7-30-73

UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

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

ANSWER OF THE DEPARTMENT OF JUSTICE
TO APPLICANT'S MOTION TO AMEND
PREHEARING ORDER NUMBER TWO

The Department of Justice hereby answers Applicant Duke Power Company's Motion to Amend Paragraph B(2)(b) of Prehearing Order Number Two, dated July 18, 1973. We respectfully request that the Board deny Applicant's motion and order it to produce immediately documents responsive to Item 6(f)(2) of the First Joint Request.

Having failed to make a timely objection to producing these documents, Applicant seeks now, nine months later, to bring them within the ambit of the Board's order sustaining its "political activity" objection--i.e., paragraph B(2)(b) of Prehearing Order Number Two. We believe this result would be inappropriate.

First, it is not at all certain that an objection to Item 6(f)(2) production would have been sustained by the Board had this matter been raised and argued along with Applicant's other objections. Intervenors argue convincingly

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in their answer to Applicant's motion that Applicant's "communications to or about elected officials, councils and boards" regarding "inquiries, invitations, negotiations, evaluations and proposals for the acquisition of electric power facilities of municipalities, electric cooperatives or other electric utilities" are in essence communications between competing business enterprises and qualitatively different from the communications to disinterested government agencies and officials that were at issue in the Noerr and Pennington cases.*/

Second, we note that the Board's order sustaining Applicant's "political activity" objection was specifically "without prejudice to a renewal [of such discovery requests] on the showing of prerequisites required by law." In ruling on the objection at the November 17, 1972, prehearing conference, Chairman Bennett elaborated on this point:

> [W]e believe at this time, that we will sustain the objection to the information with respect to the political activity. This does not mean that on a proper showing of some reason for it and relevancy, that we will necessarily exclude an additional attempt to secure more specific information on a showing of the need for it and the reason for it. Transcript, p. 177.

The documents sought under Item 6(f)(2) are clearly relevant to issues in this proceeding. The elimination and attempted elimination of competitors and potential competitors through

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*/ Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965).

acquisition would be evidence of Applicant's abuse of its monopoly power (subissue 2(a) of the final statement of subissues, Prehearing Order Number Six). Communications regarding acquisition or possible acquisition would also be relevant to subissues 2(m) and (n), dealing with the competitive viability of the small systems absent access to coordination.

That Applicant has acquired or sought to acquire municipal and cooperative electric systems in its area is not merely a guess on our part. Applicant's prolific efforts in this regard are admitted in its various nuclear license applications--i.e., in the responses to Questions 17, 18, and 19 posed by the Attorney General. A copy of these responses as submitted with the McGuire application is attached as Appendix A hereto. Furthermore, discovery already obtained from Applicant shows a concerted program to acquire competing electric distribution systems in its area (e.g., documents 75226-75228, 75460 and 75462, attached as Appendix B hereto). We believe this is a sufficient showing to justify production of this narrow category of documents that will enable us to demonstrate and characterize for the Board the manner in which Applicant carried out this concerted acquisition program. Applicant should not be permitted to withhold this relevant material by recourse to an expansive reading of the holdings of Noerr and Pennington.

We note finally that Applicant has already identified and segregated those documents responsive to request 6(f)(2); ordering their immediate production would require no new file search and should not unduly burden the Applicant.

Respectfully submitted,

DAVID A. LECKIE

WALLACE E. BRAND

Attorneys, Antitrust Division
Department of Justice

Washington, D. C.
July 30, 1973

Question No. 17

List adjacent systems to which applicant has offered to sponsor or to conduct system surveys in contemplation of an offer by applicant to purchase, merge or consolidate with said adjacent system, subsequent to January 1, 1960.

Answer

Since January 1, 1960, Duke Power Company has offered to sponsor or conduct surveys of the following systems in contemplation by Duke to purchase, merge or consolidate such systems:

The Electric Company
Town of Huntersville
Town of Prosperity
Lockhart Power Company
Pisgah Mountain Electric Company
Belton Light and Power Company
Town of Ninety-Six
Kershaw Power and Light Company
City of Greenville and County of Greenville (Donaldson Air Force Base System)
Greenwood County R.E.A.
Clemson Agricultural College of South Carolina
Nantahala Power and Light Company (offer to purchase made 1/31/59) (In connection with this proposed purchase, Duke had accompanying discussions with the Town of Highlands and Western Carolina College covering service to or possible system acquisition if the Nantahala system was acquired by Duke.)

In each instance listed above, except Pisgah Mountain Electric Company, the initial invitation to make an offer to purchase came from the other system to Duke Power Company. In the case of Pisgah Mountain Electric Company the initial request to negotiate for the acquisition of the system came from the staff of the North Carolina Utilities Commission, which was concerned about service problems being experienced by that distribution system. Since January 1, 1960, one or more salesmen ~~in~~ Duke Power Company's Power Sales Department, who make regular calls on Duke's industrial and wholesale customers with respect to reliability of service, increases in customers' demands, etc., may have inquired of a city electrical superintendent or other city official whether his municipality would be interested in selling its distribution system to Duke Power Company. However, to the best of the Company's knowledge and belief, no such inquiry resulted in any surveys or offers by Duke to purchase, merge or consolidate such systems.

Question No. 18:

List applicant's offers or proposals to purchase, merge or consolidate with electric utilities, subsequent to January 1, 1960.

Answer:

Duke Power Company, South Carolina Electric & Gas Company, and Carolina Power & Light Company each offered to purchase the rural electric cooperatives in each utility's service area and to lease and operate the State-owned South Carolina Public Service Authority generation, transmission and distribution system. At various times during the 1960's, there have been proposals considered by the South Carolina General Assembly to make rural electric cooperatives in South Carolina and South Carolina Public Service Authority, which is the bulk power supplier for certain of those rural electric cooperatives, subject to local property taxation. The companies mentioned above suggested purchase by the three major electric utilities operating in South Carolina as a means of accomplishing this result. The companies' offer was promptly rejected and no further action was taken by the companies mentioned above. Laws taxing rural electric cooperatives were subsequently passed by the South Carolina General Assembly.

At about the same time, when the issue of subjecting North Carolina electric membership corporations to local property taxation was being considered in the North Carolina General Assembly, Duke Power Company and Carolina Power & Light Company publicly announced their willingness to purchase all electric membership corporations operating in their respective service areas in North Carolina. The offer was rejected and no further action was taken by the companies. Subsequent legislation enacted by the North Carolina General Assembly made all electric membership corporations in North Carolina subject to local property taxation, and provided that the North Carolina Utilities Commission should fix service territories for the electric membership corporations as well as the regulated electric utilities. See answer to Question 14 for citation of statutes.

Duke Power Company also made offers to purchase or lease the following systems:

Nantahala Power & Light Company (offer - Jan. 31, ~~1959~~) (offer expired after 1960)	$4,000,000 (approximately) to be adjusted for further capital additions and retirements and accrued depreciation to the date of acquisition.
Pisgah Mountain Electric Company	4,000 shares Duke common-$252,298 cost of shares
Belton ~~Light &~~ Power Company	26,000 shares Duke common $1,577,936 cost of shares
Town of Ninety-Six	$751,200 offer to be adjusted at date of closing

Kershaw Power & Light Company	$1,260,161 offer to be adjusted at date of closing (payment - 58,639 shares Duke common)
City of Greenville and County of Greenville (Donaldson Air Force Base)	$304,280
Greenwood County R.E.A.	$12,918,176 which includes acquisition of a distribution system, transmission system, 14,000 KW generation plant, and $2,087,981 in cash and investments. Duke offered to lease for 40 years at $250,000 annually the R.E.A. 15,000 KW hydroelectric plant.
Clemson Agricultural College of South Carolina	$279,068

Each of the systems listed above except Pisgah Mountain Electric Company initially requested Duke Power Company to make an offer to purchase. The offer to purchase Pisgah Mountain Electric Company, a small rural distribution system in Lincoln County, North Carolina, was suggested to Duke by the staff of the North Carolina Utilities Commission, which was concerned with service and maintenance problems on the Pisgah Mountain system.

Question No. 19:

List all acquisitions of or mergers or consolidations with electric utilities by applicant, subsequent to January 1, 1960, including:

a. The name and principal place of business of the system prior to the acquisition, merger, or consolidation;
b. The date the acquisition merger or consolidation was consummated;
c. Gross annual revenue and most recent peak load, dependable capacity and the largest thermal generating unit of the system, prior to the date of consummation.

Answer

Electric utilities acquired by Duke Power Company since 1960 and data requested on such utilities are:

System	Location	Acquisition Date	Revenue of Adjacent System	Peak Load of Adjacent System	Generation
Pisgah Mountain Electric Co.	Lincolnton, N.C.	7-17-64	$74,884 (1963)	864 KWD	None
* Belton Light & Power Co.	Belton, S.C.	11-13-63	$621,962 (1962)	6,810 KWD	Hydro-electric 3-1000 KW 1-500 KW
* Ninety-Six, Town of	Ninety-Six, S.C.	10-1-69	$157,479 (year ending 9-30-68)	1,920 KWD	None
* Kershaw Power & Light Co.	Kershaw, S.C.	8-17-70	$144,507 (6 months ending 6-30-70)	3,960 KWD	None
* City of Greenville & County of Greenville (formerly Donaldson Air Force Base)	Greenville, S.C.	5-11-64	Not available	3,456 KWD	None
* Greenwood County R.E.A.	Greenwood, S.C.	7-1-66	$4,144,375 (year ending 6-30-66)	81,700 KWD	14,000 KW, incl. one 10,000 KW unit.
* Clemson Agricultural College of South Carolina	Clemson, S.C.	12-15-64	$62,105 (app.)	Not available	None

* Indicates that negotiations for acquisition by Duke Power Company were initiated by the system subsequently acquired.

DUKE POWER COMPANY

APPENDIX B

GENERAL OFFICE

CHARLOTTE 1, N. C.

April 1, 1960

Mr. P. D. Huff

SUBJECT: PURCHASE OF REA COOPERATIVES

RECOMMENDATION: It is recommended that we endeavor to purchase or initiate a purchase attempt of one cooperative in 1960, provided that a favorable situation can be found.

REASON: It is considered highly desirable to have a planned program to purchase all cooperatives in our area. The later we wait the more difficult it will be as suggested by the details of the 100 point plan outlined below. We should be in a position to follow an organized procedure that can be placed quickly into effect when a favorable situation develops.

100 POINT PLAN: To be successful in a purchase attempt, an analysis should be made of our chances before initiating such a move. Listed below are sixteen factors to be considered (and perhaps others should be listed) with an index of importance assigned. With a maximum of 100 points, it is recommended that we normally have at least 60 index points "in the bag" before becoming involved. Underlined are four factors considered as a must. A friendly director or manager is highly desirable but not considered as being absolutely necessary.

	INDEX VALUE		INDEX VALUE
Small cooperative	5	"Friendly" director or manager	11
Poor financial condition	2	Skeleton work force	2
Higher REA rates	10	No monthly publications	3
Higher mileage bill	2	An excellent "sell out" committee	20
Poor service and long outages	10	Our service manager, sound and perhaps valuable	10
Managerial dictatorial policies	2	Large number of members or poor write ups	4
Antagonistic manager	2	No minutemen	5
Neutral Board of Directors	7	No capital credit plan	5
			100

Small cooperative: Our advantage would lie in our being able to personally contact all members, whereas for a large co-op, it would be more difficult to tell our story personally. Also in a small co-op, the chances are we will have lines and "friends" as neighbors to the co-op customers.

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Mr. P. D. Huff

Poor Financial condition: This is not considered as being too important in that if the co-op is financially sound, we possibly could afford to pay for "going value." Another factor is that if the co-op is in good financial shape, the co-op probably has a large number of suburban type customers; this would be in our favor.

Higher REA rates: Since money talks, a big point in our favor would be to offer lower rates.

Higher minimum bill: A lower minimum would catch the votes of the lower income people.

Poor service and long outages: Along with the rate comparisons, a big selling point would be to offer good service and other services such as the home economist, agriculture engineer, etc.

Managerial dictatorial policies: A "dictator" type manager will cause resentment among co-op members.

Antagonistic manager: An antagonistic manager by nature will create hard feelings among his customers.

Neutral Board of Directors: In an all out "buy" fight a neutral Board would be very helpful.

"Friendly" Director or Manager: In a "buy out" battle a communication channel to the Board is highly desirable. To develop this condition may be difficult to do.

Skeleton work force: A small work force indicates the probability that customer service is not being emphasized.

No monthly publication: A local publication covering local news of co-op members has much appeal and probably will result in some members feeling close to the co-op. Such a publication would be a hindrance in a purchase attempt.

An excellent "sell out" committee: This is considered a must and would be composed of influential co-op members who will actively push the project.

Our paying member equity and perhaps going value: Here again money speaks.

Large number of negroes or poorer white people: Lower rates, lower minimum and equity payment would be a big attraction to this group of people.

No minutemen: An active minuteman organization already established would be prepared to fight us and would have the "know-how" resources already established.

No capital credit plan: Such a plan is an attractive feature of co-op plans, therefore would be a hurdle to overcome.

[illegible]

Mr. P. D. Huff

I request either formal or informal approval (with any adjustments in the form of additions, elimination, or revisions) for the point plan. The reason that approval is requested is that we can proceed to set up the procedure to obtain immediately preliminary information for all co-ops in our area.

If approval for the point plan is given, the following procedure is offered:

THE PLAN

1. Have our managers give us a report whenever any REA customer unrest appears. Customer names, summary of comments between our representative and REA customer to be made. Evaluation to be made of customer influence, etc.

2. Cultivate directors and managers. (Being covered in separate memorandum.)

3. Endeavor to get a "friendly" director elected to board.

4. Obtain if possible copy of by-laws for all co-ops.

5. Determine for all co-ops if they have minutemen (how many), monthly publication, capital credit plan, etc.

6. If possible, get on mailing list for monthly publication.

7. Determine quality of service rendered by co-op.

THE PROCEDURE

1. A co-op is selected.

2. A committee of co-op customers is formed.

3. Committee circulates an "offer" petition where Duke would be asked to prepare bid.

4. Members vote on "offer" proposition.

5. Offer made.

6. Members vote to sell

Harry L. Crawford

HLC-f

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GENERAL OFFICE

CHARLOTTE 1, N. C.

June 27, 1960

MR. P. D. HUFF

SUBJECT: PURCHASE OF FOREIGN OWNED DISTRIBUTION SYSTEMS

I have evaluated the replies to Mr. Miller's letter of 4-27-60 concerning foreign owned systems and have formed the following conclusions. Some of our districts need a push on our part by our giving them authority to proceed to contact officials of mill villages to endeavor to purchase. Contacts have been made in the past and in some instances offers made for mill villages with no recent follow-up given. A general plan to purchase or lease municipal systems needs to be formulated. A tickler file should be established and reviewed at specified intervals to continually promote such purchases.

There are 116 foreign systems and 169,620 customers in our area excluding 21 coops and the Cannon Mill Villages. In total there are approximately 300,000 customers being served by others in our service area. Approximately 60 systems with 35,000 customers should be actively pursued at the present time.

It is recommended that we give this project top priority with a continuous push to purchase these systems. The following recommendations are proposed:

1. to establish a tickler file. The attached form is proposed.
2. to write our districts where feasible suggesting contacts.
3. to activate any offers we have made in the past.
4. to formulate a municipal purchase plan.

Henry L. Cranford

Henry L. Cranford

HLC/w

Atta.

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DUKE POWER COMPANY
GENERAL OFFICE
CHARLOTTE 1, N. C.

January 3, 1961

Mr. Z. M. Harry, Manager
Duke Power Company
Salisbury, N. C.

Dear Sir:

In August last year we received a report from you on all foreign electric distribution systems in your territory. This report included, name, location, owner, number of customers, condition of system and your opinion about our chances to acquire. Attached hereto is a list of those systems in your territory that in your opinion we had a fair or good chance to buy.

Please check over this list and give us:

I. Your present opinion on our chances to acquire.

II. List in space provided priority in which they should be handled. (1,2,3, etc.)

III. Approximate date you think we should begin negotiations.

IV. Has estimated value been submitted to G. O. (Yes or No)

Return one copy to this office as soon as-possible after obtaining information.

Sincerely yours,

Chas. B. Miller Jr.

Chas. B. Miller, Jr.
Assistant Vice President

CBM/jr./c

Atta.

UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of ANSWER OF THE DEPARTMENT OF JUSTICE TO APPLICANT'S MOTION TO AMEND PREHEARING ORDER NUMBER TWO, dated July 30, 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 30th day of July, 1973:

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Chairman, Atomic Safety and
Licensing Board
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Pinehurst, North Carolina 28374

Honorable Joseph F. Tubridy
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Honorable John B. Farmakides
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