

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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| 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 Unites 1, 2) |) | |

APPLICANT'S PROPOSED STATEMENT OF ISSUES

I

INTRODUCTION

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. In an attempt to focus the direction of this proceeding, the Board has expressed a desire to define more specifically the sub-issues which will have to be decided before reaching a conclusion on the ultimate issue.

Because of the importance of these sub-issues, Applicant submits that their language and substance be scrupulously considered so as to present them in a neutral posture. Such an approach was not taken in the formulation of the "Third Draft" of the "Joint Recital of Contested Issues of Fact and Law" submitted by the parties, and subsequently adopted by the Board for the

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purpose of determining the relevancy of discovery. Order Setting Forth Matters in Controversy, Sept. 20, 1972. Indeed, the likelihood of amendment was recognized by the Board in that order and in the preamble to the "Joint Recital."^{1/}

For these reasons, Applicant submits herewith its proposed statement of issues. In large measure, Applicant has followed the basic outline suggested by the Board in Prehearing Order Number Four. It should be noted, however, that Applicant has proposed one substantive modification to Issue No. 4 proposed by the Board. This amendment reflects the Atomic Energy Commission's recent decision in Louisiana Power and Light Company (Waterford Steam Electric Generation Station, Unit 3).^{2/} In that opinion, the Commission clearly establishes that there must be a nexus between the situation, if any, found to be inconsistent with the antitrust laws and the activities under the license, and states:

^{1/} The preamble states:

"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***."

^{2/} Memorandum and Order, AEC Docket No. 50-382A, Feb. 23, 1973.

[I]t would be insufficient for a petitioner simply to describe a situation inconsistent with the antitrust laws, regardless of how grievous the situation might appear to be. A meaningful nexus must be established between the situation and the "activities under the license". [Memorandum and Order, p. 3]

Accordingly, the final sub-issue proposed should elicit a finding on whether or not such a nexus is present in the instant case.

The sub-issues proposed by Applicant also substantially track many of those proposed by the Department of Justice in its pleading filed February 26, 1973. In many instances, however, Applicant has recast these issues to eliminate any possible bias which may be entailed in the wording of the issue and/or rearranged them to reflect a more orderly consideration of the relevant matters. Applicant also has stricken certain sub-issues, such as those relating to the alleged "price squeeze", which, it believes, the Board should not consider in this proceeding.

Applicant calls particular attention to ¶3(h). This is included because it was proposed by the Justice Department. Applicant believes that, prior to hearing, such "other activities" as Justice or intervenors intend to rely on should be further identified.

Finally, Applicant has included additional sub-issues which it believes are germane to this proceeding, including issues pertaining to the question of remedy.

II

STATEMENT OF ISSUES

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.
 - (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 law, 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) Does a market structure requiring purchase by a small system (such as one of the intervenors) of bulk power from its vertically integrated retail competitor indicate the existence of a situation inconsistent with the antitrust laws?
- (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 available to the intervenors and Applicant's other municipal customers?
- (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) If any small systems failed to survive, can such failure be attributed to those systems' inability to secure bulk power supplies?

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 activities 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 attempted by unlawful means 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?
 - (c) Has Applicant, through practices not honestly industrial, 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?

- (d) Has Applicant improperly refused coordination of generation between Applicant and municipal and cooperative systems?
- (e) 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?
- (f) Has Applicant engaged in coordination of generation with others while denying participation to smaller systems? If so, does this constitute the erection of an unnatural barrier in order to exclude competition?
- (g) 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 & Light Company, South Carolina Electric & Gas Company, etc., done for the purpose of placing small utility systems in the Piedmont Carolinas at a competitive disadvantage? If this was no

Applicant's purpose in terminating the CARVA pool but said dissolution had that effect, is that fact an indication of a situation inconsistent with the antitrust laws?

(h) Has Applicant engaged in any other activities, which demonstrate that Applicant has engaged in monopolization or a combination to monopolize-- or are evidence an intent of Applicant to restrain competition or show the anticompetitive character of Applicant's course of conduct?

4. Is there a situation, involving Applicant, which is inconsistent with the antitrust 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 at retail in competition with small systems affect the existing competitive situation in Applicant's area?

(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 relevant market dependent on obtaining the type of coordination arrangements referred to in sub-issue 4(e) above?

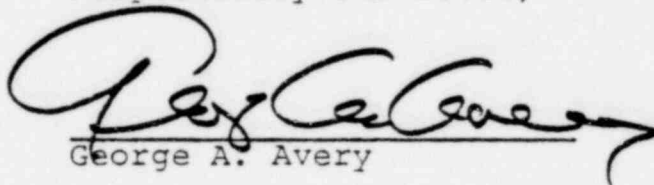
- (g) If the situation found to be inconsistent with the antitrust laws includes Applicant's ability to market low cost power from large units and to preclude its competitors from doing so, does the installation of the Oconee and McGuire units continue that situation?
 - (h) To what extent will the Oconee 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 access to them?
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 the 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 on a nondiscriminatory basis;
- (3) 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;
- (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 / Gainesville Utilities Dept. v. Florida Power Corp.;
 - (6) other forms of coordinating arrangements; and
 - (7) specified coordination terms to accomplish the foregoing.
- (b) Is each of the conditions listed in ¶5(a) above required in order to remedy the situation inconsistent with the antitrust laws which the activities under the license have been found to create or maintain?
- (c) Is there a sufficient relationship between each of the conditions set forth in ¶5(a) and the activities under the license to justify the imposition of said condition?
- (d) To what extent would any or all of the conditions set forth in ¶5(a) above create a conflict with State or Federal regulatory laws, regulations or policies applicable to Applicant?

- (e) Is the imposition of any or all of the conditions set forth in ¶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?
- (f) 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 ¶5(a) above.

Respectfully submitted,


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March 5, 1973

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| McGuire Units 1 and 2) |) | |

CERTIFICATE OF SERVICE

I hereby certify that copies of APPLICANT'S PROPOSED STATEMENT OF ISSUES dated March 5, 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 5th day of March, 1973.

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