forum for wide-ranging scrutiny of general industry affairs essentially unconnected with the plant under review.
>
> The principal problem area we foresee is that of access to a plant's output by outside utilities, public and private. To obtain the economies of scale possible under atomic generation, plants must be both very large and very expensive, in most cases too much so for one company to finance or to use wholly in its own system. Accordingly, most plants are organized as joint ventures among several utilities. At the same time, the reduction in marginal cost of power afforded by an atomic plant is so great that a competing utility, denied participation and without an alternative means of acquiring such benefits, is placed at a decisive competitive disadvantage. The problem is made more acute by environmental considerations, which will narrow the availability of plantsites for those seeking to form their own alternative projects.
>
> In any event, the guidance of the antitrust laws suggests that where companies are acting together to create or control a unique facility, they may be required, by application of the rule of reason, to grant access on equal and nondiscriminatory terms to others who lack a practical alternative.
>
> The mode and terms of access must, of course, depend on the particular factual context surrounding each individual licensing application.
>
> Under some circumstances, an ownership share may be required for an outside utility who desires to assume the risks as well as the benefits. In other cases, contractual arrangements for a portion of the plant's output may be entirely adequate. But in any case we believe that terms for adequate access to the new facility require something more than the mere equivalent of a supplier-customer relationship. Such access implies, in our view, the same opportunity to receive low-cost power for the same uses as those who control the unique low-cost facility.

6. (Page 13) Senator Aiken's "concession" that the effort "to cut back on the scope of the AEC consideration of antitrust issues . . . is reflected to some extent in this bill" had reference merely to the elimination of the words "tend to" from the statutory test contained in earlier versions of the legislation: "whether the activities under the license would [tend to] create or maintain a situation inconsistent with the antitrust laws."

7. (Pages 17-18) Applicant's system-wide arrangements are indeed necessary to its installation of the Oconee and McGuire units. However, the installation of those units and ancillary transmission also maintains and enhances Applicant's power to deny such arrangements to others, thus having an anticompetitive impact.

8. (Page 19) The context of the Assistant Attorney General's letter of endorsement indicates that his reference to conditioning the license for a joint venture nuclear power plant was by way of example only and did not intend to describe the entire scope of the bill.

9. Applicant's reference (page 20) to "Health and Safety Standards" indicates that it is referring to the Statesville case and medical therapy and experimental licenses which are not involved in this Section 105 proceeding.

UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

In the Matter of	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A 50-287A
(Oconee Units 1, 2 & 3, McGuire Units 1 & 2)	)	50-369A, 50-370A

CERTIFICATE OF SERVICE

I hereby certify that copies of REPLY OF THE DEPARTMENT OF JUSTICE TO APPLICANT'S ANSWER AND MOTION OF JULY 24, 1972, dated August 3, 1972, in the above captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 3rd day of August 1972:

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UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

ANTI-TRUST

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A
	)	50-287A
(Oconee Units 1, 2 & 3,	)	50-369A, 50-370A
McGuire Units 1 & 2)	)	

8-1-72.

REPLY OF AEC REGULATORY STAFF TO
APPLICANT'S ANSWER TO NOTICE OF HEARING

Pursuant to the provisions of 10 CFR, Part 2, Section 2.706 of the Commission's Rules of Practice, the AEC Regulatory Staff (Staff) hereby replies to the Answer to Notice of Hearing filed by Duke Power Company (applicant).

In its Answer the applicant contends the legislative history of the Atomic Energy Act, as amended (the Act), demonstrates that Congress intended the Commission to consider the implications, from the standpoint of the antitrust laws, of the construction and operation of the proposed facilities only and not to assume the responsibilities of the Department of Justice and the courts for the enforcement of the antitrust laws with respect to the applicant's overall activities as a utility.

The Staff does not agree with the applicant's interpretation of the Act and its legislative history. The Staff maintains that the legislative history of the Act reveals that Congress intended a broader antitrust review than contemplated by the applicant. However, this issue as well as whether the applicant's activities under the license in question will create or maintain a situation that is inconsistent with the antitrust laws will be addressed and resolved at the forthcominghearings on this matter. The primary purpose of the hearing herein is set forth on page 4 of the Notice.

ANTI-TRUST

"The issue to be considered at the hearing is whether the activities under the permits and licenses, respectively, in question would create or maintain a situation that is inconsistent with the antitrust laws---. In its initial decision, the Board will decide those matters relevant to that issue which are in controversy among the parties and make its findings on the issue. (Notice of Consolidated Antitrust Hearing on Application for Construction Permits and Operating Licenses, page 4, June 28, 1972.)"

The applicant's Answer also opposes the Commission's appointment of an Atomic Safety and Licensing Appeal Board. Applicant maintains that the issues involved in this matter are so fundamental and novel that they require a full review by the Commission itself. The Staff agrees that there are fundamental issues involved in the proceeding and that questions of first impression for the AEC will be presented. The staff submits, however, that the Commission's Rules of Practice applicable to proceedings subject to Appeal Board review are fully adequate in these circumstances. Those rules (10 CFR Part 2 §§2.785 and 2.786) make provision for review and final decision by the Commission when it determines that major or novel questions of policy, law or procedure have been erroneously decided in the proceedings below. Implicit in these rules provisions is the assumption that the Appeal Board may be called upon to

deal with questions which are fundamental, or novel or both; and the explicit is the consequent review role marked out for the Commission itself.

Applicant's motion in this respect should, accordingly, be denied.

Respectfully submitted,

Joseph Rutberg
Antitrust Counsel for
AEC Regulatory Staff

Benjamin H. Vogler
Assistant Antitrust Counsel
for AEC Regulatory Staff

Dated at Bethesda, Maryland
this 1st day of August, 1972.

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A
	)	50-287A
(Oconee Units 1, 2 & 3,	)	50-369A, 50-370A
McGuire Units 1 & 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of REPLY OF AEC REGULATORY STAFF TO APPLICANT'S ANSWER TO NOTICE OF HEARING, dated August 1, 1972, in the above captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 1st day of August 1972:

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UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

In the Matter of Duke Power Company (Oconee Nuclear Station Units 1, 2 and 3 and McGuire Nuclear Station Units 1 and 2)	)	Docket Nos. 50-269A, 50-270A, 50-287A, 50-369A, and 50-370A

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorneys herewith enter an appearance in the captioned matter. In accordance with §2.713, 10 CFR Part 2, the following information is provided:

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Admissions (in good standing):	United States Court of Appeals for the District of Columbia Circuit
Name of Party:	Duke Power Company Charlotte, North Carolina

Wm. Warfield Ross

Keith S. Watson

Toni K. Golden

Dated At Washington, D. C.
this 26th day of July, 1972

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Notice of Appearance filed on the 26th day of July, 1972 has been served on the following by deposit in the United States mail this 26th day of July, 1972:

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UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A, 50-287A,
(Oconee Units 1,2, and 3,	)	50-369A, 50-370A
McGuire Units 1 and 2)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of NOTICE AND ORDER FOR PREHEARING CONFERENCE dated July 14, 1972, in the captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 14th day of July 1972:

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Office of the Secretary of the Commission

cc: Mr. Bennett
Mr. Rutberg
Mr. Braitman
AS&LBP
Reg. Files

50-369A, 270A, 287A

PROD. & UTIL. FAC. 50-369A, 370A

UNITED STATES OF AMERICA

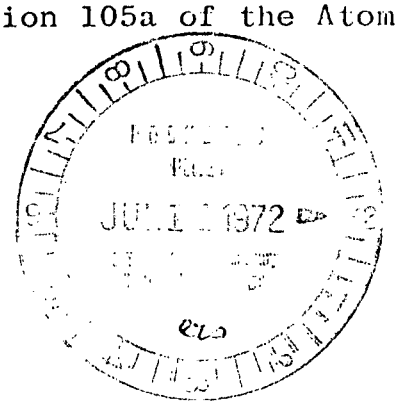
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A
	)	50-287A
	)	50-369A, 50-370A
(Oconee Unites 1, 2 & 3,	)	
McGuire Units 1 & 2)	)	

NOTICE AND ORDER FOR PREHEARING CONFERENCE

PLEASE TAKE NOTICE, that pursuant to the Atomic Energy Commission's Notice of Antitrust Hearing dated June 28, 1972, and published in the Federal Register (37 FR 13202) on July 4, 1972, and in accordance with the said Commission's Rules of Practice, a prehearing conference will be held in the above entitled proceedings on September 6, 1972 at 10:00 a.m. local time, at Courtroom 309, U. S. Court of Claims, 717 Madison Place, N.W, Washington, D. C. 20005.

The cardinal objective of said prehearing conference will be to establish a clear and particularized identification of matters related to the issue whether activities under the permits applied for would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a of the Atomic Energy Act of 1954, as amended.



C. Each of the parties and the petitioners shall be prepared to submit at the prehearing conference:

1) A written statement setting forth under topical headings a concise statement of the essential facts and a recital of the contested issues of fact and of law.

2) A schedule of additional discovery, if any, which he requires and a time table showing the dates by which each item of discovery will be completed.

3) Copies of written exhibits and printed documents which will be offered in evidence at the formal hearing.

4) The names and addresses of all witnesses now intended to be called.

It is suggested that the foregoing documents be exchanged or if impracticable, made available to all counsel for their examination prior to the prehearing conference.

In addition to determining the particular factual and legal issues to be determined at the formal hearings which is its cardinal objective the Board will also:

1. hear oral arguments on the petitions to intervene and consider amendments thereto;

2. consider motions addressed to:

   a) jurisdictional questions including pending proceedings before the Federal Power Commission

   b) the letter of advise of the Attorney General

   c) other matters including: simplification of issues; additional discovery; reduction in the amount of proof and number of expert witnesses; settlement proposals; the time table for discovery, if any; the presentation of the evidence at formal hearing; the final listing of witnesses and exchange of written testimony and documentary evidence; the submission and exchange of trial briefs; and such other matters as may aid in the disposition of the proceeding.

Each party shall be represented at the prehearing conference by the attorney who expects to present the evidence at the formal hearing.

BY ORDER OF THE ATOMIC SAFETY AND LICENSING BOARD

Walter K. Bennett

By Walter K. Bennett, Chairman

Issued at Washington, D. C.

UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-269A, 50-270A,
Duke Power Company	)	50-287A, 50-369A,
(Oconee Nuclear Station Units 1,	)	and 50-370A
2 and 3 and McGuire Nuclear	)	
Station Units 1 and 2)	)	

ANSWER TO NOTICE OF HEARING AND
OPPOSITION TO, AND MOTION TO RECONSIDER,
DELEGATION OF REVIEW AUTHORITY

Pursuant to the provisions of 10 C.F.R. section 2.705 of the Commission's Rules of Practice, Duke Power Company (hereinafter "Applicant") files this Answer to the Notice of Antitrust Hearing on Applications for Construction Permits and Operating Licenses published in the Federal Register (37 Fed. Reg. 13202, July 4, 1972) (hereinafter "Notice").

Applicant's Position

It is Applicant's position that the activities under the permits in question would not create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105(a) of the Atomic Energy Act, as amended, 42 U.S.C. §2135(a). Subsection 105(c) of the Atomic Energy Act, as amended, 42 U.S.C. §2135(c), requires the Commission, whenever antitrust issues have been properly raised in a licensing proceeding, to

"make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws***." An "affirmative" antitrust finding does not preclude unconditional issuance of a license, however, since the Commission is further directed by this section to "also consider*** such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest."

The legislative history of the Act demonstrates that Congress intended the Commission to consider the implications, from the standpoint of antitrust laws and policies, of the construction and operation of the proposed facilities only, and not to assume the responsibilities of the Department of Justice and the courts for the enforcement of the antitrust laws with respect to an applicant's overall activities as a utility. Rather, the statute commands that the Commission scrutinize the possible effects of the "activities under the license", and only those activities, in an antitrust context. The licenses applied for in this proceeding would permit Applicant to operate the Oconee units and to construct and ultimately to operate the McGuire units, but no more. The licenses are not concerned with the operation of Applicant's system in a broader context, including other generation or transmission facilities, sales contracts, coordination arrangements and the like. Thus issues relating to

coordination, market allocation, pooling, rates, and proposed, existing or former interconnection agreements, as set forth by the Justice Department, in its advice letter dated August 2, 1971, and by those filing a joint petition to intervene, are irrelevant to the inquiry which the statute contemplates, and should not be considered in this proceeding. A fuller statement of Applicant's views on this matter is attached as Appendix A to this Answer.

Subject to -- and without waiving -- the foregoing position, it is Applicant's further position that it has not monopolized any relevant market within the meaning of section 2 of the Sherman Act, 15 U.S.C. §2. Nor has Applicant engaged in any other conduct or activity which is inconsistent with any of the federal antitrust laws, to the extent that those laws are applicable to an industry characterized by pervasive government regulation and natural monopoly economies. In addition to other alternatives available to Applicant's neighboring utilities, such utilities presently enjoy the option of nondiscriminatory and wholly adequate access to the benefits of large scale generation and transmission through purchases under Applicant's wholesale rate schedules approved by the Federal Power Commission. Applicant's neighboring utilities, including those obtaining all or part of their requirements under Applicant's wholesale schedules, are financially viable and, to the extent con-

templated by federal and state law, competitively viable as well.

In those areas where competitive impediments have been raised, such restrictions have been imposed by the state, not by Applicant, and, indeed, Applicant is equally subject to these strictures. First, a pervasive scheme of state regulation in both North Carolina and South Carolina strictly controls and limits the activities of public utilities. For example, the ability of Applicant and other suppliers of electric energy to compete within those states has been seriously curtailed by operation of law.*/ In addition, the rates and practices of the Applicant are subject to regulation by the North Carolina Utilities Commission and the South Carolina Public Service Commission, respectively; and within the ambit of such regulation, those with an interest in the rates and practices of the Applicant have an opportunity to be heard. Thus, the states' intimate involvement with the activities of the Applicant, and the meaningful regulation and supervision to which it is subject, immunizes Applicant's rates and practices under challenge here from scrutiny under the antitrust laws.

Furthermore, it is Applicant's position that requiring Applicant to grant some of its customers a preferential form of access to its generation and transmission system would be unfair and discriminatory to Applicant's customers

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*/ See Gen. of North Carolina, §62-110.2 (Supp. 1971); Code of Laws of South Carolina of 1962, §24-13 through §24-18 (Supp. 1971).

who are not afforded such access and would therefore violate the Federal Power Act and the laws of the states of North Carolina and South Carolina. Additionally, to afford such access to municipal or other small systems, which enjoy tax and other advantages, would place such entities in a position to compete unfairly with Applicant for wholesale and industrial --and in some areas, residential -- load, and would be inconsistent with the antitrust laws and the public interest.

Finally, it is Applicant's position that its activities in regard to the proposed Electric Power in Carolinas (EPIC) project to which the Justice Department refers in its advice letter are fully protected by the Constitution of the United States. These efforts before legislative and other governmental bodies constitute a legitimate exercise of Applicant's Constitutional rights under the First Amendment. They in no way represent an abuse of the processes through which Applicant may direct its views, do not evidence an intent to unlawfully monopolize, and therefore cannot be introduced as evidence in this proceeding.

Specification of Issues and Facts

Applicant denies that the activities under the permits in question would create or maintain a situation inconsistent with the antitrust laws as specified in subsection

105(a) of the Atomic Energy Act as amended [42 U.S.C. 2135(a)].

Applicant also takes issue with the fact that the petition of the town of Newton to intervene in this proceeding (Notice, p. 2) in regard to the Oconee units is now before the Board. By letter to the Commission dated October 11, 1971, counsel for the petitioning intervenors made a formal request to delete Newton as a party.

Appearance

Applicant proposes to appear and present evidence in this proceeding.

Opposition to Delegation of Review Authority

Applicant respectfully opposes, and moves the Commission to reconsider, that portion of the Notice which delegates, pursuant to 10 C.F.R. section 2.785, to the Atomic Safety and Licensing Appeals Board (hereinafter "Appeals Board"), the final authority, including the review function, which would otherwise be exercised and performed by the Commission.

Applicant submits that the issues to be considered in the above-captioned proceeding are so fundamental, and may be so novel to this Commission, that they require a full review by the Commission itself. The hearing will be held to determine whether the activities which Applicant proposes under the construction and operating permits in question would

create or maintain a situation inconsistent with the antitrust laws, pursuant to amendments to the Atomic Energy Act enacted in December, 1970. See 42 U.S.C. §2131 et seq. Until the 1970 amendments, the Commission's antitrust review under the 1954 Atomic Energy Act remained inoperative because all reactors were licensed under section 104 of the Atomic Energy Act, as amended, to which the antitrust review provisions did not apply. The 1970 amendments changed the law so that almost all reactor licensing proceedings now require antitrust review. See Bertram Schur, Background Discussion of Nuclear Power Licensing, ALI-ABA Course on Atomic Energy Licensing and Regulations, Washington, D. C., (November 12, 1971), pp. 1-3.

The instant proceeding is the second to be noticed for hearing on antitrust issues pursuant to the 1970 amendments. While the first of these, Consumers Power Company (Midland Plants Units 1 and 2), Dockets Nos. 50-329A and 50-330A, has progressed through an initial prehearing conference, it cannot now be determined which matter will be completed first. In any event, it is likely that many additional antitrust hearings will follow. In the words of one Justice Department official, "many of the applications involve issues just as complex and difficult as those which we encounter in a major antitrust investigation under the

Sherman Act." Milton J. Grossman, Antitrust -- Aspects of Nuclear Power Licensing -- The Role and Philosophy of the Antitrust Decision, ALI-ABA Course of Study on Atomic Energy Licensing and Regulations, Washington, D.C., (November 12, 1971), p. 3.

In addition to the complex questions of fact and law arising under the Sherman Act, this proceeding (and those which will follow it) raises difficult questions about the Commission's role in enforcing the antitrust laws, serious issues of comity with the Federal Power Commission and other federal and state governmental agencies, and vital questions concerning the nature and scope of hearings required by the 1970 amendments. The issues are further compounded because of the consolidation of the Oconee and McGuire applications. The Commission has never before had to address itself to these or other fundamental issues of antitrust law and public policy. The published amendments to the Commission's Rules which implement the 1970 amendment [see 35 Fed. Reg. 19655 (1970)] are of little guidance in this regard since, "generally, these rules simply crank into our regulatory system the statutory amendment." Schur, supra, at 9.

Given the lack of Commission precedent and the fundamental nature of the issues raised, Applicant submits that the delegation of final review to the Appeals Board would be particularly unwise and impractical. An appellate review board's role is to apply agency policy to given factual

circumstances, not to formulate policy. See Freedman, Review Boards in the Administrative Process, 117 U. Penn. L. Rev. 546 (1969). Significantly, in the Federal Communications Commission and the Interstate Commerce Commission, where Congress has explicitly provided for the establishment of appellate review boards, 47 U.S.C. §155(d)(1) and 49 U.S.C. §17(5), such boards are not utilized as final authority where important policy questions are concerned. See Note, Intermediate Appellate Review Boards for Administrative Agencies, 81 Harv. L. Rev. 1325, 1329-30 (1968). Similarly, the Administrative Conference's proposed amendment to section 8(b)(1) of the APA, 5 U.S.C. §557, calls for Commission-level review of cases where a party makes a "reasonable showing" that the case involves "a decision of law or policy which is important". See Freedman, supra, at 577.

Here, there is no extant Commission policy for the Appeals Board to apply, and the Commission's on-going regulatory process will suffer from a lack of Commission guidance in policy areas. Unlike the ICC and FCC, the Commission's Rules of Practice, 10 C.F.R. section 2.786(b), do not permit parties to petition the Commission to review Appeals Board decisions. This provision emphasizes that the Appeals Board mechanism was established to review ordinary cases, not to formulate Commission policy or otherwise resolve important questions of law and public policy. Thus, here, where the issues are novel, complex, and fundamental, and

where their disposition will have a far reaching effect on a vital segment of our economy, the parties are entitled to have the issues heard and reviewed by the Commission itself, the agency charged by Congress with paramount oversight responsibility for nuclear energy.

Conclusion

For the foregoing reasons, Applicant prays that the Commission reconsider that portion of its Notice delegating final review authority to the Appeals Board.

Respectfully submitted,

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July 24, 1972

UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
Duke Power Company	)	Docket Nos. 50-269A, 50-270A,
(Oconee Nuclear Station Units 1,	)	50-287A, 50-369A
2 and 3 and McGuire Nuclear	)	and 50-370A
Station Units 1 and 2)	)	

Appendix A to
Answer to Notice of Hearing and
Opposition to, and Motion to Reconsider
Delegation of Review Authority

It is the position of Duke Power Company (hereinafter "Applicant") that the scope of the antitrust scrutiny is limited by Section 105(c) of the Atomic Energy Act, as amended, 42 U.S.C. 2135(c), to activities under the licensed units. Any holding to the contrary would ignore the statutory standard set forth in Section 105(c) which governs this proceeding and misread the legislative history underlying this section.

A. The Applicable Statute Itself Limits the Scope of the Commission's Antitrust Review

The Atomic Energy Commission has no authority to conduct antitrust enforcement proceedings as such, i.e., proceedings directly to compel compliance with the antitrust laws. That power is reserved principally to the Department of Justice as prosecutor in civil or criminal court actions; to injured private parties suing in court for damages or injunctions; and to the Federal Trade Commission. Some federal administrative

agencies are also authorized by Section 11(a) of the Clayton Act, 15 U.S.C. §21(a), to conduct enforcement proceedings with respect to the industries they regulate, but the Atomic Energy Commission is not one of those so authorized.

Most administrative agencies with licensing responsibilities are required by statute or judicial decision to take account of antitrust policy. Such licensing responsibilities, however, do not require, or permit, the agency to conduct an overall review of the license applicant's conduct in light of the antitrust laws. Rather, there must be "a reasonable nexus between the matters subject to its surveillance and those under attack on anti-competitive grounds". City of Lafayette v. SEC, Slip Op. 27 (D.C. Cir. Nos. 24,764 and 24,963, 1971), cert. granted sub nom. Gulf States Utilities v. FPC, et al., 40 USLW 3565 (1972).[1/]

In the Lafayette case, supra, the Court found an insufficient "nexus" between the SEC's approval of security issues under the Holding Company Act and the operation of the facilities for which the financing was required, because "the agency, here

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1/ The Court granted certiorari only in the companion case to Lafayette, supra, of Lafayette v. FPC (D.C. Cir. No. 71-1041), which held that the Federal Power Commission must consider antitrust issues relating to the issuance of securities by a public utility.

the SEC, has not been given any regulatory jurisdiction over the operations of the company". Slip Op. at 27. The same restrictions limit the Atomic Energy Commission's antitrust review. As the Court of Appeals said in Cities of Statesville v. AEC, 441 F.2d 962, 975 (D.C. Cir. 1969) (en banc),

> [w]hat is unique about the instant situation, is the extreme narrowness of the Commission's jurisdiction in making licensing determinations. Unlike the Federal Power Commission, the Federal Communications Commission, and the many other regulatory agencies, the Atomic Energy Commission is dealing with a subject matter that is not, as yet, open to vast commercial exploitation. These atomic power plants are not like radio stations of proven technical and commercial feasibility which are coveted prizes of the elite; instead, nuclear reactors are extremely speculative investments because of the many technical and financial imponderables. Unlike the other regulatory agencies, the Atomic Energy Commission concerns itself not with economic feasibility but with practical development and application of this wondrous source of energy. While the regulatory agencies in most of the other fields concern themselves with establishing an efficient national allocation of resources in the area which they are administering, and base this goal on a "public interest" concept of free enterprise, the Atomic Energy Commission concerns itself with promoting technical innovation in a highly experimental field and implementing "public interest" concepts through protection of the health, safety, and security of the nation.

Section 105(c) of the Atomic Energy Act, as amended, 42 U.S.C. 2135(c), requires the Atomic Energy Commission to consider the antitrust laws in its licensing process. But it does not provide the Commission with general antitrust enforcement authority, or subject every facet of the license applicant's activities to antitrust review by the Commission. On the contrary, whenever antitrust issues have properly been raised in a licensing proceeding, the section only mandates the Commission to "make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws" (emphasis supplied).

An attempt to subject all of Applicant's activities as an electric utility to an unlimited antitrust review in this proceeding would require this Board to construe Section 105(c) as if the words "activities under the license" (emphasis supplied) had been deleted from the statute. Significantly, these words limiting the Commission's antitrust review authority were added by the 1970 amendments to the Act. By contrast, the previous version of Section 105(c) required only that the Attorney General advise the Commission as to the anticompetitive impact of the proposed license. The statute was silent as to what antitrust principles or parameters should guide the Commission in its consideration of license applications. See 68 Stat. 938. At the hearings which considered the 1970 amendments, the Justice Department proposed a revision of Section

105(c) which again failed to set forth the parameters or principles of the Commission's antitrust review functions. Thus, the acting Assistant Attorney General testified that under his proposal the Commission would not "have to make an express conclusory finding that the license or the transaction upon which the license was based" might be inconsistent with the antitrust laws, but could condition the license -- in the light of the Attorney General's advice -- without limitations as to the area of antitrust scrutiny. Prelicensing Antitrust Review of Nuclear Powerplants, Hearings before the Joint Committee on Atomic Energy, 91st Cong., 1st Sess. (November, 1969 and April, 1970) 125. [Hereinafter cited as "Hearings"].

The Justice Department's proposal was not adopted by Congress; instead, Congress rejected an unlimited and open-ended scope of review and inserted the phrase "activities under the license" in place of the pre-1970 standard in order to establish the principles and parameters of the review proceedings. This conclusively demonstrates that, not only did Congress focus its attention on the question of the scope of the Commission's inquiry in antitrust proceedings, it explicitly restricted the inquiry to an applicant's activities under the license.

B. Legislative History Confirms Congressional Intent to Limit Commission's Antitrust Review

1. Prior Antitrust Review Standards

The legislative history of the antitrust provisions of the Atomic Energy Act confirms the clear meaning of Section 105(c), i.e., that the Commission's antitrust inquiry must be confined to activities under the license. See Power Reactor Development Co. v. International Union of Electrical Workers, 367 U.S. 396, 408-411 (1961).

The original Atomic Energy Act of 1946 provided:

> Where activities under any license might serve to maintain or to foster the growth of monopoly, restraint of trade, unlawful competition, or other trade position inimical to the entry of new, freely competitive enterprises in the field, the Commission is authorized and directed to refuse to issue such license or to establish such conditions to prevent these results as the Commission, in consultation with the Attorney General, may determine. §7(c), 60 Stat. 724.

The Commission was thus required by this section not only to condition every license so as to prevent anticompetitive consequences, but also to deny a license altogether if it determined that conditioning would not be effective. The practical operation of such a requirement was never experienced, however, because no licensing proceedings under the 1946 Act ever arose.

A substantially different regime was established by the Atomic Energy Act of 1954. The statutory revision first

proposed in that year by the Joint Committee on Atomic Energy (JCAE) would have eliminated entirely the obligation of the Commission to consider or apply antitrust policy in licensing proceedings.[2/] Upon the protest of several JCAE members and the Department of Justice, an alternative proposal was advanced under which antitrust considerations would have continued to be controlling, but with the power to make the requisite antitrust determinations removed from the AEC and given to the Federal Trade Commission.[3/] The version initially passed by the Senate was similar but would have made the Attorney General the final antitrust arbiter.

The common thread in all these proposals was extinguishment of this Commission's authority to decide antitrust issues. But, as finally enacted, the 1954 statute nevertheless preserved an antitrust role for the Commission. While eliminating the prior provision which made antitrust considerations dispositive, the new statute required the Commission in commercial-licensing cases to obtain the views of the Attorney General as to "whether, insofar as he can determine, the proposed license would tend to create or maintain a situation inconsistent with the antitrust laws. . . ." 68 Stat. 938. However, as previously observed, the 1954

2/ H.R. 8862, 83d Cong.; S. 3323, 83d Cong.

3/ H.R. 9757, 83d Cong.; S. 3690, 83d Cong.

legislation established no principles or parameters to guide the Commission in its antitrust review.

Like the original 1946 statute establishing an antitrust rule for licensing proceedings, however, the 1954 antitrust provision never came to be applied. All applications filed under the 1954 Act were for research and development licenses rather than for commercial licenses, and, as the Court of Appeals held in the Statesville case, the Commission was neither obligated nor permitted to consider antitrust issues when only a research license was sought. Cities of Statesville v. AEC, 441 F.2d 962 (D.C. Cir. 1969) (en banc).

2. The 1970 Amendments

Following the Statesville case, supra, increasing dissatisfaction with the research-commercial dichotomy, and with the lack of any role for antitrust in research licensing, eventually resulted in the 1970 amendments to Section 105(c).

These amendments were enacted only after numerous Committee hearings and conferences in which interested parties, including the Antitrust Division of the Justice Department, participated extensively. The legislative process began in late 1969, when the JCAE Committee initiated hearings to consider three bills which proposed changes in the Atomic Energy Commission's antitrust review procedures: S. 212 (the Anderson-

Aiken bill); H.R. 8289 (the Holifield-Price bill); and the Atomic Energy Commission's bill, H.R. 9647 (also introduced in the Senate as S. 1883).

Each of these bills proposed changes to the language of Section 105(c) concerning the scope of the antitrust review by the Attorney General and the Commission in nuclear facility licensing proceedings.[4/] But, H.R. 9647 failed to set forth principles or parameters to guide the Commission in its antitrust review functions. Despite, or perhaps because of, such lack of guidance, the Antitrust Division of the Justice Department endorsed H.R. 9647, since the bill "would assure the applicability of the antitrust standard to all significant nuclear utilization and production facilities", including supply arrangements for the proposed licensed units. Hearings, pp. 119, 121. (Testimony of acting Assistant Attorney General).

The lack of guidance to the Commission in the proposed legislation troubled the Committee. One member of the Committee staff warned:

4/ S. 212 and H.R. 8289 authorized the Attorney General to advise and the Commission to consider whether "activities under any license would tend to create a situation inconsistent with the antitrust laws." H.R. 9647, the Commission's bill, provided that the Attorney General would advise the Commission whether "issuance of such license or activities for which the license is sought would tend to create or maintain a situation inconsistent with the antitrust laws. . . ."

> "[T]here apparently are no other statutes, and no court decisions based thereon, to which the AEC could look for guidance in implementing and interpreting Section 105(c). The only analogous statute as far as I am aware, is the one you [the acting Assistant Attorney General] mentioned, the Federal Property and Administrative Services Act. For the reasons indicated earlier, it probably would not afford much guidance." Hearings, p. 125.

The Association of the Bar of the City of New York expressed a similar concern. Commenting upon the proposed bills, the Association warned that:

> "Unless Congress establishes some perimeters *** presumably the Commission will feel obligated to pursue at least the following questions as to the following activities of each license applicant:
>
> * * *
>
> "Activities of applicant in disposing of electrical energy from the facility. Is the facility part of a pool which is inconsistent with the antitrust laws? Are there improper agreements between the applicant and others as to the parties to whom and the areas in which the applicant will sell the electricity? Is there a joint venture from which other parties have been improperly excluded? Even if there is no joint venture or joint understanding, does the applicant occupy such a position of dominance that he is akin to a monopolist? If so, is his refusal to sell to some parties inconsistent with the antitrust laws? Does the applicant charge discriminatory prices, utilize deceptive advertising, or engage in unfair sales practices which are inconsistent with the antitrust laws?" Hearings, pp. 595, 612, 613.

One of the "perimeters" recommended by the Bar Association was that the supply industry be entirely excluded from consideration. It also proposed that "[t]he [antitrust] review should also be limited to the activities of the applicant directly associated with activities under the proposed license in order to preclude the possibility of Commission investigations into unrelated matters . . . ." Id. at 625. This concern was also reflected in the testimony of Donald G. Allen, President of the Yankee Atomic Electric Co., who concluded that:

> ". . . the AEC will need guidance in determining what antitrust issues can appropriately be resolved in licensing proceedings, and should be given express authority to exclude issues which are not directly related to the proposed project, which it cannot dispose of because all necessary parties are not before it, or which for other reasons can more appropriately be resolved in another forum." Hearings, p. 532.

The hearings on the bills concluded in April 1970, but discussions continued in other forums, including informal conferences between interested parties and the Committee members and staff. In June 1970, the question of the scope of antitrust review in the proposed legislation arose during hearings before the Senate Antitrust & Monopoly Subcommittee. There, the acting Assistant Attorney General testified that while

> ". . . antitrust review would consider the contractual arrangements and other factors governing how the proposed plant would be owned and

> its output used . . . [, n]o broader scope of review is contemplated . . . .
>
> We do not consider such a licensing proceeding as an appropriate forum for wide-ranging scrutiny of general industry affairs essentially unconnected with the plant under review." Hearings, p. 366.

This testimony was put into the JCAE hearing record by the American Public Power Association, as part of its written response to questions propounded by the JCAE. Hearings, p. 366. It is of value not merely as evidence of what the JCAE was led to believe the Justice Department's interpretation of the Act should be, but also as a contemporaneous opinion of a principal participant in the development of the legislation.

The bill, H.R. 18679, which finally emerged from the Committee and was enacted as PL 91-560 in December 1970, clearly took account of the concerns of certain Committee members and other parties, such as the Bar Association of the City of New York, that the scope of the Commission's antitrust review as proposed was too vague and open-ended. The final Committee report which accompanied PL 91-560 emphasized that the new antitrust standard to be applied by the Commission did not encompass industries supplying the construction and operation of the proposed unit "unless the license applicant is culpably involved in activities of others that fall within the ambit of the standard." House Report 91-1470, Joint Committee on Atomic Energy to Accompany

H.R. 18679, p. 31. In addition, the new Act itself explicitly restricted the Commission's inquiry to "activities under the license" -- a much more defined and limited standard than originally found in the proposed legislation of the Atomic Energy Commission and the Justice Department. Even Senator Aiken, an advocate of broad review authority, conceded that the effort "to cut back on the scope of the AEC consideration of antitrust issues . . . is reflected to some extent in this bill" (emphasis in the original). (Dissenting views on H.R. 18679.)

The clearest indication of the Congressional decision to define and limit the Commission's antitrust authority is contained in the Committee Report, supra, at 14, which states:

> "The committee is recommending the enactment of prelicensing review provisions which -- as in the proposed Atomic Energy Act of 1954 that the Joint Committee originally reported out, and as is in the version of subsection 105c, that the Senate passed on July 27, 1954 -- do not stop at the point of the Attorney General's advice, but go on to describe the role of the Commission with respect to potential antitrust situations.
>
> * * *
>
> ". . . It is intended that, in effect, the Commission will conclude whether, in its judgment, it is reasonably probable that the activities under the license would, when the license is issued or thereafter, be inconsistent with any of the antitrust laws or the policies clearly underlying these laws." (Emphasis added.)

Although several industry spokesmen preferred a more narrow standard, while others sought a broader scope of review, such views merely confirm that the legislation ultimately enacted was a compromise. As Senator Pastore, the floor manager of the bill in the Senate, told his colleagues:

> "The committee and its staff spent many, many hours on this [antitrust] aspect of the bill, and I can assure the Senate that we consider [sic] very carefully the considerable testimony, comments and opinions we received from interested agencies, associations, companies and individuals, including representatives from the Antitrust Division of the Justice Department, from privately owned utilities, and from public and cooperative power interests. The end product, as delineated in H.R. 18679, is a carefully perfected compromise by the committee itself; I want to emphasize that it does not represent the position, the preference or the input of any of the special pleaders inside or outside of the Government. In the committee's judgment, revised subsection 105(c), which the committee carefully put together to the satisfaction of all of its members, constitutes a balanced, moderate framework for a reasonable licensing review procedure." Congressional Record, S. 19253 (December 2, 1970).

The "balanced, moderate" approach is reflected in the bill and in the Committee report which adopted it. For example, the Committee report, supra, stated:

> "Of course, the committee is intensely aware that around the subject of prelicensing review and the provisions of subsection 105c, hover opinions and emotions ranging from one extreme to the other pole. At one extremity is the view that no prelicensing antitrust review is either necessary or advisable and that the first two subsections of section 105

> concerned with violation of the antitrust laws and the information which the Commission is obliged to report to the Attorney General are wholly adequate to deal with antitrust considerations. Additionally, there are those who point out that it is unreasonable and unwise to inflict on the construction or operation of nuclear powerplants and the AEC licensing process any antitrust review mechanism that is not required in connection with other types of generating facilities. At the opposite pole is the view that the licensing process should be used not only to nip in the bud any incipient antitrust situation but also to further such competitive postures, outside of the ambit of the provisions and established policies of the antitrust laws, as the Commission might consider beneficial to the free enterprise system. The Joint Committee does not favor, and the bill does not satisfy, either extreme view." Committee Report, supra, p. 14.

It is well settled that where the language of an act in its final form represents a compromise, the views of those who sought different wording, "cannot control interpretation of the compromise version." Hardin v. Kentucky Utilities Co., 390 U.S. 1, 11 (1968). Similarly, the "legislative history of a bill that was not adopted cannot be resorted to to construe a bill that was." Interstate Natural Gas Co. v. FPC, 156 F.2d 949, 952 (5th Cir. 1946), aff'd, 331 U.S. 682 (1947). Thus, Senator Aiken's threatened dissent and the failure of Congress to enact the abortive Aiken-Kennedy bill (S. 2564 and H.R. 13828) contribute nothing to the interpretation of the 1970 amendments of the Atomic Energy Act.

What emerges from the foregoing review of the legislative history of the 1970 amendments is the desire of Congress to give the Atomic Energy Commission some power of antitrust review, but to limit the scope of that review. Congress made clear that the Act does not foreclose Justice Department enforcement of the antitrust laws in federal court. See Section 105(a) and Remarks of Representative Price, Congressional Record, H. 9449 (September 30, 1970). Thus, the narrow scope of the Commission's antitrust review does not leave the public unprotected against allegedly unlawful conduct since enforcement of antitrust violations unrelated to an applicant's proposed activities under the license is left to the traditional forums.

During consideration of the legislation, spokesmen for the public power interests, the Atomic Energy Commission, and the Justice Department recognized that the Commission's antitrust review should be limited and that general antitrust enforcement should be left to the courts. A representative for the American Public Power Association wrote the JCAE and quoted with approval the testimony of the Atomic Energy Commission's General Counsel that "the antitrust authority of [sic] Commission will be an appropriate complement to the authority of the Attorney General, and, it would seem, should not be used by the Commission to duplicate authority already held by the Attorney

General." Hearings, pp. 365-366. Finally, a restrictive interpretation of the scope of the Commission's review comports with the Justice Department's testimony that the fortuity of a nuclear license application should not be used to initiate a "wide-ranging scrutiny of general industry affairs essentially unconnected with the plant under review." Hearings, p. 366.

C. Issues Raised by Justice and Petitioners are Beyond the Scope of Review Provided in the Act

Applicant's view of the Act is entirely consistent with the standard applied by the Justice Department in reviewing the disposal of property under Section 207 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. §488, whose applicable statutory language was adopted by the 1970 amendments. The analysis under the Property Act is whether an anticompetitive "situation" could be created or maintained as a result of the contemplated disposal of government property. By analogy, therefore, the test here should be whether an anticompetitive situation would be created or maintained as a result of Applicant's construction or operation of the Oconee and/or McGuire units.

Limiting this proceeding to issues proximately related to the construction and operation of the Oconee and McGuire units in this instance precludes inquiry into the nature and use of Applicant's transmission system, interconnection arrangements, and other areas of Applicant's conduct which relate to

its system-wide operations as an electric utility. Any other conclusion would turn the applicable standard on its head: the test is not whether the overall system has an impact on the Oconee or McGuire units, but rather whether an anticompetitive impact will result from the variation in the method of supplying a part of Applicant's bulk power supply. Hence, the "activity" of generating power in the Oconee or McGuire station could not rationally be said to "maintain" a situation inconsistent with the antitrust laws, and hence is not the sort of event calling for antitrust scrutiny by this Commission as a precondition to a license.

Such an interpretation of Section 105(c) in no way precludes Commission review of the kind of activities under a power reactor license which did concern the JCAE Committee and the Department of Justice. Commenting upon "issues which are of particular concern to the electric utility industry at this time," the acting Assistant Attorney General testified:

> "Specifically, the industry is now going through a considerable controversy over the extent to which, and the means by which, small systems should have access to large new generation and transmission facilities. As to this, I think antitrust law provides some general guidance. Companies acting together to create or control a unique facility may be required by application of the rule of reason, to grant access on equal and nondiscriminatory terms to others who lack a practical alternative." Hearings, pp. 127-128.

Similarly, when the Justice Department was asked to comment on the bill which was enacted, the Assistant Attorney General endorsed the bill and observed that it would enable the Commission to condition a license for a "joint venture" nuclear power plant -- that is, one owned by two or more companies. Congressional Record, S. 19254 (December 2, 1970).[5/]

Thus, it is clear that the 1970 amendments sought principally to deal with the exclusion of small utilities from joint ventures owning and operating nuclear power reactors. The ownership and operation of such reactors would raise questions directly and immediately under Section 1 of the Sherman Act without need for appraisal of an entire utility system operation, and thus are appropriate for AEC review under the statutory standard. There is no suggestion in the legislative history that where, as here, the proposed units will be owned by a single utility, Section 105(c) was intended to trigger an antitrust review of an applicant's general activities as an electric utility.

5/ The acting Assistant Attorney General made clear in his JCAE testimony that if the licensed unit were owned by a single utility which was a member of a pool, such membership per se would not cause the unit to be considered a joint venture. Hearings, p. 134.

Finally, even assuming arguendo that there could be shown a sufficient nexus between the Commission activity in licensing the Oconee and McGuire units according to health and safety standards and the competitive "situation" in Applicant's service area, that nexus could not extend to the wide range of demands and issues raised by the Antitrust Division and the Petitioners. While questions regarding Petitioners' participation in the licensed facilities might be considered arguendo within the statutory ambit, issues as to monopoly, joint ventures, interconnection, wheeling and pooling arrangements (all posed on a system-wide basis), are plainly too remote to the operation of the Oconee and McGuire plants to require scrutiny in this licensing proceeding. Rather, if the overall competitive condition of Applicant's system is to be examined, it can only be done in antitrust enforcement proceedings, the availability of which is carefully preserved by the 1970 amendments to the Atomic Energy Act.

It is significant that following passage of the final version of the 1970 amendments in the House, the Antitrust Division of the Justice Department wrote several letters offering an expansive interpretation of the antitrust provisions of the bill. After these letters were introduced into the Congressional Record during the Senate debate by Senator

Aiken and other proponents of a broader scope of antitrust review than enacted, Representative Hosmer, co-author of the bill, rose on the House floor to set the record straight. He noted that the language of the legislation was a compromise and warned: "Thus, the views and opinions expressed in the letters from the Antitrust Division of the Department of Justice are not necessarily authoritative, and may or may not accurately represent the intent" of the bill. Congressional Record, H. 11087 (December 3, 1970).

In this proceeding, the Justice Department and the Petitioners basically seek to achieve what Congress refused to sanction, i.e., an unlimited antitrust review of every facet of Applicant's activities as an electric utility. Section 105(c) does not permit such review. Accordingly, Applicant urges the Board to find that Applicant's activities which are unrelated to the Oconee and McGuire units are beyond the scope of this proceeding.

UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

In the Matter of	)	Docket Nos. 50-269A,
	)	50-270A,
Duke Power Company	)	50-287A,
(Oconee Nuclear Station Units 1,	)	50-369A
2 and 3 and McGuire Nuclear	)	and 50-370A
Station Units 1 and 2	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Answer to Notice of Hearing and Opposition to, and Motion to Reconsider Delegation of Review Authority" in the captioned matter have been served upon the following by deposit in the United States mail, first class or air mail, this 24th day of July, 1972:

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Attorneys for Applicant

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A
	)	50-287A
(Oconee Units 1, 2 & 3,	)	50-369A, 50-370A
McGuire Units 1 & 2)	)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with §2.713, 10 CFR Part 2, the following information is provided:

Name:	Joseph Rutberg
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Admission:	Supreme Court of Pennsylvania
Name of Party:	Regulatory Staff U. S. Atomic Energy Commission Washington, D. C. 20545

Joseph Rutberg
Antitrust Counsel for
AEC Regulatory Staff

Dated at Bethesda, Maryland
this 13th day of July, 1972.

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A 50-287A 50-369A, 50-370A
(Oconee Units 1, 2 & 3, McGuire Units 1 & 2)	)	

NOTICE OF APPEARANCE

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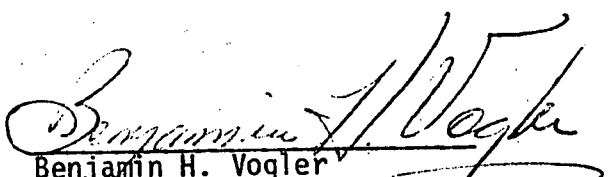

Benjamin H. Vogler
Assistant Antitrust Counsel
for AEC Regulatory Staff

Dated at Bethesda, Maryland
this 13th day of July, 1972.

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A, 50-287A
(Oconee Units 1, 2 & 3, McGuire Units 1 & 2)	)	50-369A, 50-370A

CERTIFICATE OF SERVICE

I hereby certify that copies of NOTICE OF APPEARANCE for Joseph Rutberg, dated July 13, 1972, and NOTICE OF APPEARANCE for Benjamin H. Vogler, dated July 13, 1972, in the above captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 13th day of July 1972:

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J Rutberg (3)
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UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A
	)	50-287A
(Oconee Units 1, 2 & 3,	)	50-369A, 50-370A
McGuire Units 1 & 2)	)	

ANTI-TRUST

CERTIFICATE OF SERVICE

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Joseph Rutberg
Antitrust Counsel for
AEC Regulatory Staff

ANTI-TRUST

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A Braitman (2)
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J Rutberg (3)
OGC Files

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A
	)	50-287A
(Oconee Units 1, 2 & 3,	)	50-369A, 50-370A
McGuire Units 1 & 2)	)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with §2.713, 10 CFR Part 2, the following information is provided:

Name:	Joseph Rutberg
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Name of Party:	Regulatory Staff U. S. Atomic Energy Commission Washington, D. C. 20545

Joseph Rutberg
Antitrust Counsel for
AEC Regulatory Staff

Dated at Bethesda, Maryland
this 13th day of July, 1972.

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A
	)	50-287A
(Oconee Units 1, 2 & 3,	)	50-369A, 50-370A
McGuire Units 1 & 2)	)	

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Telephone Number:	Area Code 301, 973-7386 (Or Code 119, Ext. 7386)
Admission:	Supreme Court of Ohio
Name of Party:	Regulatory Staff U. S. Atomic Energy Commission Washington, D. C. 20545

Benjamin H. Vogler
Assistant Antitrust Counsel
for AEC Regulatory Staff

Dated at Bethesda, Maryland
this 13th day of July, 1972.

UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A
	)	50-287A
	)	50-369A, 50-370A
(Oconee Units 1, 2 & 3, McGuire Units 1 & 2)	)	

NOTICE AND ORDER FOR PREHEARING CONFERENCE

PLEASE TAKE NOTICE, that pursuant to the Atomic Energy Commission's Notice of Antitrust Hearing dated June 28, 1972, and published in the Federal Register (37 FR 13202) on July 4, 1972, and in accordance with the said Commission's Rules of Practice, a prehearing conference will be held in the above entitled proceedings on September 6, 1972 at Courtroom 309, U. S. Court of Claims, 717 Madison Place, N. W., Washington, D. C. 20005.

The cardinal objective of said prehearing conference will be to establish a clear and particularized identification of matters related to the issue whether activities under the permits applied for would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a of the Atomic Energy Act of 1954, as amended.

TO THAT END,

A. Each of the attorneys for the parties and for the petitioners to intervene will supply in writing to this Board and to each other on or before August 9, 1972 a statement listing:

1) The legal theory of the party or petitioner concerning the question whether the issuance of the permits applied for would create or maintain a situation inconsistent with the antitrust laws and supplying the authorities relied on in support of such theory.

2) The detailed facts on which such legal theory is based, including the dates, places, and persons involved and attaching copies of all documents pertaining thereto.

B. Following the exchange of such statements and prior to the prehearing conference, the attorneys for the parties and the petitioners are requested to discuss with each other and report to the Board at the prehearing conference on:

1) the prospect of settlement; and

2) their willingness to stipulate to particular facts o to a statement of facts.

C. Each of the parties and the petitioners shall be prepared to submit at the prehearing conference:

1) A written statement setting forth under topical headings a concise statement of the essential facts and a recital of the contested issues of fact and of law.

2) A schedule of additional discovery, if any, which he requires and a time table showing the dates by which each item of discovery will be completed.

3) Copies of written exhibits and printed documents which will be offered in evidence at the formal hearing.

4) The names and addresses of all witnesses now intended to be called.

It is suggested that the foregoing documents be exchanged or if impracticable, made available to all counsel for their examination prior to the prehearing conference.

In addition to determining the particular factual and legal issues to be determined at the formal hearings which is its cardinal objective the Board will also:

1. hear oral arguments on the petitions to intervene and consider amendments thereto;

2. consider motions addressed to:

   a) jurisdictional questions including pending proceedings before the Federal Power Commission

   b) the letter of advise of the Attorney General

   c) other matters including: simplification of issues; additional discovery; reduction in the amount of proof and number of expert witnesses; settlement proposals; the time table for discovery, if any; the presentation of the evidence at formal hearing; the final listing of witnesses and exchange of written testimony and documentary evidence; the submission and exchange of trial briefs; and such other matters as may aid in the disposition of the proceeding.

Each party shall be represented at the prehearing conference by the attorney who expects to present the evidence at the formal hearing.

BY ORDER OF THE ATOMIC SAFETY AND LICENSING BOARD

Walter K. Bennett

By Walter K. Bennett, Chairman

Issued at Washington, D. C.
this 14th day of July, 1972

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UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A
(Oconee Nuclear Stations Units 1,	)	270A
2 and 3; William B. McGuire	)	287A
Nuclear Station Units 1 and 2)	)	369A
	)	370A
	)	

CERTIFICATE OF SERVICE

I hereby by certify that copies of NOTICE OF CONSOLIDATED ANTITRUST HEARING ON APPLICATIONS FOR CONSTRUCTION PERMITS AND OPERATING LICENSES dated June 28, 1972, in the captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 29th day of June 1972:

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Public Library of Charlotte and Mecklenburg County
310 North Tryon Street
Charlotte, North Cardina 28202

Miss Louise Marcum, Librarian
Oconee County Library
301 South Spring Street
Walhalla, South Cardina 29691

Mary Thomas
Office of the Secretary of the Commission

cc: Mr. Bennett
Mr. Rutberg
Mr. Braitman
AS&LBP
Reg. Files

DOCKET NUMBER 50-269A, 270A, 287A
PROD. & UTIL. FAC. 50-369A, 370A

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A
	)	50-287A
	)	50-369A, 50-370A
(Oconee Units 1, 2 & 3, McGuire Units 1 & 2)	)	

NOTICE OF CONSOLIDATED ANTITRUST HEARING ON APPLICATIONS FOR CONSTRUCTION PERMITS AND OPERATING LICENSES

Pursuant to the Atomic Energy Act of 1954, as amended (the Act), and the regulations in Title 10, Code of Federal Regulations, Part 50, "Licensing of Production and Utilization Facilities," and Part 2, "Rules of Practice," notice is hereby given that a consolidated hearing will be held, at a time and place to be set in the future by an Atomic Safety and Licensing Board (Board) designated herein, to consider the antitrust aspects of the applications filed under the Act by Duke Power Company (the applicant), for (a) construction permits for two pressurized light water nuclear power reactors (McGuire Nuclear Station Units 1 and 2) and (b) operating licenses for three pressurized light water nuclear power reactors (Oconee Nuclear Station Units 1, 2 and 3). The proposed McGuire Nuclear Station Units will be located on the shore of Lake Norman, approximately seventeen miles northwest of Charlotte, North Carolina. The Oconee Nuclear Station Units are located in eastern Oconee County, near Seneca, South Carolina.

The hearing will be conducted by an Atomic Safety and Licensing Board (Board) designated by the Atomic Energy Commission (Commission)

consisting of Joseph F. Tubridy, John B. Farmakides and Walter W. K. Bennett, Chairman.

On September 4, 1971, the Commission published in the Federal Register a letter from the Attorney General dated August 2, 1971, advising the Commission that certain antitrust aspects of the operating license application of Duke Power Company for the Oconee Nuclear Station Units 1, 2 and 3 required a hearing pursuant to Section 105c of the Act. A notice published with the Attorney General's letter provided that, within thirty days, any person whose interest may be affected by the proceeding could file a petition for leave to intervene and request for an antitrust hearing. In a timely joint petition, dated September 29, 1971, eleven North Carolina municipalities requested leave to intervene and an antitrust hearing. The eleven North Carolina municipalities are the cities of Statesville, High Point, Lexington, Monroe, Shelby and Albemarle, and the towns of Cornelius, Drexel, Granite Falls, Newton and Lincolnton. The AEC regulatory staff and the applicant have responded to the joint petition.

On October 19, 1971, the Commission published in the Federal Register a letter from the Attorney General dated September 29, 1971, advising the Commission that certain antitrust aspects of the construction permit application of the Duke Power Company for the William B. McGuire Nuclear Station Units 1 and 2 required a hearing pursuant to Section 105c of the Act. A notice published with the Attorney General's letter provided that, within thirty days, any person whose interest may be affected by the

proceeding could file a petition for leave to intervene and request for an antitrust hearing. In a timely joint petition dated November 16, 1971, nine North Carolina municipalities requested leave to intervene and an antitrust hearing. The nine North Carolina municipalities are: the cities of High Point, Lexington, Monroe, Shelby and Albemarle, and the towns of Landis, Drexel, Granite Falls and Lincolnton. Answers to these petitions were filed by the applicant and the AEC Regulatory Staff.

The Commission has found that consolidation of the hearings held in response to the advice of the Attorney General would be conducive to the proper dispatch of its business and to the ends of justice. The Commission has, therefore, determined that the hearings should be consolidated. (10 CFR, § 2.716.) Power from the McGuire and Oconee Units is not proposed to be marketed separately but is to be added to the applicant's integrated system. The Attorney General has advised that the facts upon which he based his advice and recommendations for an antitrust hearing regarding the McGuire Units are identical to the facts set forth in his earlier communication concerning the Oconee Units. In addition, a number of North Carolina municipals who expressed their interest in antitrust issues concerning the Oconee Units have also expressed their antitrust interests in the McGuire Units. Although there are some minor variations in the makeup of the municipals concerning the McGuire and Oconee Units, the antitrust interests expressed for both units are the same. However, consolidation of the hearings does not mean that Duke Power Company's applications will be considered together as one application or

are mutually dependent. There are two separate and distinct applications pending in this matter and each application will be reviewed on its own merits. Consolidation is simply for the convenience and dispatch of the Commission's business.

The Commission has also determined that the pending petitions should be ruled upon by the Board in regard to their respective requests for intervention.

A pre-hearing conference will be held by the Board, at a date and place to be set by it, to consider pertinent matters in accordance with the Commission's "Rules of Practice" (10 CFR Part 2). The date and place of the hearing will be set by the Board at or after the pre-hearing conference. Notices as to the dates and places of the pre-hearing conference and the hearing will be published in the Federal Register.

The issue to be considered at the hearing is whether the activities under the permits and licenses respectively in question would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a of the Act. In its initial decision, the Board will decide those matters relevant to that issue which are in controversy among the parties and make its findings on the issue.

A cardinal pre-hearing objective will be to establish, on as timely a basis as possible, a clear and particularized identification of those matters related to the issue in this proceeding which are in controversy. As a first step in this pre-hearing process, the Board shall obtain from the parties a detailed specification of the matters which they seek to have considered in the ensuing hearing.

In the event the Board finds that the activities under the respective permits or licenses would create or maintain a situation inconsistent with the antitrust laws, it will also consider, in determining whether permits or licenses should be issued, continued, modified, or conditioned, such other factors, including the need for power in the affected area, as the Board in its judgment deems necessary to protect the public interest. The Board's consideration in the latter regard shall be based on the record submissions by the parties relevant to that matter.

The applications and the Attorney General's letters have been placed in the Commission's Public Document Room, 1717 H Street, N.W., Washington, D.C. As they become available, the transcripts of the pre-hearing conference and of the hearing will also be placed in the Commission's Public Document Room, where they will be available for inspection by members of the public. Copies of all of the foregoing documents will also be available at the Public Library of Charlotte and Mecklenburg Counties, 310 North Tyron Street, Charlotte, North Carolina.

Any person who wishes to make an oral or written statement in this proceeding setting forth his position on the issue specified, but who has not filed a petition for leave to intervene, may request permission to

make a limited appearance pursuant to the provisions of 10 CFR section 2.715 of the Commission's "Rules of Practice." Limited appearances will be permitted at the time of the hearing in the discretion of the Board, within such limits and on such conditions as may be fixed by the Board. Persons desiring to make a limited appearance are requested to inform the Secretary of the Commission, United States Atomic Energy Commission, Washington, D. C. 20545, not later than thirty (30) days from the date of publication of this notice in the Federal Register. A person permitted to make a limited appearance does not become a party, but may state his position and raise questions which he would like to have answered to the extent that the questions are within the scope of the hearing as specified hereinabove. A member of the public does not have the right to participate in the proceeding unless he has been granted the right to intervene as a party or the right of limited appearance.

In the event that the Board grants either or both pending petitions to intervene, persons permitted to intervene shall become parties to the proceeding, and shall have all the rights of the applicant and the regulatory staff to participate fully in the conduct of the hearing.

An answer to this notice, pursuant to the provisions of 10 CFR section 2.705 of the Commission's "Rules of Practice," must be filed by the applicant not later than twenty (20) days from the date of publication of this notice in the Federal Register.

Papers required to be filed in this proceeding may be filed by mail or telegram addressed to the Secretary of the Commission, United States Atomic Energy Commission, Washington, D. C. 20545, Attention: Chief, Public Proceedings Branch, 1717 H Street, N. W., Washington, D. C. Pending further order of the Board, parties are required to file, pursuant to the provisions of 10 CFR section 2.708 of the Commission's "Rules of Practice," an original and twenty conformed copies of each such paper with the Commission.

With respect to this consolidated proceeding, the Commission has delegated to the Atomic Safety and Licensing Appeal Board the authority and the review function which would otherwise be exercised and performed by the Commission. The Commission has established the Appeal Board pursuant to 10 CFR §2.785 of the Commission's "Rules of Practice," and has made the delegation pursuant to subparagraph (a)(1) of that section. The Appeal Board for this proceeding will be composed of the Chairman and two members designated in a subsequent Commission notice (10 CFR §2.787).

UNITED STATES ATOMIC ENERGY COMMISSION

By _____

Dated at Germantown, Maryland
this 28th day of June 1972

UNITED STATES
ATOMIC ENERGY COMMISSION
WASHINGTON, D.C. 20545

June 29, 1972

Director
Office of the Federal Register
National Archives & Records Service
Washington, D. C. 20408

Dear Sir:

Attached for publication in the Federal Register are an original and two certified copies of a document entitled:

DUKE POWER COMPANY

NOTICE OF CONSOLIDATED ANTITRUST HEARING ON APPLICATIONS FOR CONSTRUCTION PERMITS AND OPERATING LICENSES

Please publish as soon as possible.

Publication of the above document at the earliest possible date would be appreciated.

Sincerely yours,

W. B. McCool
Secretary of the Commission

Enclosures:
Original and 2
certified copies

bcc: Docket Clerk (Dir. of Reg.)
Public Information
~~Robert Lindquist, OGC~~
~~Abraham Braitman, SIR~~
Congressional Liaison
Joseph J. Saunders,
Dept. of Justice
Public Proceedings Branch (SECY)
DC Files (SECY)
GT Files (SECY)
MR. Rutberg, OGC

DOCKET NUMBER 50-269A, 270A, 287A
PROD. & UTIL. FAC. 50-369A, 370A

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A
	)	50-287A
(Oconee Units 1, 2 & 3,	)	50-369A, 50-370A
McGuire Units 1 & 2)	)	

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With respect to this consolidated proceeding, the Commission has delegated to the Atomic Safety and Licensing Appeal Board the authority and the review function which would otherwise be exercised and performed by the Commission. The Commission has established the Appeal Board pursuant to 10 CFR §2.785 of the Commission's "Rules of Practice," and has made the delegation pursuant to subparagraph (a)(1) of that section. The Appeal Board for this proceeding will be composed of the Chairman and two members designated in a subsequent Commission notice (10 CFR §2.787).

UNITED STATES ATOMIC ENERGY COMMISSION

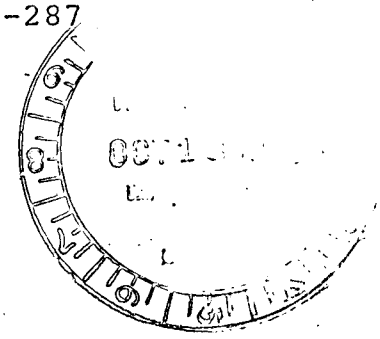
By _____

Dated at Germantown, Maryland
this 28th day of June 1972

BEFORE THE ATOMIC ENERGY COMMISSION

10-14-71

In the Matter of	)	
	)	Docket Nos. 50-269
DUKE POWER COMPANY	)	50-270
	)	50-287
(Oconee Nuclear Station, Units 1, 2, and 3)	)	ANTI-TRUST



Motion For Leave to File Answer to Petition to Intervene Two Days Out of Time

Duke Power Company, Applicant in the above-captioned proceeding, hereby moves the Commission for leave to file its Answer to the Joint Petition of Statesville, et al., two days out of time. In support thereof, Applicant shows the following:

On September 4, 1971, the Commission, pursuant to Section 105(c)(5) of the Atomic Energy Act, as amended, published in the Federal Register the Attorney General's advice concerning the antitrust aspects of the license application in the captioned matter, together with a notice providing thirty days for interested parties to file petitions for leave to intervene and requests for an antitrust hearing.

In a joint petition dated September 29, 1971, eleven North Carolina municipalities - the cities of Statesville, High Point, Lexington, Monroe, Shelby, and Albemarle, and the towns of Cornelius, Drexel, Granite Falls, Newton, and Lincolnton -- requested leave to intervene and an antitrust hearing. Pursuant to Section 2.714(b) of the Commission's Rules of Practice, Answers to said Joint Petition were due October 12, 1971.

Said Joint Petition was not served upon the undersigned counsel for Applicant, nor to date has a copy of said Joint Peti- A.T.

tion been made available for inspection in the Commission's public document room in Washington, D. C. The Joint Petition was served upon Applicant at its headquarters in Charlotte, North Carolina, and was, in turn, forwarded to the undersigned on October 7, 1971. The undersigned received the Joint Petition on October 12, 1971 -- the due date for Applicant's Answer to said Joint Petition.

WHEREFORE, Applicant Duke Power Company moves the Commission for leave to file its Answer to the Joint Petition of Statesville, et al., on October 14, 1971, two days out of time.

Respectfully submitted,

William W. Ross

Keith S. Watson

Attorneys for Duke Power Company

October 14, 1971

BEFORE THE

UNITED STATES ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269
(Oconee Nuclear Station,	)	50-270
Units 1, 2 and 3)	)	50-287

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Motion for Leave to File Answer to Petition to Intervene Two Days Out of Time" in the captioned matter have been served upon the following by deposit in the United States mail, first class or air mail, this 14th day of October 1971:

Mr. Stanley T. Robinson, Jr.
Chief, Public Proceedings Branch
Office of the Secretary
of the Commission
U. S. Atomic Energy Commission
Washington, D. C. 20545

J. O. Tally, Jr., Esquire
P. O. Drawer 1660
Fayetteville, North Carolina

Mr. Dayne H. Brown, Director
State Radiation Protection Program
North Carolina State Board
of Health
Raleigh, North Carolina 27602

Honorable Reese A. Hubbard
County Supervisor of Oconee County
Walhalla, South Carolina 29621

Mr. Joseph Knotts, Jr.
Counsel for AEC Regulatory Staff
U. S. Atomic Energy Commission
Washington, D. C. 20545

Mr. Robert Liedquist
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Jack R. Harris, Esquire
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Stimpson Wagner Building
Statesville, North Carolina 28677

Dr. W. C. Bell
State Planning Task Force
P. O. Box 1351
Raleigh, North Carolina 27602

Mr. J. Bonner Manly, Director
State Development Board
Hampton Office Building
Columbia, South Carolina 29202

Algie A. Wells, Esquire, Chairman
Atomic Safety and Licensing
Board Panel
U. S. Atomic Energy Commission
Washington, D. C. 20545

Keith S. Watson
Wald, Harkrader, Nicholson & Ross
Attorneys for Applicant

BEFORE THE

UNITED STATES ATOMIC ENERGY COMMISSION

10-14-71.

IN THE MATTER OF

DUKE POWER COMPANY

ANTI-TRUST

OCONEE NUCLEAR STATIONS UNITS 1, 2 AND 3

DOCKET NOS. 50-269

50-270

50-287

ANSWER OF APPLICANT DUKE POWER COMPANY
TO JOINT PETITION OF
NORTH CAROLINA MUNICIPALITIES, STATESVILLE ET AL.,
FOR LEAVE TO INTERVENE
AND OBTAIN ANTITRUST REVIEW

The Applicant Duke Power Company, answering the Petition of the North Carolina Municipalities, Statesville, et al., filed on or about the 29th day of September, 1971, alleges:

1. Paragraph 1 of the Petition to Intervene is admitted, except that it is denied that the Town of Newton, North Carolina, is a Petitioner. Applicant is informed and believes that the

A.T.

Town of Newton, on or about the 3rd day of June, 1969, by resolution of its Town Council, formally withdrew as an intervenor and protestant in this proceeding.

2. Paragraph 2 of the Petition is admitted, except that it is denied that the municipalities are "captive" customers of the Applicant Duke Power Company. It is further denied that "The availability and price of power to each and all of petitioners are initially and inextricably bound with and in the determinations in this proceeding."

3. Answering Paragraph 3 of the Petition, it is admitted that the Applicant Duke Power Company together with Carolina Power & Light Company, South Carolina Electric & Gas Company and Virginia Electric and Power Company executed on July 9, 1970, and filed with the Federal Power Commission on July 10, 1970, an agreement terminating the Carolinas-Virginias Power Pool Agreement, and at the same time filed with the Federal Power Commission a series of rate schedules under which they would in the future buy from and sell power to each other and buy from or sell to any other power supplier with whom they are interconnected. A copy of the July 9, 1970 Agreement was attached as Exhibit A to Applicant's Answer to Joint Petition, filed February 9, 1971, and is incorporated herein by reference. It is denied that the power sales between Duke Power Company, Carolina Power & Light Company, Virginia Electric and Power

Company and South Carolina Electric & Gas Company constitute a pool or a joint venture, or that any pool or joint venture exist since termination of the CARVA Pool Agreement. Applicant Duke Power Company is willing to sell power, when available, to any power supplier with whom it is interconnected, under the rate schedules set forth in Exhibit A. The Limited Term Power and Energy Schedule provides for pricing power and energy in essentially the same manner that these Petitioners' wholesale rates from Duke are fixed by the Federal Power Commission. It is further denied that "Duke, a giant utility, is unable alone to reap the full economic benefits of nuclear power." It is denied that "none of petitioners is able alone (nor by combination with one another) effectively to enjoy the benefits of this low-cost source of power." It is denied that "Monopolization of the benefits of nuclear power and of electric power marketing over petitioners' geographic area by Duke appears then imminent." Petitioners themselves have publicly represented to the contrary. Applicant is informed and believes and alleges that the petitioners are members of ElectriCities of North Carolina, which together with the North Carolina Electric Membership Corporation, whose membership comprises the rural electric cooperatives operating in North Carolina, have formed an organization known as EPIC (Electric Power in Carolina) which proposes to build three large scale

nuclear generating plants, three fossil fuel plants and one pumped-storage hydroelectric plant in North Carolina, linking them with transmission grids of 500 KV and 230 KV, duplicating the generation and transmission facilities of the Applicant Duke Power Company and Carolina Power & Light Company in North Carolina. Applicant is further informed and believes and so alleges that petitioners' attorneys, Tally, Tally and Bouknight, and their engineers R. W. Beck and Associates and Southern Engineering Company of Georgia have recommended that such a generation and transmission plan is feasible for the long range power supply of the cities and cooperatives of North Carolina. Copy of the EPIC plan was attached as Exhibit B to Applicant's Answer to Joint Petition, filed February 9, 1971, and is incorporated herein by reference. Except as herein admitted, the allegations of Paragraph 3 of the Petition are denied.

4. Answering Paragraph 4 of the Petition, Applicant admits that the petitioners are entitled to the "opportunity to enjoy equally with their competitors access to the miracle of nuclear generation." Applicant avers that the question of what is petitioners' fair share of the nuclear generation being constructed by Duke is a matter within the primary jurisdiction of the Federal Power Commission. Except as herein admitted, the allegations of Paragraph 4 of the Petition are denied.

5. The allegations of Paragraph 5 of the Petition are denied. Applicant further alleges that the justness and reasonableness of its wholesale power rates to these petitioners, and to its other municipal and rural electric cooperative customers in North and South Carolina is now at issue in a proceeding pending before the Federal Power Commission in F.P.C. Docket No. E-7557, In the Matter of Duke Power Company, in which proceeding the Applicant here is seeking a 17% increase in its wholesale rates to these petitioners and its other municipal and rural electric cooperative customers. Petitioners here are intervenors and protestants in that proceeding pending before the Federal Power Commission, which proceeding when finally concluded will of necessity determine the justness and reasonableness of the wholesale rates of Duke Power Company to these petitioners. In this proceeding the fair share of these petitioners in the economies of nuclear generation, as well as their fair share of the economies of conventional generation and large-scale transmission will be determined by the well-settled public utility regulatory principle of cost of service to each class of customers. At present these petitioners enjoy the lowest rate of any class of customers in Duke Power Company's rate structure. It is denied that these petitioners' wholesale power costs from Duke Power Company place them at any competitive disadvantage to Duke Power Company with respect to new retail customers.

6. Answering Paragraph 6 of the Petition it is admitted that in the hearing on Duke Power Company's Application for a construction permit, these petitioners were permitted to intervene and that they did make formal demand upon Duke to sell these petitioners a 4% undivided interest in the entire Oconee Nuclear Station, and that the Applicant Duke Power Company denied that demand on the grounds that (1) it would cause a discrimination against Duke's other large customers similarly situated, contrary to the Federal Power Act and the Public Utility Regulatory Laws of South Carolina; (2) under the laws of North Carolina and South Carolina the petitioners have no legal authority to own an interest in the Oconee Nuclear Station. In response to the renewal of that request and demand in Paragraph 6 of the Petition, the Applicant Duke Power Company again denies same, and for the same reasons.

7. Paragraph 7 of the Petition is denied.

AND FOR A FURTHER ANSWER TO THE PETITION TO INTERVENE, Applicant Duke Power Company alleges:

1. Unit No. 1 of the Oconee Nuclear Station is now scheduled for operation around the first of the year, and the capacity and energy to be produced by this unit will be badly needed in the Applicant's service area at that time. The Applicant therefore requests, in the interest of its electric customers, including these petitioners, that if the Commission determines

that a hearing on antitrust issues is necessary, that pursuant to Section 105 (c)(8) of the Act, as amended, and the Commission's Regulations pursuant to the Act as amended, Section VIII, Appendix A, 10 CFR Part 2, Subsection (e), the Commission issue to the Applicant Duke Power Company the operating license for Oconee Unit No. 1, conditioned upon the final outcome of the hearing on antitrust issues as specified in Section 50.55b of the Regulations.

2. Applicant opposes the Petition because it is overly broad in two crucial respects. First, the petitioners request leave to "become parties for all purposes." Since their Petition raises only antitrust issues, its request is over-broad and should be limited to Commission antitrust proceedings held pursuant to Section 105(c) of the Atomic Energy Act, as amended, 21 U.S.C. §2135. Second, the Petition at numerous places throughout appears to contemplate consideration and decision by the Commission of issues unrelated to the Commission's consideration of the above-captioned license application or to the Commission's inquiry whether Applicant's activities under said license would create or maintain a situtation inconsistent with the antitrust laws. To the extent that the Petition seeks to raise issues unrelated to said application or said inquiry, it should be denied. In not opposing petitioners' intervention in the proceeding, Applicant reserves its right to challenge, in the light of

governing law, the scope of petitioners' participation herein, including, but not restricted to, the issues posed, discovery sought, evidence presented, and any and all other matters arising during the course of the proceeding.

Respectfully submitted,

DUKE POWER COMPANY

By William H Grigg
William H. Grigg
Vice President and General Counsel
422 South Church Street
Charlotte, North Carolina 28201

Attorney for Applicant

WALD, HARKRADER, NICHOLSON & ROSS

By Wm Warfield Ross
Wm. Warfield Ross

Keith S Watson
Keith S. Watson

1320 Nineteenth Street, N. W.
Washington, D. C. 20036

Attorneys for Applicant

October 14, 1971

BEFORE THE

UNITED STATES ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269
	)	50-270
	)	50-287
(Oconee Nuclear Station, Units 1, 2 and 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Answer of Applicant Duke Power Company to Joint Petition of North Carolina Municipalities, Statesville et al., for Leave to Intervene and Obtain Antitrust Review" in the captioned matter have been served upon the following by deposit in the United States mail, first class or air mail, this 14th day of October, 1971:

Mr. Stanley T. Robinson, Jr.
Chief, Public Proceedings Branch
Office of the Secretary of the Commission
U. S. Atomic Energy Commission
Washington, D. C. 20545

J. O. Tally, Jr., Esquire
P. O. Drawer 1660
Fayetteville, North Carolina

[illegible], Director
State Radiation Protection Program
North Carolina State Board of Health
Raleigh, North Carolina 27602

Honorable Reese A. Hubbard
County Supervisor of Oconee County
Walhalla, South Carolina 29621

Mr. Joseph B. Knotts, Jr.
Counsel for AEC Regulatory Staff
U. S. Atomic Energy Commission
Washington, D. C. 20545

Mr. Robert Liedquist
Antitrust Counsel for AEC
Regulatory Staff
U. S. Atomic Energy Commission
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Saint Michaels, Maryland 21663

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Statesville, North Carolina 28677

Dr. W. C. Bell
State Planning Task Force
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Raleigh, North Carolina 27602

Mr. J. Bonner Manly, Director
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Columbia, South Carolina 29202

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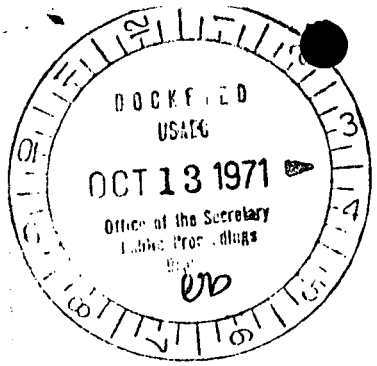
Atomic Safety and Licensing Board Panel
U.S. Atomic Energy Commission
Washington, D. C. 20545

Wm. Warfield Ross
Wald, Harkrader, Nicholson & Ross
Attorneys for Applicant



ANTI-TRUST

DOCKET NUMBER 50-269A 270A 287A
PROD. & UTIL. FAC.

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
) 10-12-71
DUKE POWER COMPANY) Docket Nos. 50-269
) 50-270
(Oconee Nuclear Station,) 50-287
Units 1, 2, and 3))

REPLY OF THE AEC REGULATORY STAFF TO JOINT PETITION OF ELEVEN NORTH CAROLINA MUNICIPALITIES

On September 4, 1971, the Commission, pursuant to Section 105c.(5) of the Atomic Energy Act, as amended, published in the Federal Register the Attorney General's advice concerning the antitrust aspects of the license application in the captioned matter, together with a notice providing thirty days within which interested parties might file petitions for leave to intervene and requests for an antitrust hearing.

In a joint petition dated September 29, 1971, eleven North Carolina municipalities - the cities of Statesville, High Point, Lexington, Monroe, Shelby, and Albemarle, and the towns of Cornelius, Drexel, Granite Falls, Newton, and Lincolnton (municipalities) - requested leave to intervene and an antitrust hearing.

I.

An antitrust hearing is required in this matter. The application for an operating license was pending before the Commission upon enactment of Public Law 91-560. Through a joint petition dated January 18, 1971,

A.T.

the municipalities timely sought antitrust review.[1/] Accordingly, the application herein was forwarded to the Attorney General for prelicensing advice as to whether Commission proceedings involving inquiry into antitrust aspects were warranted. "Such proceedings must be held by the Commission if the Attorney General advises that there may be adverse antitrust aspects and recommends a hearing."[2/] The Attorney General has rendered such advice.

In those instances where the Commission holds an antitrust hearing on an application for a construction permit or an operating license, Section 105c.(5) of the Atomic Energy Act, as amended, requires the Commission to make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws. In arriving at such a finding, the Commission "shall give due consideration to the advice received from the Attorney General and to such evidence as may be provided during the proceedings in connection with such subject matter....."[3/]

The Attorney General's advisory letter on the antitrust aspects of the pending application focuses upon the alleged conduct of applicant Duke

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1/ See "Memorandum and Order" of the Commission, In the Matter of Duke Power Company, Docket Nos. 50-269A, 50-270A, and 50-287A, April 5, 1971.

2/ S. Rep. No. 91-1247, 91st Cong. 2d Sess., 30 (1970).

3/ 42 U.S.C. §2135c.(5) (1970).

Power Company vis-a-vis its customer-competitors. Among the matters believed by the Attorney General to raise "substantial questions regarding the applicant's activities and probable activities under the license" is the applicant's alleged refusal to coordinate its nuclear generation expansion program with certain municipalities who wish to participate in that program by purchasing an interest in or power supply from the Oconee nuclear facilities.

In their joint petition, the municipalities assert that they are wholesale customers of the applicant who compete with applicant in the retail sale of electric power. They request, inter alia, that the award of any operating licenses be conditioned upon provision to them of an opportunity to purchase an interest in the Oconee nuclear facilities, maintaining that their ability to remain competitive with the applicant and to survive as viable utilities is dependent on such relief.

In view of the foregoing, the staff believes that it would be appropriate for the Commission to admit the municipalities as full parties in the required antitrust hearing.

II

The legislative history of Section 105 of the Atomic Energy Act and the Commission's "Rules of Practice" contemplate that hearings on the antitrust

aspects of an application for a construction permit or an operating license will be held separately from the hearing held on the radiological health and safety and environmental aspects of the application.[4/] Although their joint petition is based solely upon antitrust considerations, we note that the municipalities request to "become parties for all purposes" and to be accorded "full rights.....to which parties are entitled, before the Atomic Energy Commission and all boards and authorities subordinate thereto...." To the extent that the municipalities request leave to intervene in any Commission proceeding other than the required antitrust hearing, their joint petition should be denied. The joint petition does not raise any contentions concerning health and safety, national security, or environmental considerations concerning the pending applications, and, accordingly, clearly fails to meet the substantive requirements of Section 2.714 of the Commission's "Rules of Practice."

Respectfully submitted,

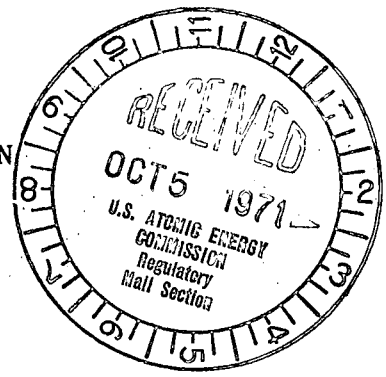
Robert E. Liedquist
Antitrust Counsel for AEC Regulatory Staff

Dated at Bethesda, Maryland,
this 12th day of October, 1971.

4/ S. Rep. No. 91-1247, 91st Cong. 2d Sess., 15 (1970). 10 CFR Appendix A, Part VIII.

BEFORE THE

UNITED STATES ATOMIC ENERGY COMMISSION



IN THE MATTER OF

DUKE POWER COMPANY

(Oconee Nuclear Station Units 1, 2 and 3)

9-29-71

ANTI-TRUST

DOCKET NOS. 50-269
50-270
50-287

JOINT PETITION
OF
THE FOLLOWING
MUNICIPALITIES IN NORTH CAROLINA:

STATESVILLE, HIGH POINT, LEXINGTON, MONROE, SHELBY, ALBEMARLE, CORNELIUS, DREXEL, GRANITE FALLS, NEWTON, and LINCOLNTON

FOR
LEAVE TO INTERVENE
AND BECOME
PARTIES FOR ALL PURPOSES
AND TO OBTAIN AN ANTITRUST REVIEW

Tally, Tally & Bouknight
Attorneys and Counsellors at Law
P. O. Drawer 1660
Fayetteville, North Carolina 28302

Attorneys for Joint Petitioners

29 September 1971

BEFORE THE

UNITED STATES ATOMIC ENERGY COMMISSION

IN THE MATTER OF

DUKE POWER COMPANY

(Oconee Nuclear Station Units 1, 2 and 3)

DOCKET NOS. 50-269
50-270
50-287

JOINT PETITION
OF
THE FOLLOWING
MUNICIPALITIES IN NORTH CAROLINA:

STATESVILLE, HIGH POINT, LEXINGTON, MONROE, SHELBY, ALBEMARLE, CORNELIUS, DREXEL, GRANITE FALLS, NEWTON, and LINCOLNTON

FOR
LEAVE TO INTERVENE
AND BECOME
PARTIES FOR ALL PURPOSES
AND TO OBTAIN AN ANTITRUST REVIEW

PETITIONERS

1. Petitioners are municipalities in and of the State of North Carolina whose names and addresses are:

City of Statesville
Statesville, North Carolina

City of High Point
High Point, North Carolina

City of Lexington
Lexington, North Carolina

TALLY, TALLY & BOUKNIGHT
ATTORNEYS AT LAW
FAYETTEVILLE, N. C.

City of Monroe
Monroe, North Carolina

City of Shelby
Shelby, North Carolina

City of Albemarle
Albemarle, North Carolina

Town of Cornelius
Cornelius, North Carolina

Town of Drexel
Drexel, North Carolina

Town of Granite Falls
Granite Falls, North Carolina

Town of Newton
Newton, North Carolina

Town of Lincolnton
Lincolnton, North Carolina

who come now, in accord with Sections 105c.(3) and 189 of the Atomic Energy Act of 1954, as amended, and Section 2.714 of the Commission's Rules of Practice; and, notice of receipt of application of facility operating license by Duke Power Company having been published in the Federal Register on 29 December 1970; and these petitioners having participated as intervenors in the construction permit stage of this proceeding; and having there sought to obtain a determination of antitrust issues, hereby move to intervene and to be admitted as parties; and to be accorded the full rights, among others, to file motions, institute pleadings, submit testimony, cross-examine witnesses, submit briefs, and argue orally, to which parties are entitled, before the Atomic Energy Commission and all boards and authorities subordinate thereto, including the Atomic Safety and Licensing Board; and hereby request an antitrust review pursuant to Section 105 of the Atomic Energy Act of 1954,

as amended.* Counsel for all joint petitioners and upon whom service of all process and papers may be made (and upon whom all joint petitioners request and direct that such be made), with their address, are:

Tally, Tally & Bouknight
Attorneys and Counsellors at Law
P. O. Drawer 1660
Fayetteville, North Carolina 28302

DESCRIPTION OF PETITIONERS

2. The joint petitioners for leave to intervene are North Carolina municipalities each of which owns and operates an electric distribution system, selling electricity at retail to ultimate consumers within and without their municipal borders. All of the joint petitioners are captive wholesale customers of applicant Duke Power Company (Duke); and in many instances compete with Duke for retail customers. Together they pay Duke millions of dollars each year for wholesale power. The availability and price of power to each

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* By Petition dated 18 January 1971 Petitioners previously sought to intervene in these proceedings. Staff and the applicant Company responded to such Petition and the Commission thereafter entered an Order stating in part:

> "The Commission believes that action on the Petitioners' intervention and hearing requests should await the notice which will later be published in accordance with 10 CFR Section 2.102(d)(3). Accordingly, we note at this time that the petitioning municipalities are entitled to request antitrust review pursuant to Section 105 c. of the Act; that they have timely sought such review; and that appropriate action has been taken by the staff to initiate this review. Within that context, final action on the instant petition is deferred. We believe it would be desirable for the joint petitioners to renew their requests or file an amended petition at the appropriate time following publication of the Section 2.102(d)(3) notice...."

Publication of the Attorney General's advice pursuant to Section 2.102(d)(3) having been made on 4 September 1971, it is now appropriate and timely for Petitioners to renew their requests, and this pleading fully does so.

and all of petitioners are initially and inextricably bound with and in the determinations in this proceeding.

PETITIONERS' INTERESTS

3. Duke currently enjoys a monopoly in the generation of bulk power over a substantial portion of Western and Central North Carolina. Duke, further, is a signatory of agreements with each of Carolina Power and Light Company (CP&L), South Carolina Electric and Gas Company (SCE&G), and Virginia Electric and Power Company (VEPCO), which agreements (when considered with bi-lateral contracts between each of the other above-named utilities) provide for the interchange of power and joint planning among the four companies. Duke, CP&L, SCE&G and VEPCO together monopolize the generation of electric power over a substantial geographical area in North Carolina, South Carolina and Virginia. Nuclear energy, developed at the expense of the taxpayers of the United States, offers, when utilized on a large scale, a source of energy lower in cost than any now available to Duke. The necessity of large-scale construction permits Duke access to this low-cost source only through its interconnection and exchange agreements with the other named utilities. Petitioners have no access to the "pool" in which Duke, CP&L, VEPCO and SCE&G are effective participants. As Duke, a giant utility, is unable alone to reap the full economic benefits of nuclear power, and as each petitioner operates an electric system much smaller than Duke's, none of petitioners is able alone (nor by combination with one another) effectively to enjoy the benefits of this low-cost source of power. Monopolization of the benefits of nuclear power and of electric power marketing over petitioners' geographic area by Duke appears then imminent.

4. Petitioners' ability to offer electrical energy at retail rates competitive with those of Duke, their ability to survive as viable utilities, is in the long run dependent on their opportunity to enjoy equally with their competitors access to the miracle of nuclear electric generation.

PETITIONERS' CONTENTIONS

5. The antitrust statutes of the United States and the Atomic Energy Act of 1954 in the circumstances of Petitioners' wholesale power captive status, and Duke's otherwise monopolistic position, above detailed, require that the award of any licenses for the construction and operation of these proposed facilities be denied or conditioned upon provision to Petitioners of opportunity to purchase a fair share of these facilities and to be afforded such other rights as may be necessary to promote free competition and to prevent monopolization.

6. Petitioners have made formal demand upon Duke to respond and commit itself to these petitioners and to this Commission that, if it should be licensed for these facilities, it would offer to sell to these petitioners, pursuant to license conditions and promises to be fixed by this Commission and other appropriate authorities, a fair share of the ownership and capacity of such facilities; and petitioners here renew that request and demand.

7. Petitioners here state their expectation and willingness, so far as the propriety and practicality of their owning a fair share of these facilities is concerned, to acquire, by purchase, construction, lease, contract or otherwise, any and all reasonably required or appropriate subsidiary or additional facilities so as, fully and fairly, to integrate themselves and

their fair share of these facilities into the electric generation here involved. At the same time, of course, Petitioners reserve all their rights under law including, but not limited to, rights related to wheeling, pool participation, and the like; and the decretal protection of such rights is implied and included in the prayer reliefs requested below, particularly 4) and 5) thereof.

PRAYERS

WHEREFORE, Petitioners pray that:

1) They be allowed fully, as above stated, to intervene;

2) They be accorded an antitrust review pursuant to Section 105 of the Atomic Energy Act of 1954, as amended, and other applicable law;

3) Hearings be held thereon, with these petitioners permitted fully to participate therein; and upon all such

4) Duke's application be denied or conditioned, as above detailed, to avoid violation of or inconsistency with the antitrust provisions of the Atomic Energy Act of 1954, as amended, and the other provisions of the antitrust laws of the United States; and

5) Petitioners be granted such other and further relief as to which they are entitled.

Respectfully submitted,

THE MUNICIPALITIES OF STATESVILLE, HIGH POINT, LEXINGTON, MONROE, SHELBY, ALBEMARLE, CORNELIUS, DREXEL, GRANITE FALLS, NEWTON and LINCOLNTON, all of NORTH CAROLINA

BY: .....

Tally, Tally & Bouknight
Attorneys and Counsellors at Law
P. O. Drawer 1660
Fayetteville, North Carolina 28302
Attorneys for Petitioners

VERIFICATION

NORTH CAROLINA

CUMBERLAND COUNTY

J. O. TALLY, JR., first being duly sworn, says that:

He is Attorney for the Petitioners herein; that he is authorized to file the foregoing Petition on their behalf; that he has read it and knows the contents thereof; and that to the best of his knowledge, information and belief the statements made in it are true.

J. O. Tally, Jr.

Subscribed and sworn to before me, a Notary Public of the State of North Carolina, County of Cumberland, this 29th day of September, 1971.

Notary Public

My Commission Expires: 2-22-76

UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

IN THE MATTER OF	)	
DUKE POWER COMPANY	)	DOCKET NOS. 50-269
(OCONEE NUCLEAR STATION,	)	50-270
UNITS 1, 2 and 3)	)	50-287

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing document dated 29 September 1971, were served upon the following by deposit in the United States Mail, First Class or Air Mail, this the 29th day of September, 1971:

Samuel Jensch, Esquire
Chairman
Atomic Safety and Licensing Board
United States Atomic Energy Commission
Washington, D. C.

Dr. Hugh Paxton
Los Alamos Scientific Laboratory
Los Alamos, New Mexico

Reece A. Hubbard
County Supervisor
Oconee County, South Carolina

Carl Horn, Esquire
President
Duke Power Company
Charlotte, North Carolina

Honorable Robert W. Scott
Governor of State of N. C.
Capitol Building
Raleigh, North Carolina

Algie A. Wells, Chairman
Atomic Safety and Licensing Board Panel
United States Atomic Energy Commission
Washington, D. C. 20545

Dr. John Henry Buck
The Budd Company
Phoenixville, Pennsylvania

Dr. Clarke Williams
Deputy Director
Brookhaven National Laboratory
Upton, Long Island, New York

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Washington, D. C. 20006

Honorable John Carl West
Governor of the State of S. C.
State House
Columbia, South Carolina

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Washington, D. C. 20545

William H. Grigg
Assistant General Counsel
Duke Power Company
Charlotte, North Carolina

Peter A. Morris
Director
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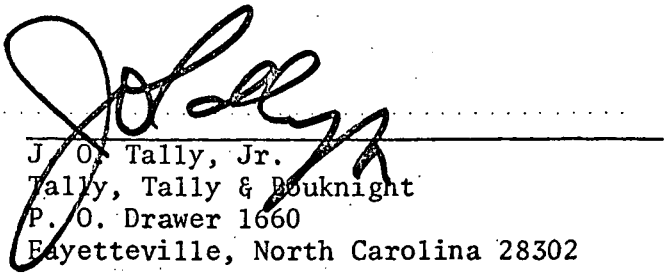
United States Atomic Energy Commission
Washington, D. C. 20545

Harry M. Lightsey, Jr.
Assistant Attorney General
The South Carolina Public Service Commission
325 Hampton State Office Building
Columbia, South Carolina



J. O. Tally, Jr.
Tally, Tally & Bouknight
P. O. Drawer 1660
Fayetteville, North Carolina 28302

4-5-71

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of)
)
DUKE POWER COMPANY) Docket Nos. 50-269-A, 270-A,
(Oconee Nuclear Station) 287-A
Units 1, 2 and 3))

4-5-71

CERTIFICATE OF SERVICE

I hereby certify that copies of the MEMORANDUM AND ORDER issued by the Commission dated April 5, 1971 in the captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 6th day of April 1971:

J. O. Tally, Esq.
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Fayetteville, North Carolina 28302

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Regulatory Staff Counsel
U. S. Atomic Energy Commission
Washington, D. C. 20545

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Raleigh, North Carolina 27601

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Atlanta, Georgia 30334

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Attorney General, State of
South Carolina
Columbia, South Carolina 29201

Patricia M Verlong
Office of the Secretary of the Commission

cc: Mr. Knotts
Mr. Wells
F. Karas
H. Smith

A.T.

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

COMMISSIONERS:

Glenn T. Seaborg, Chairman
James T. Ramey
Wilfrid E. Johnson

IN THE MATTER OF DUKE POWER COMPANY (Oconee Nuclear Station, Units 1, 2 and 3)	DOCKET NOS. 50-269-A 50-270-A 50-287-A

MEMORANDUM AND ORDER

On December 29, 1970, the Commission published in the Federal Register a "Notice of Receipt of Application for Facility Operating License" in the captioned dockets (35 F. R. 19708). Insofar as is here relevant, the Notice provided that:

> "Pursuant to subsection 105 c.(3) of the Act, any person who intervened or who sought by timely written notice to the Commission to intervene in the construction permit proceedings for these facilities to obtain a determination of antitrust considerations or to advance a jurisdictional basis for such determination has the right to obtain an antitrust review under section 105 c. of the Act, of the application for an operating license for these facilities, upon written request to the Commission made within 25 days after the date of publication of this notice..."

On January 18, 1971, eleven North Carolina municipalities filed a joint petition to intervene for the purpose of obtaining the antitrust review dealt with in the cited Notice provision.[1/] Petitioners asked that a copy of the Oconee license application and of their joint petition be transmitted to the Attorney General for his review pursuant to Section 105 c. of the Atomic Energy Act; that hearings be held on the application with participation by petitioners as parties; and that the application be denied or conditioned on antitrust grounds.

The petitioning municipalities were joint intervenors in the construction permit proceedings for the Oconee facilities, at which time they challenged the licensability of those facilities under Section 104 b. of the Atomic Energy Act. The purpose of that challenge, in terms of the above Notice provision, was "to advance a jurisdictional basis" which would permit petitioners "to obtain a determination of antitrust considerations". The municipalities are, therefore, within the class entitled to request antitrust review pursuant to Section 105 c.(3) of the Atomic Energy Act of 1954, as amended by P. L. 91-560 (December 19, 1970).

The regulatory staff, in a response filed on January 28, 1971, took note of petitioners' status under Section 105 c.(3) of the Act and advised that, in accordance with 10 CFR Section 2.102(d)(1), it would promptly

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1/ The joint petitioners are the following North Carolina municipalities: The cities of Statesville, High Point, Lexington, Monroe, Shelby, and Albemarle; and the towns of Cornelius, Drexel, Granite Falls, Newton and Lincolnton.

submit the municipalities' joint petition and the Oconee application to the Attorney General for review pursuant to Section 105 c. of the Act.[2/] The staff's response went on to contend that intervention and a hearing on antitrust considerations are matters appropriately to be dealt with following antitrust review pursuant to Section 105 c. In this regard the staff pointed out that, under our Rules of Practice, the Attorney General's advice, or notice that the Attorney General has not rendered any such advice, will be published in the Federal Register; and that, in either event, an opportunity will then be afforded joint petitioners to pursue their intervention and hearing requests on the antitrust aspects of the application. 10 CFR Section 2.102(d)(3).

The staff response also noted that the joint petition does not appear to seek intervention and a hearing on matters outside the sphere of antitrust considerations; and that no contentions are asserted relating to the matters embraced by the "Notice of Proposed Issuance of Facility Operating License" for Duke Power Company's Oconee Unit No. 1 (Docket No. 50-269), which was published in the Federal Register on January 8, 1971 (36 F. R. 296). As regards this Notice, the staff added that, in accordance with Section 105 c.(8) of the Act, an operating license containing appropriate

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2/ The docket of this proceeding reflects that such a transmittal, as well as a later transmittal of the applicant's response to the petition (infra), has in fact been made.

conditions relating to antitrust matters, as provided in 10 CFR Section 50.55 b., may be issued for this unit prior to consideration of and findings with respect to antitrust matters.

The applicant's answer to the petition, in addition to its response to petitioners' allegations, also points to Section 105 c.(8) and to the corresponding provisions of our Rules permitting issuance of an operating license conditioned on the final outcome of the antitrust review process.

The Commission believes that action on the petitioners' intervention and hearing requests should await the notice which will later be published in accordance with 10 CFR Section 2.102(d)(3). Accordingly, we note at this time that the petitioning municipalities are entitled to request antitrust review pursuant to Section 105 c. of the Act; that they have timely sought such review; and that appropriate action has been taken by the staff to initiate this review. Within that context, final action on the instant petition is deferred. We believe it would be desirable for the joint petitioners to renew their requests or file an amended petition at the appropriate time following publication of the Section 2.102(d)(3) notice. In taking this step we further note that, in accordance with Section 105 c.(8) of the Atomic Energy Act and in conformity with the Notice of Proposed Issuance published on January 8, 1971, such license as may be issued for Oconee Unit No. 1 will be conditioned

to assure that any subsequent findings and orders of the Commission with respect to antitrust matters will be given full force and effect. (See 10 CFR Section 50.55 b.).

It is so ORDERED.

Commissioner Larson did not participate in this matter.

By the Commission.

W. B. McCool
Secretary of the Commission

Dated April 5, 1971