50-269A
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50-287A
50-369A
50-370A

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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

PREHEARING ORDER NUMBER SIX

A fourth Prehearing Conference was held in the above entitled matter on March 7, 1973, pursuant to Order of this Board dated February 20, 1973. Extended discussion on all pending matters was held commencing at 9:30 am and concluding at 7:50 pm. Counsel were most cooperative in stipulating a large number of matters initially in dispute, and the Board after due consideration has reached its decision on the others. Accordingly;

IT IS ORDERED THAT the following discussion is recorded and the following action is taken with respect to the various matters considered. For convenience, these matters are separated under the ensuing descriptive headings:

A. Dismissal of Certain Intervenors

Counsel for Intervenors reported on the status of the various municipalities who are referred to in paragraph

five (5) of Prehearing Order Number Five. Resolutions from two of such municipalities, the Town of Granite Falls and the City of Newton, North Carolina, were treated at the Hearing as applications to withdraw their respective petitions for intervention; and such applications were accepted and the respective Intervenors dismissed. Counsel indicated that all municipalities had been notified. Some applications have been delayed for reasons deemed sufficient. As to those, counsel was instructed to file, when received, and in any event on or before March 30, 1973, formal applications on behalf of all municipal Intervenors who desire to withdraw. All parties have agreed that such filing shall constitute effective withdrawal and dismissal.

B. Subpoena Served on E.P.I.C., Inc.

The Board, having heard extensive argument; having carefully considered the motion papers filed with respect to the subpoena served on E.P.I.C., Inc., on December 18, 1972; having received a comprehensive report on the progress of the attempts of the persons concerned to resolve the problems presented; having determined that

the information sought was generally relevant, although not necessarily specifically admissible; and having dictated on the record an Order and rescinded same because of certain presumably inadvertent representation by counsel which were later corrected, issues the following protective order.

IT IS ORDERED THAT:

1. The following items in the subpoena of December 18, 1972, were withdrawn by Applicant: 3(f) through 3(j), 3(m), 5(u)(i), 8.

2. E.P.I.C., Inc., has agreed to and will comply with the following items in the subpoena on or before June 1, 1973: 1, 2, 3(a) through 3(e), 4(e) through 4(j), 4(m), 5(e), 5(f), 5(i), 5(k), 5(u)(ii) and 5(u)(iii), 7, 9 through 11, 15 through 21, 22(a), 26, 30, 32, 33.

3. As to all the remaining items in said subpoena, the following disposition is made:

(a) E.P.I.C., Inc., will, as it has agreed, make available to Applicant, on or before April 15, 1973, the underlying full report (now in course

of publication in addition to its already furnished project summary report) either in galley proof or other suitable form which E.P.I.C., Inc., represents will adequately supply all the data covered by all other items called for by said subpoena.

(b) Applicant, as it has agreed, will examine said underlying full report promptly. Applicant will within two weeks of its being made available, prepare and serve on E.P.I.C., Inc., on the parties and on this Board a written statement covering each item not already disposed of and listed by number above which either:

(i) withdraws the item, or

(ii) states the reasons why the information supplied is inadequate and recasts the item to specify the persons or classes of persons to or from whom it believes the desired document passed if the document is not an internal memorandum, and if it is such an internal memorandum, the supposed distribution thereof.

(c) Within ten days of the receipt of Applicant's statement called for in subparagraph B.3(b)(ii) hereof, E.P.I.C., Inc., will, if it then questions such statement as to any item, make a motion in writing with respect thereto supported by affidavit.

(d) If no motion be made as provided in subparagraph B.3(c) hereof, E.P.I.C., Inc., will comply with such items served on it in accordance with subparagraph B.3(b)(ii) hereof in addition to the items agreed to and listed in paragraph B.2 hereof on or before June 1, 1973.

(e) In making compliance, E.P.I.C., Inc., will either supply documents as called for by each item in the subpoena as modified or by affidavit state as to each such item that no such documents are in its possession or under its control.

C. Final Statement of Subissues

The ultimate issue in this proceeding, as all parties have agreed, is whether or not the activities under the

licenses for the Oconee and McGuire units will create or maintain a situation inconsistent with the antitrust laws.

The parties also agreed upon the principal subissues and on may of the subsidiary subissues. As to those not agreed upon, this Board, after due consideration and upon the briefs and arguments of the parties, has made a determination[1/] that the principal subissues and subsidiary subissues a e as set forth in the following paragraphs.

1. What is the structure of the Applicant including its ownership, relations to and arrangements with other utilities, its distribution system, its capital and income, and its sales policies at wholesale and retail?

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?

1/ While this determination indicates the general relevancy, nothing contained herein detracts from the Board's power to determine the admissibility of any particular offer of evidence.

(a) What are the relevant product and geographic markets for antitrust analysis in this proceeding?

(b) What is the structure of Intervenors and any other competitor of Applicant serving at retail in a relevant market, including their capital and income, sales policies, and growth?

(c) What percentage of the generation in the relevant geographic market(s) does Applicant own or control?

(d) What percentage of the high voltage and/or extra high voltage transmission in the relevant geographic market(s) does Applicant own or control?

(e) Does Applicant have substantial monopoly power in electric power supply in one or more relevant markets?

(f) Is Applicant's percentage of generation and/or transmission a source of its alleged monopoly power in electric power supply in one or more relevant markets?

(g) What is the effect of Federal, State, and local laws, and other Government Regulation on Applicant's alleged monopoly power and on existing and/or potential competition in any of the relevant markets?

(h) If, as alleged, Applicant has monopoly power over generation and/or transmission, can it use that power to retain and extend its alleged monopoly power in retail distribution markets or submarkets?

(i) What is the nature and extent of existing and/or potential competition in any of the relevant markets?

(j) Is a market structure requiring purchase by a small system (such as one of the Intervenors) of bulk power from its vertically-integrated retail competitor conducive to effect retail

competition? If not, what are the implications of that fact in this proceeding?

(k) Is access to the full benefits of large-scale generation (including the nuclear units here at issue) and transmission afforded the Intervenors and Applicant's other municipal customers through Applicant's wholesale rate schedules?

(l) If Applicant's wholesale rate schedules do not afford such access, are alternatives offering comparable benefits available to the Intervenors and Applicant's other municipal customers? If alternatives are available, do they offer benefits comparable to those referred to in subparagraph (k)? If benefits are not comparable, what are the implications of that fact in this proceeding?

(m) What effect has the alleged absence of access to coordination had on the ability of small electric systems to compete effectively against Applicant in any of the relevant markets over the long term?

(n) Did any small systems fail to survive? Can such failure be attributed to those systems inability to secure adequate bulk power supplies from Duke or some other source? Is the standard of retention or increase of market share an appropriate standard to determine what is an adequate bulk power supply in this proceeding?

3. What additional facts are necessary to understand the nature of the structure of Applicant and the relevant market including any facts demonstrating that the structure of Applicant was affected by activites tending to improperly increase its position in the market and including any facts demonstrating that the relevant market is improperly restricted, dominated, or controlled by Applicant?

(a) Has Applicant monopolized electric power supply in relevant markets by abusing its alleged control over generation and/or transmission to retain and extend its alleged monopoly power?

(b) Has Applicant at any time imposed a price squeeze on its wholesale customers who are also retail competitors? Has it been capable of doing so under existing Statutes and Regulations?

(c) Has Applicant attempted to prevent the establishment of alternative bulk power facilities or systems, including Federal hydroelectric projects, or to cause the establishment of such facilities or systems to be on such conditions as to allow Applicant to control or influence the design or operation thereof? If so, what are the implications of that fact in this proceeding?

(d) Has Applicant 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? Were such activities (1) honestly industrial, (2) economically inevitable, or (3) unfair

within the meaning of the Federal Trade Commission Act. Which one or more of the foregoing standards, if any, is the applicable standard for determining inconsistency with the antitrust laws?

(e) Has Applicant refused coordination of generation between Applicant and municipal and cooperative systems? If so, what are the implications of that fact in these proceedings?

(f) If Applicant has entered into arrangements for equal percentage reserve sharing with others, does Applicant discriminate against municipals and cooperatives in its area if it refuses to do so with them?

(g) Has Applicant engaged in coordination of generation with others while denying the same type of participation to smaller systems? If so, does this constitute the erection of an unnatural barrier in order to exclude competition?

(h) Was Applicant's participation in the termination of the CARVA pool and its entry into new arrangements with other large utility systems in its area such as Carolina Power and Light Company, etc., done for the purpose of placing small utility systems in the Piedmont Carolinas at a competitive disadvantage? If this was not Applicant's purpose in terminating the CARVA pool, but said dissolution had that effect whether anticipated or not, is that fact relevant evidence pertaining to a situation inconsistent with the antitrust laws? Should the term purpose include anticipated effects?

(i) Has Applicant engaged in any other activities, including sham litigation and sham attempts to influence Government acts, which demonstrate that Applicant has engaged in monopolization or a combination to monopolize --, or are evidence of an intent of Applicant to restrain competition or show the anticompetitive character of Applicant's course of conduct?

4. Is there or will there be a situation involving Applicant, which is inconsistent with the anti-trust laws? If so, what is that situation; and what is the nexus between that situation and the Applicant's activities under the licenses which may be issued in this proceeding?

   (a) How will Applicant's activities under the licenses applied for in installing large nuclear units and marketing power from them in competition with small systems affect the existing competitive situation in any relevant market?

   (b) 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?

   (c) 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?

(d) 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?

(e) Is the economic feasibility of the Oconee and McGuire Units dependent on some form of coordination with units of other utilities or dependent on some form of coordination of Applicant's load growth with load growth of other utilities? If so, what forms of coordination are involved?

(f) Is the feasibility of installing and marketing large unit nuclear generation in any market relevant in this proceeding dependent on obtaining the type of coordination arrangements referred to in subissue 4(e) above?

(g) If the situation found to be inconsistent with the antitrust laws includes Applicant's ability to market low-cost power from large units and to preclude its competitors from doing so, does the installation of the Oconee and McGuire Units continue that situation?

(h) To what extent will the Oconee and McGuire Units afford Applicant advantages not available from other kinds of generation? To the extent that any such advantages exist, do Applicant's wholesale rates provide Intervenors and Applicant's other wholesale customers with equal access to such advantages? If access is not equal, what is the implication of that fact in this proceeding?

5. If it is found that the activities under the license will create or maintain a situation inconsistent with the antitrust laws, should the Commission, upon considering that conclusion,

along with such other factors, including the need for power in the affected area, as are necessary to protect the public interest, take any action in connection with the licenses in question?

(a) Should the Applicant be required, as a condition to grant of the license, to make available to the Intervenors any or all of the following:

(1) Ownership of an appropriate portion of the Oconee and McGuire Units or power therefrom on an equivalent basis;

(2) The necessary transmission services to transmit this power together with back-up service all on a fair and nondiscriminatory basis;

(3) The necessary transmission services to transmit coordinating power and energy on a nondiscriminary 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;

(4) Other forms of coordinated development other than (1) above which would give Intervenors and other small systems (i) 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 (ii) the opportunity to construct or use a large-scale transmission system ancillary to the foregoing -- such as by joint transmission arrangements or wheeling;

(5) 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 Dept. v. Florida Power Corp.;

(6) Other forms of coordinating arrangements; and

(7) Specified coordination terms to accomplish the foregoing.

(b) Is there a sufficient relationship between each of the conditions set forth in paragraph 5(a) and the activities under the license to justify the imposition of said condition? Is any relationship necessary?

(c) To what extent would any or all of the conditions set forth in paragraph 5(a) above create a present conflict with State or Federal Regulatory laws, Regulations, or policies applicable to Applicant? If there is a repugnancy between any of said conditions and an order of a Federal or State Regulatory Agency, what action should the Board take with respect thereto?

(d) Is the imposition of any or all of the conditions set forth in paragraph 5(a) above

in the public interest in light of the tax and financing advantages and governmental subsidies available to Applicant's wholesale customers, operating separately or in a joint venture? Are the existence of tax and financing advantages or governmental subsidies, if any, of any relevance in this proceeding?

(e) What other factors necessary to protect the public interest should be considered in determining whether to impose any or all of the conditions listed in paragraph 5(a) above?

D. The Effect of Federal and State Administrative Proceedings

The parties have exhaustively briefed the problem of the effect of a decision or a finding of one administrative agency on another agency where the same parties are present. We have also had the benefit of several separate arguments by counsel, and have given the matter careful consideration. This exercise has been most helpful to

this Board in drawing to its attention the types of problems which may arise when evidence is offered at the Evidentiary Hearings. We have determined, however, as did the Atomic Safety and Licensing Board in the Alabama and Georgia Power Antitrust proceedings (see scope order dated February 9, 1973) that absent a particular offer of proof we are in no position to make a definitive ruling now which would exclude whole areas of evidentiary material without knowing of what such material consists. Clearly, our task is a different one from those presented to the State and other Federal agencies. While we intend, as we must, to give due deference to their findings and conclusions, we are bound to ascertain whether such findings and conclusions create in the particular instance a bar to our consideration before we exclude any particular offer of proof. For example, a finding on a particular tariff proposed by a utility might well bar the persons who intervened in that proceeding from claiming that it was unreasonable before a second tribunal, but it would not necessarily exclude consideration of some of the evidence received by the first agency if such evidence was also probative of a fact related to issues before the second tribunal.

Hence, we deny Applicant's motion to limit at this time the evidence to be offered without prejudice to Applicant or any other party raising proper objection to the offer of any particular proof.

E. Department of Justice Motion for Reconsideration

This Board issued a protective Order dated January 8, 1973, regarding subpoenas issued at the request of the Department of Justice. The Department informed the Board by letter dated January 15, 1973, that it was impossible for the Department to comply with the conditions Ordered. The Board treated that letter as a motion to reconsider, and on January 24, 1973, directed the Department to file an affidavit and gave the persons subpoenaed an opportunity to reply. The Department has filed its affidavit verified February 8, 1973, and served the same on the subpoenaed persons. There has been no response. Accordingly, we tend to regard the Department's affidavit as compliance with our Order of January 8, 1973. On the basis of the facts stated in the affidavit, the Board is inclined to rescind such conditions specified in said Order to the extent that said Order may seem to require further

specification of the documents ordered produced. However, one of the subpoenaed parties has represented that it had no knowledge of the requirements of filing any response by affidavit. Accordingly, the time of the persons subpoenaed to comply is extended to two weeks following the service of both this Order and our Order of January 24, 1973, by the Department of Justice on said persons.

F. Format of Trial Briefs

For the purpose of facilitating the preplanning required, in their trial briefs the parties are instructed to allocate the proof to be offered under the issues specified in this Order. By that we mean that the description of the testimony to be offered by each witness and the exhibits to be tendered are to be specifically listed under the particular issues to which they relate. This will permit this Board to study such trial briefs well in advance of the Evidentiary Hearing and will place this Board in a position to rule promptly on objections to particular proof should any be made, and to more readily consider the findings to be proposed by the parties at the conclusion of the hearings.

G. Time Schedule

This Board has accepted with reluctance the representations of counsel concerning the time necessary to comply with the discovery requests made to each of the parties. It has determined that discovery requests now outstanding will be complied with on or before June 1, 1973. It has also determined that all further requests for discovery will specify in detail not only the information desired, but where possible, will also indicate the source material to be examined.

All requests for interrogatories, further production of documents, and depositions will be made on or before July 2, 1973, and will be scheduled for completion on or before September 4, 1973. Reports of progress will continue to be submitted every two weeks as now required.

Prepared testimony, exhibits proposed, and trial briefs will be exchanged and served on this Board on or before September 28, 1973. Answering briefs and rebuttal testimony will be exchanged and served on the Board on or before October 31, 1973. Evidentiary Hearings will commence November 15, 1973.

H. Saving Clause

Any party may move for resettlement of this Order within five days from the date of service thereof. This Order may thereafter be amended only for good cause shown or to permit manifest injustice.

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 22nd day of March, 1973.