

4/13/73

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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

RESPONSE OF SOUTH CAROLINA ELECTRIC & GAS COMPANY
TO APPLICATION FOR ISSUANCE OF SUBPOENA DUCES TECUM
AND AFFIDAVIT IN SUPPORT THEREOF BY JUSTICE DEPARTMENT

On November 16, 1972, the United States Department of Justice ("Justice") requested the issuance by the Atomic Safety and Licensing Board in this proceeding of a subpoena duces tecum requiring the South Carolina Electric & Gas Company ("SCE&G") to produce various specified documents for inspection and copying. This subpoena duces tecum was issued by the Board on November 20, 1972 and served on SCE&G on November 27, 1972.

On December 12, 1972, SCE&G moved to quash the subpoena as unreasonable and, alternatively, asked for additional time in which to make further response. By Order dated January 8, 1973, the Board denied the motion to quash on the condition that Justice provide further specification of the documents it was seeking and reduced to 10 years the time covered by the subpoena, but granted SCE&G 30 days

1697 143
7912180 924 m

from the receipt of the Justice letter in which to make further response.

Justice responded by letter dated January 15, 1973, in which it stated that it was impossible to fulfill the conditions specified in the January 8, 1973 Order. In its "Order Granting Request for Motion to Reconsider Order" dated January 24, 1973, the Board chose to treat Justice's letter of January 15 as a motion for reconsideration, and required Justice to file an affidavit:

"showing that it had reason to believe that [SCE&G] had documents as specified, that according to its information such documents either were internal memoranda distributed among officers of [SCE&G] (or other persons) (specify the class) or were correspondence between [SCE&G] and one or more classes of person (specify such classes by description) and denying that it was engaged in a 'fishing expedition'."

In an affidavit dated February 8, 1973, Wallace Edward Brand, an attorney representing Justice in this proceeding, averred that he believed documents such as those requested "may at sometime" have been generated somewhere in the Piedmont Carolinas as a result of his "experience in other matters involving the electric power industry," including similar antitrust reviews involving electric utilities elsewhere in the United States. He further

stated that he believed SCE&G might have some of the requested documents because of his understanding of the history of the electric utility business generally in the Carolinas.

In its "Prehearing Order Number Six" dated March 22, 1973, the Board found that this affidavit complied with its Order of January 8, 1973. The Board also determined the issues to be tried in this proceeding. The only issue to which the requested documentation might relate is issue number 2:

"What is the structure of the relevant market including the nature and extent of competition for electric power at wholesale and retail, arrangements for coordinating and wheeling power, and arrangements for and with customers?"

As stated in the Brand affidavit, the documents in question are those which would have been "generated as a result of the anticipated few occasions when a 'customer' or potential competitor of Duke Power Company may have sought to deal with [SCE&G] in order to obtain its electric power." (emphasis added)

Although denying that it was engaged in a fishing expedition, Justice has not identified any instance in which such a request may have been made. Indeed, as the affidavit noted, SCE&G is not aware of any requests for coordination or power sales directed to it by small systems which deal with Duke which were not met.

1697 145

Furthermore, the request for documents is overly broad. The subpoena requests information concerning SCE&G's policies and relationships concerning wholesale customers in the Piedmont Carolinas generally. This goes far beyond the review of instances where competitors or customers of Duke may have sought to deal with SCE&G suggested by the Brand affidavit or even a review of the structure of Duke's market, as contemplated in issue number 2 identified by the Board.

A search for such documents requested by Justice as might exist would be much less burdensome, and would still provide the information requested, if Justice would identify with particularity those customers or potential competitors of Duke with respect to which it believes the requested documentation exists, and if the Board accordingly limited the scope of the requested search.

The Brand affidavit contemplates that a search for the documents which are sought by Justice would begin in the district sales offices of SCE&G, and might entail substantial search of SCE&G's files. The attached affidavit of James H. Fowles shows that a search of SCE&G's district sales offices would not be required. However, a search sufficient to comply with the subpoena would require a detailed review of numerous files of SCE&G in Columbia, S. C. Such a search would entail substantial effort and expense to SCE&G, and would thus be extremely oppressive and burdensome.

1697 146

On the other hand, alternative means are available to Justice for developing the information which it seeks. Many, if not all, of the wholesale customers or potential competitors of Duke are parties to this proceeding. They, along with Justice, have been jointly reviewing records of the Duke Power Company, and, of course, are each aware of their own relations with SCE&G. Presumably on the basis of the information already made available to it as a result of discovery in this proceeding, Justice stated in its January 15 letter that it would be able to avail itself of other methods provided by the Commission's rules in an attempt to establish its position if the subpoena was quashed.

In considering whether to modify or quash a subpoena duces tecum addressed to a non-party to a proceeding, the Board should consider the inconvenience and burden which would be imposed on the non-party as a result of issuance of the subpoena in relation to the benefit of obtaining the information which might be developed as a result of the issuance of the subpoena. Westinghouse Electric Corp. v. City of Burlington, Vt., 351 F.2d 762 (D. C. Cir. 1965); Covey Oil Co. v. Continental Oil Co., 340 F.2d 993 (10th Cir. 1965), cert. denied, 380 U.S. 964 (1965). It is evident in this instance that compliance with the subpoena in its present form, even as modified by the Board's Order of January 8, 1973, would be extremely burdensome to SCE&G,

1697 147

and that alternative means are available to Justice for developing the relatively minor amount of information which it expects to be developed as a result of compliance with the subpoena.

For this reason, the Board should quash the subpoena issued by it to SCE&G on November 20, 1972.

Alternatively, the Board should further modify the subpoena so as to require only the production of documents relating to relations between SCE&G and specified municipal or cooperative electric companies for which Justice can show in greater detail why it believes such documents may exist. Such a condition would be consistent with the ruling in U.S. v. Grinnell Corp., 30 F.R.D. 358 (C.D. R.I. 1962), wherein the court limited a subpoena duces tecum to the relationship among defendants and their competitors within a relevant geographic area.

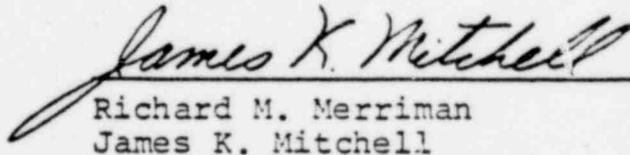
SCE&G further requests the Board to condition compliance with the subpoena on a requirement that Justice reimburse SCE&G for the cost of such compliance. In Novak v. General Electric Co., 10 F.R. Serv. 2d 456.31, Case 2 (SDNY, 1967), the Court conditioned its grant of a similar request for documents from a non-party to the proceeding on payment by the party seeking the subpoena of the cost of the records search. In imposing the condition, the court ruled that "A subpoena duces tecum does not require this work

(searching of files and compilation of documents) to be performed by a witness. It requires only that the documents be produced."

CONCLUSIONS

For the reasons set forth herein and in the attached affidavit of James H. Fowles, the subpoena issued to South Carolina Electric & Gas Company should be quashed. Alternatively, if the subpoena is not quashed, it should be granted only on the condition that it be further modified to cover only matters which are relevant to this proceeding, that Justice be required to reimburse SCE&G for the cost of searching its records, and that SCE&G be given the further right to object to the production of particular documents following the completion of its search.

Respectfully submitted,


Richard M. Merriman
James K. Mitchell

Reid & Priest
1701 K Street, N. W.
Washington, D. C. 20006

Counsel for
SOUTH CAROLINA ELECTRIC & GAS COMPANY

April 13, 1973

1697 149