UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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

APPLICANT'S MEMORANDUM ON THE IMPACT OF THE LOUISIANA POWER AND LIGHT ORDER

To Atomic Safety and Licensing Board:

The question addressed in this memorandum is the impact upon the proper scope of the issues in this proceeding of the Commission's recent decision in the Louisiana Power and Light Company proceeding.[1/] The answer to this question suggested by the Justice Department and the intervenors is a simple one: The LP&L decision should have no impact whatever and the proceeding should go on just as before.

Applicant believes that such a view is seriously in error and is an unwarranted rejection of the Commission's efforts in LP&L to provide guidance to its hearing boards in these antitrust review proceedings. Consider what the Commission said in its Memorandum and Order:

> (1) The statutory standard in Section 105c "has inherent boundaries. It does not

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1/ Louisiana Power and Light Company (Waterford Steam Electric Generating Station, Unit 3), AEC Docket No. 50-382A, Sept. 28, 1973.

authorize an unlimited inquiry into all alleged anticompetitive practices in the utility industry." (LP&L, p. 5)

(2) The Commission was taking the opportunity in LP&L "to outline some appropriate benchmarks" for the proper scope of the inquiry. (LP&L, p. 5)

(3) "[I]t is the existence of that tie [between alleged anticompetitive practices and the nuclear facilities] which is critical to antitrust proceedings under the Atomic Energy Act. If activities relating to a facility have no substantial connection with alleged anticompetitive practices, there is no need for a hearing as to such practices or proposed forms of relief from them." (LP&L, p. 6)

(4) The burden of establishing that "tie" or nexus is upon the intervenors, or where it is asserting antitrust problems, upon the Justice Department. "[A]n intervenor must plead and prove a meaningful nexus between the activities under the nuclear license and the 'situations' alleged to be inconsistenct with the antitrust laws." (LP&L, pp. 6-7)

(5) One suggested means of establishing that tie is inadequate and was expressly rejected by the Commission. This is the commingling theory. The Commission said: "The Board found that "[p]ower from Waterford will be comingled (sic) with the power from other LP&L generating facilities" (decision, p. 6). That is a truism applicable to all cases; power is not isolated. Such a finding should not be utilized to support the view that an application to construct one nuclear plant somehow authorizes an inquiry into all alleged anticompetitive practices in the electric utility industry." (LP&L, p. 7)

(6) As to certain types of alleged anti-competitive activities, the Commission established a specific standard. Thus, as to transmission, the Commission said: "Denial of access to transmission systems would be more appropriate for consideration where the systems were built in connection with a nuclear unit than where the systems solely linked non-nuclear facilities and had been constructed long before application for an AEC license." (LP&L, p. 6)

As to pooling and interconnections, the Commission stated: "While the propriety of pooling arrangements and physical interconnections could certainly be considered in appropriate cases, such matters in most circumstances could not be dealt with by this Commission where no meaningful tie exists with nuclear facilities." (LP&L, p. 6)

(7) Finally, the Commission clearly stated that the Board has a responsibility at any point in the proceeding to confine the inquiry to its proper scope. Thus, the Commission suggested that the LP&L Board require additional submissions in order to conduct that proceeding within the Commission's guidelines. It stated that, if a meaningful nexus cannot be shown, all or part of the proceeding should be summarily disposed of. (LP&L, p. 8)

These guidelines should be carefully analyzed and applied to this proceeding. Particularly, the Board should review very carefully any claim by the Justice Department that the LP&L decision changes nothing and that the extremely broad inquiry being pursued here should go forward unchanged.

For instance, in the depositions which have taken place thus far, Justice has indicated its intent to inquire into transmission arrangements between Applicant and other utilities (Beyer, 10/18/73, Tr. 105). It has further pressed inquiry into the history of the CARVA pool, now defunct (Beyer, 10/18/73, Tr. 38, 114). When asked to establish the nexus between these facts and the activities under the license, Justice has stated that the power from the nuclear plant must be marketed through the Applicant's transmission grid; that power from that grid must be marketed on a "firm" basis; and that interconnections are necessary to make that power firm. Thus, contends Justice, the connection between the activities under the license and Applicant's transmission and interconnection practices is established.

The Beyer deposition has already cast doubt on one factual premise of this argument. Mr. Beyer has testified that Duke's interconnections with others are necessary to enhance reliability (Beyer, 10/17/73, Tr. 114). However, he has not testified that they are necessary to enable marketing of power from Duke's own plants. However, for purposes of this discussion, we will assume that Justice's factual contentions are accurate. We submit, however, that they have established no more than

the commingling truism which the Commission expressly rejected in the LP&L Memorandum and Order. Most significantly, what Justice says of the role of the transmission grid vis-a-vis the nuclear plant and the marketing of firm power can be said of every plant on every utility system in the country. If this view is accepted, there are no limits on the anti-trust inquiry in these Section 105c proceedings. The marketing of power from the atomic plant is commingled with the marketing of all the system's power. Thus, all aspects of marketing are proper subjects for inquiry and the Commission is thrust into "an unlimited inquiry into all alleged anti-competitive practices in the utility industry" (LP&L, p. 5), precisely the inquiry said by the Commission to be unauthorized.

At its base, Justice's theory argues that, because the power from the nuclear facilities is marketed with Applicant's other power, grant of the license will "maintain" the adverse antitrust situation. This is yet another truism of the kind rejected in LP&L. The Commission said:

> "A description of a situation inconsistent with the antitrust laws -- however well pleaded -- accompanied by a mere paraphrase of the statutory language, alleging that the situation would be created or maintained by the activities under the license, would be deficient." (LP&L, p. 6, fn. 2)

The Board should require some showing of nexus more meaningful than a reliance on commingling and the reference to the statute's use of the word "maintain."

We submit that Justice has utterly failed to meet its burden of establishing nexus between transmission arrangements and pooling/interconnection arrangements and the plants in question. We further submit that, before inquiring into transmission and pooling/interconnection, Justice must show a nexus in accordance with the Commission's stated standard. That is, it must show that the transmission system was built in connection with the nuclear facilities; and it must show that a meaningful link exists between Applicant's past pooling and interconnection arrangements and the nuclear plants here in question.

Turning to the broader meaning of the LP&L order, the Board should require Justice and the intervenors to set out the anticompetitive practices which they allege to exist in this proceeding. As to each such practice, the Board should require those parties to set forth the nexus between the practice and the activities under the license. That showing should be something more than the fact that the power from the plant must be marketed through the transmission grid existing on the Duke system. Applicant should then be given an opportunity to comment for the

Board on the adequacy of the showing and the Board should then reshape the issues in light of that review and analysis.

In considering the validity of the nexus showing by Justice and the intervenors, the Board should bear in mind the basic principle with which the Commission began its discussion in the LP&L decision. The Commission stated that "the requirement in Section 105 for pre-licensing antitrust review reflects a basic Congressional concern of access to power produced by nuclear facilities . . . it was the intent of Congress . . . that access to nuclear facilities be as widespread as possible." (LP&L, p. 4) The Commission thus made clear that the central inquiry in these proceedings is the adequacy of access to the nuclear facility. It is Applicant's position that adequate access to the output of these nuclear plants is provided by its sale of power under a regulated wholesale rate. Further, Applicant believes that the alternate forms of access being sought by Justice and the intervenors are contrary to sound public policy, being unduly discriminatory, anticompetitive and wasteful. Justice and the intervenors, of course, contend otherwise, and this issue should be tried. This conclusion does not require, however, the apparently limitless inquiry into every business action

taken by Applicant since 1960, or perhaps even earlier, as Justice apparently wishes to pursue. To cite but a few examples, the inquiry need not include Duke's acquisitions in the years since 1960, nor its policies concerning line extension or promotional practices, nor even the history of the now defunct CARVA pool.

Applicant does not suggest that LP&L requires that all areas of inquiry be shut off in this proceeding. Rather, the inquiry should fall within the Commission's guidelines. Thus, the focus should be on adequacy of access to the nuclear facilities. Inquiry into any particular allegation of anticompetitive practices should not be permitted until the requisite connection with these nuclear facilities is shown. The Board should require Justice and the intervenors to meet this burden before permitting the present unrestricted inquiry to proceed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of APPLICANT'S MEMORANDUM ON THE IMPACT OF THE LOUISIANA POWER AND LIGHT ORDER, dated October 23, 1973, in the above-captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 23rd day of October, 1973:

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