

UNITED STATES ATOMIC ENERGY COMMISSION

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IN THE MATTER OF:

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## 1 UNITED STATES OF AMERICA

## 2 ATOMIC ENERGY COMMISSION

3 In the matter of: )  
 4 DUKE POWER COMPANY ) Docket Nos. 50-269A, 50-270A  
 ) 50-287A  
 ) 50-369A, 50-370A  
 5 (Oconee Units 1, 2 & 3; )  
 McGuire Units 1 & 2) )

6  
 7 Courtroom 404  
 717 Madison Place, N. W.  
 8 Washington, D. C.

9 Friday, 17 November 1972

10 The hearing was reconvened at 10 a.m., pursuant to  
 11 adjournment.

## 12 BEFORE:

13 WALTER K. BENNETT, Chairman.

14 JOSEPH F. TUBRIDY, Member.

15 JOHN B. FARMAKIDES, Member.

## 16 APPEARANCES:

17 GEORGE A. AVERY, TONI K. GOLDEN, AND KEITH S. WATSON,  
 Wald, Harkrader and Ross, 1320 19th Street, N. W.,  
 18 Washington, D. C., on behalf of the applicant Duke  
 Power Company.

19 WALLACE E. BRAND, DAVID A. LECKIE, United States Depart-  
 ment of Justice, Antitrust Division, Washington,  
 20 D. C. 20530, on behalf of the Department of Justice.

21 DAVID F. STOVER and J. A. BOUKNIGHT, JR., Tally, Tally &  
 Bouknight, Home Federal Building, P. O. Box 1660,  
 22 Fayetteville, North Carolina 28302, on behalf of  
 23 the petitioning intervenors.

24 BENJAMIN H. VOGLER, Office of General Counsel, United  
 States Atomic Energy Commission, Washington, D. C.  
 20545, on behalf of the AEC Staff.  
 25

P R O C E E D I N G S

1  
2 CHAIRMAN BENNETT: Will you come to order, please?

3 Ladies and gentlemen, we are here today in a  
4 second prehearing conference in the matter of Duke Power  
5 Company, Docket Nos 269A, 270A, 287A, 369A, and 370A.

6 Our prime purpose in this conference is to resolve  
7 the problems of discovery raised by objection by the Applicant  
8 to the joint request and to the Intervenor to the Applicant's  
9 request.

10 We also want to discuss further scheduling and  
11 briefly the motion for additional time which I have not yet  
12 received but which I understand was served yesterday. We  
13 appreciate very much the effort which has been made and was  
14 for the most part successful to resolve differences and to make  
15 an accommodation and we are very happy to have the careful  
16 briefs which have been prepared and which we have considered.

17 We have considered the response filed by the  
18 Applicant with its motion for leave to file it, and it may  
19 be filed.

20 Have there been any other practical adjustments  
21 made by the parties since the briefs were filed?

22 MR. LECKIE: Yes, Mr. Chairman.

23 I am David Leckie of the Department of Justice.

24 The Department of Justice wishes to withdraw its  
25 request for tax returns. That is item 7 of the objections.

ty 2

1 CHAIRMAN BENNETT: Right. I take it to be no  
2 objection to the withdrawal on the Applicant's part?

3 MR. AVERY: No, sir.

4 MR. LECKIE: We believe it would be possible to  
5 obtain the information from other sources including  
6 interrogatories.

7 CHAIRMAN BENNETT: It would seem to me, if I  
8 remember the practice in the Justice Department, that the  
9 Attorney General by statute requests the Secretary of the  
10 Treasury to supply tax returns. That is the manner in which  
11 it is done and any other manner of doing it is subject to  
12 some question as I found out in United States against Aloca  
13 a great many years ago.

14 MR. LECKIE: Yes, sir.

15 CHAIRMAN BENNETT: Is there any other practical  
16 adjustment?

17 Thank you very much, gentlemen. We appreciate it.

18 It is our purpose today to make a further effort at  
19 practical accommodation so that the need for information will  
20 again be considered and the ability and willingness to  
21 respond will again be candor. We do this because as I have  
22 said before we regard this matter of discovery as primarily a  
23 practical matter of weighing the need for information against  
24 the reason for its nonproduction.

25 Now there are certain reasons over which we have no

1 control, of course. To that end we would like to hear argument  
2 on each of the objections separately starting with Applicant's  
3 stated objections to the joint request.

4 Reversing the normal method of having the moving  
5 party speak first, we believe it is more practical to have  
6 the party seeking the information first state as to each  
7 of the other parties' objections precisely what data is  
8 required and why it is deemed relevant and necessary. Then  
9 on each objection we will hear from the objecting party.

10 First, whether he was willing to supply the  
11 information desired as amended by the statement just made;  
12 and, if not, what he can do practically to satisfy the  
13 need for information or why he refuses to do so.

14 After each point is discussed the Board will  
15 recess and either then determine the question or indicate  
16 that it will reserve decision. Each party is asked to limit  
17 his statement to five minutes.

18 The joint requesters will be treated as a party  
19 and the Applicant as a party in the case of the joint request.

20 The second phase of the argument will deal with  
21 the Intervenor's objections to the Applicant's demands.  
22 We will adopt the same procedure.

23 The Applicant will indicate what it needs and why  
24 and the Intervenor's will respond as to what they are willing  
25 to give in response and, if nothing, why.

1 We will deal with each set of objections in the  
2 same manner as the Applicant's objections. Five minutes  
3 to the Applicant, five minutes to the Intervenor's to respond.  
4 Then the Board will recess to consider the particular objections  
5 and make its announcement.

6 Now am I clear as to what is desired?

7 MR. AVERY: Yes, Mr. Chairman.

8 I think the only question I have is on one of  
9 the objections that we raised going to a number of items.  
10 It might take a little longer than five minutes.

11 CHAIRMAN BENNETT: Well, if we get into a situation  
12 where you need more time, we are not going to be too sticky  
13 about how much time you take. We would like you to limit  
14 your time to the extent it is practical to do so and we  
15 think that five minutes ought to be adequate and, if it is not,  
16 if you let us know, we will try to accommodate you.

17 Mr. Brand, how do you feel about it; is that  
18 satisfactory?

19 MR. BRAND: Your Honor, I am not clear as to the  
20 timing for the Department of Justice as opposed to the Inter-  
21 venors.

22 Will each of the Department of Justice and  
23 Intervenor's have time?

24 CHAIRMAN BENNETT: You have one five-minute time;  
25 if you need more, of course I will give it to you. But I

1 would like you to confine yourself to that if it is possible.

2 Now certainly these requests I assume are requests  
3 that are made by reason of the request of the Interevenors  
4 and others of them are made by reason of the desire of the  
5 Antitrust Division. So I would think that it would be  
6 desirable if you accommodated that by letting the party  
7 who is really interested in the infromation speak and you may  
8 speak, too, or they may let you do the whole bit.

9 MR. BRAND: But there are several items in which  
10 both the Intervenors and the Department have expressed an  
11 interest. So we will have to have a practical method of  
12 accommodating that.

13 CHAIRMAN BENNETT: Do the best you can, and again  
14 this five minutes is not a matter of do or die but,  
15 if we can, confine yourself to a short space. Remember  
16 we want you to focus on exactly what you need and exactly why  
17 you need it.

18 MR. BRAND: Yes, your Hcnor.

19 CHAIRMAN BENNETT: So if you speak on this first  
20 objection which has to do with the indexes **first**.

21 MR. BRAND: Yes, your Honor, Mr. Leckie will argue  
22 for the Department.

23 CHAIRMAN BENNETT: Fine.

24 MR. AVERY: Mr. Chairman, one matter I should  
25 raise at this point, there was an introductory section to the

ty 6

1 Justice Department's answer to our objections in which a  
2 rather more sweeping point was made. It was not confined to  
3 the particular category of documents.

4 CHAIRMAN BENNETT: I am trying to nail that down,  
5 Mr. Avery. I would like to make sure that we nail down just  
6 exactly what is wanted with respect to each objection and  
7 then we will give you an opportunity to respond as to why  
8 you won't give them what is really needed.

9 MR. TUBRIDY: What document did you mention, Mr.  
10 Avery?

11 MR. AVERY: The Justice Department's answer to  
12 our objections and in the introductory section in that answer  
13 the Justice Department raised the claim that it had a broad  
14 inquisitorial power that should not be judged by the standards  
15 set out in the rules.

16 CHAIRMAN BENNETT: I think that we will confine  
17 ourselves to the particulars rather than generalization, Mr.  
18 Avery, and if the Departments wants to get into that, we will  
19 deal with that at some other time. But right now, what  
20 precisely do you want with respect to indices, and why do  
21 you need it?

22 MR. LECKIE: May it please the Board, we would like  
23 a general description of Applicant's filing system. I say  
24 "general," I guess I mean a little more detailed than that.  
25 A description showing what kind of files Applicant keeps, how



1 it segregates its files, what offices keep what particular  
2 kinds of files.

3 We are asking for this information to assist us in  
4 fixing the discovery in the second phase of discovery with much  
5 more particularity and specificity as the Board has directed.  
6 We believe --

7 CHAIRMAN BENNETT: Just what do you want? Do you  
8 want a list of the file names or what do you want?

9 MR. LECKIE: We certainly don't want a list of all  
10 the index cards in the Applicant's law library, for example.  
11 We want more than a general description, however.

12 CHAIRMAN BENNETT: Why don't you take a deposition  
13 of somebody who runs the files? Isn't that what you really  
14 want?

15 MR. LECKIE: We do that, your Honor; we ask that  
16 Applicant handle this through the document request procedure,  
17 however.

18 CHAIRMAN BENNETT: Do you suppose they have a  
19 document like that?

20 MR. LECKIE: We are not certain if they have a  
21 document specifically or documents specifically describing  
22 the filing system. Applicant's counsel didn't choose to  
23 discuss that further with us as to the possibilities of what  
24 documents might be available or as to the possibility of  
25 handling it.

1 CHAIRMAN BENNETT: And you need it, you say, for  
2 the purpose of securing additional discovery, is that it?

3 MR. LECKIE: To focus the discovery in the second  
4 phase, yes, sir. We don't believe that to merely ask in an  
5 interrogatory where the particular document we received the  
6 first time come from will satisfy our requirements. It will  
7 help us with regard to that particular document but we  
8 feel we should have an overview of the entire system so that  
9 we can determine perhaps where a document search didn't  
10 cover a particulare file that might be relevant.

11 MR. FARMAKIDES: Excuse me, when you say "entire  
12 system," what do you mean? Do you mean the reference system,  
13 the technical reference system? I am not sure I understand.

14 MR. LECKIE: No, your Honor, the electric power  
15 system of Applicant, its business files.

16 MR. FARMAKIDES: Business files. You are talking  
17 about its business system.

18 MR. LECKIE: Yes, your Honor, and we made this  
19 clear to Applicant in our discussion with them. We are not  
20 concerned with the --

21 CHAIRMAN BENNETT: We are trying to make an  
22 accommodation. Maybe they can give you something, I don't know  
23 Maybe they can't. Maybe they have nothing like that. So  
24 we will find that out.

25 What I want to do is nail you to the mast as to

ty 9

1 exactly what you want.

2 Now what you say is I want something that tells me  
3 how you put things in files; is that right?

4 MR. LECKIE: Yes, sir.

5 CHAIRMAN BENNETT: Now, you say you think there  
6 may be a paper like this; you don't know?

7 MR. LECKIE: We don't know.

8 CHAIRMAN BENNETT: Or there may be a series of  
9 papers.

10 How far back do you want to go? Do you want the  
11 situation as it exists today or as it existed over the last  
12 10 years and the various changes?

13 MR. LECKIE: We ask for the situation as it exists  
14 today and that would satisfy us.

15 CHAIRMAN BENNETT: As it exists today.

16 MR. LECKIE: Yes, sir. We are simply concerned  
17 with getting an overview of the system so we can learn better  
18 how the system is organized and how the files are kept.

19 CHAIRMAN BENNETT: You believe this situation will  
20 lead you to evidence and you don't believe it is evidence  
21 itself.

22 MR. LECKIE: Certainly it is not evidence itself,  
23 certainly it is not fishing for evidence because I don't see  
24 what possible evidence we could get from file titles or  
25 description of the system but we definitely believe it will

1 lead us to relevant evidence.

2 CHAIRMAN BENNETT: Mr. Avery, I would like to hear  
3 from you now unless we have other questions.

4 MR. AVERY: I think I will stand up here, if I may.

5 CHAIRMAN BENNETT: Fine.

6 MR. AVERY: Mr. Chairman, first of all, I have the  
7 feeling we are being met with shifting ground here.

8 CHAIRMAN BENNETT: That is exactly what I had  
9 hoped to develop today, that we had hit a shifting ground  
10 and we could make a decision as to the shifted ground on  
11 both sides. Because what we want to do is to make a practical  
12 solution here, Mr. Avery, these things are not matters of  
13 great technical value or great technical importance or a  
14 situation where the latest decision of the Supreme Court  
15 really is an important matter.

16 The thing is how practically can we get evidence  
17 necessary or information that is necessary. They have said well,  
18 we want to know how you put things in files.

19 Now, maybe there is no such thing. I don't know  
20 that.

21 In the Justice Department you may recall we had a  
22 fairly detailed manner in which things went in particular  
23 places and I think they had something called a Dewey Decimal  
24 System and so forth. Maybe even something like that is  
25 available, maybe not. Maybe it is in a document, maybe

1 somebody has to testify on deposition. But that is what we  
2 want to find out from you, how practically can you meet this  
3 need which they say they have to find out where things go  
4 in the files so that in the second go-around if there is to be  
5 a second go-around, they can direct your attention to a  
6 particular place that they want you to see where there is  
7 information, if there is information, of the character which  
8 they desire. How much can you do by way of satisfying the  
9 need for the information practically?

10 MR. AVERY: Well, first of all, I think you have to  
11 think this problem in terms of what they are entitled to find  
12 out.

13 CHAIRMAN BENNETT: That is exactly what I am trying  
14 to go into.

15 First if you say we are not going to give them  
16 anything, all right, I will listen to you.

17 MR. AVERY: I am not going to say that.

18 CHAIRMAN BENNETT: What I would like to have you  
19 do first is to see if there is any practical accommodation  
20 which we can arrive at. They have now told you they don't  
21 want every piece of paper that deals with the filing system,  
22 all they want to know is how your files today are organized  
23 so they can direct their further questions to particular  
24 places so that you won't have to look all over the map to  
25 try and find what they now seek. That sounds fairly practical.

1 MR. AVERY: I would like to get a firmer grasp  
2 and perhaps inquire through you of Mr. Leckie if what he  
3 means by how things are put in files, does that include a  
4 list of the title on every file folder in the company's  
5 files which is what we were asked for in the discussions  
6 where we tried to settle this matter out?

7 It sounds to me like that could still be embraced  
8 within what they are now describing. If it is, we have a  
9 problem with it.

10 I would like to know whether we are still talking  
11 about whether how things are put in files includes a list  
12 of every single file folder title.

13 CHAIRMAN BENNETT: How many thousands of file  
14 folders do you have?

15 MR. AVERY: Many, many thousands. Let's see.  
16 Maybe 50,000.

17 CHAIRMAN BENNETT: All right.

18 Mr. Leckie, what do you want? Do you want 50,000  
19 names?

20 MR. LECKIE: If Applicant has prepared a list  
21 including his 50,000 file titles, we would be happy to have  
22 that. If not --

23 CHAIRMAN BENNETT: What do you want 50,000 titles  
24 for? You couldn't possibly make any use of it.

25 MR. LECKIE: But if Applicant has such a list in

that amount of detail, that would certainly be sufficient.

2 CHAIRMAN BENNETT: One of the real problems in  
3 these cases is the amount of detailed information which is being  
4 processed here, which is holding up the proceedings.

5 Now, isn't there some practical way you can limit  
6 this? You don't want 50,000 titles, that is ridiculous.

7 MR. AVERY: Moreover, Mr. Chairman, I don't think  
8 they are entitled to it and I want to press that point.

9 CHAIRMAN BENNETT: Let's go this way, let me talk  
10 him out of it, if I can.

11 MR. LECKIE: We presume they don't have a list of  
12 that sort.

13 CHAIRMAN BENNETT: They undoubtedly have file  
14 folders, but I wouldn't order them to produce 50,000 folders,  
15 that wouldn't make sense.

16 MR. LECKIE: Prior to our discussions prior to  
17 coming here we didn't go that far.

18 CHAIRMAN BENNETT: Apparently they thought you  
19 did and I thought you did. So let's find out what you really  
20 do want. What you want is some description which tells you  
21 where, if there is one, which indicates where they put these  
22 things. In other words, some things go in individual files,  
23 some go to policy files, some go to legal files, some things  
24 go to other places; is that what you want?

25 MR. LECKIE: That is correct, your Honor.

1 CHAIRMAN BENNETT: Is there such a thing, Mr.  
2 Avery?

3 MR. AVERY: Essentially there is a central file and  
4 certain official documents go into the central files,  
5 that is, official copies of contracts or something like that.  
6 But much of the material, however, is filed in accordance with  
7 the -- by the secretary of the individual division.

8 CHAIRMAN BENNETT: In other words, each one of the  
9 officials may keep his own file.

10 MR. AVERY: Exactly but there are also central  
11 files in which -- I am sure you understand that.

12 CHAIRMAN BENNETT: You are not interested in anything  
13 but the central files, are you? Or are you?

14 MR. LECKIE: Your Honor, we are interested in  
15 central files and we would be interested in the files of the  
16 top corporate officers.

17 CHAIRMAN BENNETT: Now who are they you are talking  
18 about?

19 MR. LECKIE: The top officers are the president of  
20 the company and the executive vice president and particularly  
21 of the chief of the power planning section.

22 CHAIRMAN BENNETT: Chief of the what?

23 MR. LECKIE: Power planning section.

24 CHAIRMAN BENNETT: Each one of these has a separate  
25 filing system all its own and the secretary keeps it?



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1 MR. AVERY: That is my understanding, Mr. Chairman.

2 CHAIRMAN BENNETT: Is it reduced to writing or is  
3 it something the secretary works out ad hoc?

4 MR. AVERY: I suspect it is close to the latter.  
5 I believe there may be a document which describes which goes  
6 in the central files but as far as what goes on in the man's  
7 office as far as filing, I don't believe it is formalized into  
8 a document.

9 CHAIRMAN BENNETT: So what you would have to do is  
10 get the secretary of each of these persons on the stand and  
11 ask how she did it.

12 MR. AVERY: That is right. I am not sure they  
13 are entitled to it, I am not sure it is germane. I haven't  
14 heard them say anything as to why it would be useful infor-  
15 mation.

16 CHAIRMAN BENNETT: The reason they say it is useful  
17 information -- I have to take them at their word -- they think  
18 this may help in the second request which is contemplated.  
19 I think it was contemplated by both parties at the original  
20 prehearing conference. There could be two of these requests.

21 MR. AVERY: They said that for the first time this  
22 morning. In their answer they said they wanted to know  
23 the source of the documents they did get in their brief. We  
24 pointed out in our reply that that wasn't much of a reason.

25 Now they have a new reason and I don't think it is

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1 much of a reason.

2 CHAIRMAN BENNETT: It may help them get evidence  
3 and to that extent there is something there.

4 What can you give them practically that will help?  
5 Can you give them this general memorandum that shows where  
6 things go in the general file without any real problem?

7 MR. AVERY: Well, I have not seen it myself. I  
8 would have to look at it before I could make a judgment on  
9 it. We would certainly be glad to consider that as a way  
10 out.

11 CHAIRMAN BENNETT: Would that meet your problem?

12 MR. LECKIE: Yes, it would, your Honor, and we  
13 could go from there to depositions of the secretaries  
14 presumably of the officials of the company.

15 CHAIRMAN BENNETT: You may have to do that, but is  
16 it worthwhile, really?

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1 MR. LECKIE: We had thought in addition to  
2 prepared documents, Applicant might be willing as part of his  
3 request, to give us newly-prepared summaries along this line,  
4 summaries prepared specifically for us. In other words,  
5 using the document process, in lieu of an interrogatory later  
6 on or deposition.

7 CHAIRMAN BENNETT: You place a tremendous burden  
8 on the Applicant if you try to make him tell you all about  
9 everything in all of these respects. Now, I think if there  
10 is something that is already in existence that you want and  
11 they are willing to give it to you, that is reasonable.  
12 If it helps you, if it helps you find evidence in the next  
13 go-around, fine. But just to go through and find out matters  
14 of this character on the theory that maybe it might help  
15 sometime is going a little far.

16 Now, do you want to say anything further on this?

17 MR. AVERY: I still think, your Honor, if we are  
18 talking about some general description, I would be willing to  
19 check and see whether there is such an animal in existence and  
20 if there is -- assuming there is no other reason why it should  
21 not be produced -- we would be happy to furnish it.

22 CHAIRMAN BENNETT: If there is a privileged  
23 communication, of course, you take that one out.

24 MR. AVERY: Barring things like that, I would be  
25 willing to do it.

1 CHAIRMAN BENNETT: Right.

2 MR. AVERY: But I still resist, because I don't  
3 think they are entitled to it, nor do I think it is useful --  
4 in providing a document which lists every file folder that  
5 the company has.

6 CHAIRMAN BENNETT: They don't want that now,  
7 apparently. They have indicated this is general in nature.  
8 We will recess now right here. Do you want to speak?

9 MR. STOVER: May we be heard, your Honor?

10 CHAIRMAN BENNETT: Yes.

11 MR. STOVER: We think it might be relevant, number  
12 one, to establish, as the discovery rules of this Commission  
13 allow, the location of certain documents if they are not in  
14 the central files. The question naturally occurs, why are  
15 they not there? Why are they in the files of the officers  
16 instead of in the official files of the company?

17 CHAIRMAN BENNETT: You would have to ask somebody  
18 rather than getting a general statement like this, though.

19 MR. STOVER: Yes, but we have been discussing the  
20 question of deposing the secretaries of certain top officers  
21 of the company in that respect.

22 The only other point I would like to make, your  
23 Honor, is that in addition to round two, if there is to be  
24 one, I think that having at joint discoverer's disposal a file  
25 index of description of some kind might help to clear up some

3mil 1 of the -- or narrow some of the breadth, of some of the first  
2 round. The Applicant has objected later on in the document  
3 which we are now working through to requests for all documents  
4 in certain files which we have made.

5 CHAIRMAN BENNETT: Let's get into that a little  
6 later. I have some very definite feelings on that one.

7 MR. STOVER: Thank you, your Honor.

8 MR. AVERY: Could I respond to that? Apparently,  
9 now, if I understand Mr. Stover correctly, he is still  
10 pressing the request for a description of every file folder.  
11 I think for the reasons we laid out in our reply, and for the  
12 reasons laid out in our original objections and for the  
13 reasons laid out in some of the cases we cited, that type of  
14 approach to discovery is improper and should not be permitted.  
15 They should not be permitted to look at a mass of information  
16 in order to perhaps find one or two things that might be  
17 pertinent. I just wanted to refer you specifically to one of  
18 the cases that we cited in our reply or in our objections, the  
19 Richland Wholesale Liquor case, and there a similar request  
20 was under consideration. The request was for all the finan-  
21 cial statements and records of the company, of the defendant  
22 company.

23 The Court said --

24 CHAIRMAN BENNETT: Now, Mr. Avery, this is a  
25 practical matter to be decided in each case.

4mil 1 MR. AVERY: Well, the reason I press this, Mr.  
2 Chairman, yes, a practical solution, I am delighted to see us  
3 pursuing that after he knew. But I think you have to think  
4 about it in terms of the standards that govern discovery.

5 CHAIRMAN BENNETT: Yes.

6 MR. AVERY: If you say we are going to look for a  
7 practical solution and put aside the standards that should  
8 govern, we may find ourselves in difficulty at some later point.  
9 I merely wanted to press the fact that there is a legal  
10 standard which says you cannot get everything in the hope that  
11 one or two of those things might be helpful.

12 CHAIRMAN BENNETT: And I think the Commission, in  
13 their Appendix H, is it -- or one of them -- has indicated to  
14 us that we are not to be engaged in a fishing expedition.

15 MR. AVERY: Right.

16 CHAIRMAN BENNETT: All right. Gentlemen, do you  
17 want to recess now for five minutes?

18 (Recess.)

19 CHAIRMAN BENNETT: All right, gentlemen, we have  
20 discussed this matter and we are going to limit the request  
21 to such a general statement as there may be concerning the  
22 location and method of filing. Now, one of the members of the  
23 Board indicated to me that there had been some discussion  
24 of inquisitorial powers that the Justice Department might  
25 have. I don't think that would apply to the Intervenor, even

1 if there were such a power, would it?

2 MR. TUBRIDY: There is a joint statement, but you  
3 claim exceptional powers. Are they included in their powers,  
4 is this your position, Mr. Brand?

5 CHAIRMAN BENNETT: Mr. Leckie, let's stick with him.

6 MR. LECKIE: No, your Honor, we don't claim that  
7 the Intervenors are included in any inquisitorial powers we may  
8 have. Our powers are primarily prior to the notice of hearing.  
9 We merely cited the matter concerning inquisitorial powers  
10 to indicate that this type of proceeding is really a little  
11 more broadly-based than the average civil litigation where  
12 you have a complaint filed and an answer and you proceed  
13 from there.

14 We provide our advice to the Atomic Energy  
15 Commission here; the Commission notices a hearing and then the  
16 hearing proceeds without any great specificity at that point.  
17 Specificity is developed later.

18 CHAIRMAN BENNETT: We have to have some specificity  
19 and that is why we are having the prehearing conference. We  
20 will nail it down to the extent we can. If we start with an  
21 amorphous mass of requests, we are just never going to get  
22 through. I sat through 2 - two and a half year trials of anti-  
23 trust proceedings and that is not going to happen here if  
24 there is any way we can avoid it.

25 MR. LECKIE: Yes, sir.

6mil

1 MR. AVERY: Mr. Chairman, could I note, for the  
2 record, of course, our disagreement with the assertion of  
3 inquisitorial powers in behalf of the Justice Department.

4 MR. TUBRIDY: I want to bring this out because  
5 Mr. Stover is backing up a request here and he said he has  
6 these broad powers. Mr. Stover is supplementing what he has  
7 said. I would like to know the position of the Intervenors.

8 MR. AVERY: I think that is a good point to make.  
9 Even though they assert they don't have them, that power slops  
10 over.

11 MR. TUBRIDY: It seems inconsistent to me. That  
12 is why I ask.

13 MR. AVERY: That's right. I want to direct your  
14 attention to the ruling of the Consumers Power Hearing Board  
15 which rejected this claim.

16 CHAIRMAN BENNETT: Yes, I realize you don't accept  
17 that claim.

18 MR. LECKIE: Mr. Chairman --

19 CHAIRMAN BENNETT: Let's go into the next one. Let's  
20 not get into this generalized discussion until it becomes really  
21 necessary to do so. Let's get into the specifics now and see.  
22 Now the next matter calls for political activity and legal  
23 activity and the charge seems to be that this would chill  
24 the rights of the Applicant to take various actions in accord-  
25 ance with the theory that was adopted by the Supreme Court, I



7mil

1 guess in the NAACP case. Now I would like to have from you,  
2 Mr. Leckie, a statement of just exactly what you expect to  
3 get, what do you want and why you think you need it. I would  
4 like you to direct your attention there to the character of  
5 activity in the Noerr case.

6 MR. LECKIE: Yes, Mr. Chairman.

7 CHAIRMAN BENNETT: Which was -- shocked some of us,  
8 put it that way.

9 MR. LECKIE: Yes, Mr. Chairman. The Board has the  
10 requirement to make a finding whether Applicant's activities  
11 under the license for which it has applied will create or  
12 maintain a situation inconsistent with the antitrust laws.  
13 Essentially, the proceeding that we have here is analogous  
14 to a Section 2 Sherman Act monopolization case in terms of  
15 what we believe must be considered for the Board to arrive  
16 at its finding.

17 CHAIRMAN BENNETT: In other words, you say these  
18 people have a natural monopoly and a legal monopoly to such  
19 an extent, to an extent and then they have slopped over and  
20 have tried to get more encompassed in their monopoly than was  
21 originally granted properly?

22 MR. LECKIE: That is why we are concerned of not  
23 excluding merely on Applicant's own motion any political  
24 activity and legal activity in which Applicant has been  
25 engaged. We believe that the Board's finding must be based on

8mil 1 consideration of the total competitive context of Applicant's  
2 system, the Intervenors, and the other small systems in North  
3 and South Carolina. We don't believe this can be done by  
4 merely looking at the circumstances where it is absolutely  
5 certain that there is no governmental activity or no political  
6 activity involved.

7 In other words, we are absolutely certain there is  
8 a violation of the antitrust laws or a situation inconsistent  
9 with the anti-trust laws if certain events have taken place.  
10 We believe that the whole picture must be looked at.  
11 As Applicant has claimed, it is very, very much involved in  
12 political activity on a day-to-day basis. It is inextricably  
13 interwoven with everything else Applicant does. So merely to  
14 -- to deny us discovery of anything that Applicant believes  
15 concerns its political activity without having --

16 CHAIRMAN BENNETT: How are we ever going to get it  
17 into evidence, Mr. Leckie, under the Noerr decision?

18 MR. LECKIE: Your Honor, in some cases, it may not  
19 be gotten into evidence. We may not choose to get it into  
20 evidence.

21 CHAIRMAN BENNETT: Why do you believe you are  
22 entitled to discovery?

23 MR. LECKIE: We believe we are entitled to get the  
24 picture of what we feel should be in evidence or what matters  
25 we should try to prove to the Board. We don't believe we should

9mil 1 be presented on discovery with merely segments of Applicant's  
2 activity because Applicant chooses not to provide the rest.  
3 When the time comes to put in evidence in this proceeding,  
4 then the question will arise, is what we are trying to put  
5 in probative for anything? It may not be. We have, of  
6 course, Footnote 3 in the United Mine Workers versus Pennington  
7 decision, which says that although political activity may not  
8 be a violation of the antitrust laws, either standing alone or  
9 in conjunction other activity, it may be used as evidence of  
10 purpose and character of other activity. We believe that is  
11 very likely here.

12 We see -- let me try and draw a picture -- we have

13 CHAIRMAN BENNETT: Somebody put a newspaper article  
14 here not having to do with this particular organization at  
15 all and which I thought was a little bit like bringing a bloody  
16 shirt into a courtroom where there was a jury.

17 MR. LECKIE: Your Honor, the newspaper article  
18 was included with regard to information concerning municipal  
19 elections, activities of Applicant with regard to such  
20 elections. Applicant suggested that it would provide --  
21 assuming that this basic ~~objection~~, Pennington objection two is  
22 decided against it -- it suggested it would provide information  
23 concerning municipal or other elections where on its face the  
24 material showed anti-competitive intent in participating in  
25 the election. That was a fall-back position of Applicant, as

1 opposed to the primary position it takes under objection two  
2 to withhold all political information.

3 We were suggesting by putting in that newspaper  
4 article that there was quite a bit of material that doesn't  
5 necessarily on its face indicate political participation for  
6 anti-competitive purposes.

7 CHAIRMAN BENNETT: Do you have any evidence or  
8 any indication with respect to this Applicant that that is what  
9 they are doing, or is this just out of the blue? You think  
10 maybe somebody may be doing this?

11 MR. LECKIE: We know, your Honor, from our study  
12 of electric systems in general, on our review of all of the  
13 applications for license under the Atomic Energy Act, that  
14 this is a normal procedure for a large electric system to  
15 follow to attempt to prevent competition from, say, the  
16 establishment of a new municipal system, or the establishment  
17 of a new bulk power system by a municipality. We know that --

18 CHAIRMAN BENNETT: Then doesn't a person in the  
19 utility business naturally -- and is selling to a municipality  
20 -- have a right to go into the legislature and say, "Now,  
21 look, we are selling this; we are doing a good job; why don't  
22 you want to start a new system here?" Isn't that perfectly  
23 legitimate activity?

24 MR. LECKIE: Yes, your Honor, it is.

25 CHAIRMAN BENNETT: Now, if somebody disagrees with

11mil 1 them, haven't they the right to . . . and secure the election  
2 of somebody who will agree with them

3 MR. LECKIE: Yes Your Honor, they do. All we are  
4 saying here, however, is that such activities on the part of  
5 Applicant are a part of the total competitive picture in the  
6 Piedmont Carolinas with which we are concerned. We don't  
7 believe Applicant can deny us discovery of these important  
8 segments of the picture.

9 CHAIRMAN BENNETT: What about this chill argument?  
10 If you -- I don't say you -- but if this is spread all over  
11 the newspapers tomorrow, is that not going to give the  
12 Applicant some pause as to whether they are going to exercise  
13 the rights which you have indicated they have?

14 MR. LECKIE: Your Honor, we don't believe there is  
15 any merit to the chilling argument.

16 CHAIRMAN BENNETT: Why not? Isn't that a natural  
17 consequence? You know, and I know, that utilities are quite  
18 sensitive about public image.

19 MR. LECKIE: Your Honor, yes, but if all of Appli-  
20 cant's activities were in fact legitimate political activities  
21 and not so as to come under perhaps the sham exception of  
22 Noerr and California Motor Transport, then what does Applicant  
23 possibly have to worry about?

24 CHAIRMAN BENNETT: Noerr was pretty rough -- that  
25 case had some pretty shocking things that were disclosed.

2mil 1 MR. TUBRIDY: Did you read the District Court's  
2 opinion in Noerr?

3 MR. LECKIE: No.

4 MR. TUBRIDY: Try reading that. You know bribery  
5 goes, that's all right. There were 17 legislatures involved.  
6 They put up phony fronts, pretended to be people interested  
7 in promoting this and that, set up by the railroads, all sham.  
8 All sham. The Supreme Court didn't frown on it.

9 MR. LECKIE: Your Honor, we are not concerned here  
10 with whether Applicant's political activities have violated  
11 the antitrust laws. We are talking about discovering them --

12 MR. TUBRIDY: We are interested in finding out  
13 what can you prove by getting this information. It doesn't  
14 prove anything according to the Supreme Court. Read Judge  
15 Cleary's opinion. You would be amazed what they got away with.

16 MR. LECKIE: But it would show the purpose and  
17 character of other activities. For example, if Applicant  
18 succeeded, through legitimate political activity, in preventing  
19 a municipal system from establishing its own bulk power supply  
20 through buildings its own generation, succeeded in doing that  
21 through general political activity, and later on, through a  
22 purely private act, refused to sell power at wholesale to that  
23 municipality, purely private act, the fact that the municipality  
24 had been precluded from establishing its own generation would  
25 increase the significance of refusing to sell at wholesale.

3mil 1 CHAIRMAN BENNETT: Isn't that sufficient without  
2 all this background? Because, Mr. Leckie, if we are going  
3 into the background of all the political activities of all the  
4 elections for the past 10 years in all the subdivisions of  
5 the states of North and South Carolina and other parts, we  
6 are going to be here forever.

7 MR. LECKIE: But, your Honor --

8 CHAIRMAN BENNETT: It is a tremendous burden you  
9 are placing on the Respondents to produce all this material.  
10 Unless you can show a real reason why this is going to help you,  
11 we have considerable doubt about it.

12 MR. LECKIE: Your Honor, a reason is that we want  
13 to develop the total story of Applicant's activities in those  
14 states.

15 CHAIRMAN BENNETT: Mr. Leckie, we always say we want  
16 to see the big picture, and the big picture is fine, but we  
17 have to narrow this thing down to the particular facts which  
18 constitute a violation or which indicate there is going to be  
19 a situation inconsistent with the antitrust laws.

20 MR. LECKIE: Yes, your Honor.

21 CHAIRMAN BENNETT: We can't go all over the map  
22 unless you show us a particular need for this particular  
23 matter. Now, do you suppose the Intervenors would like to talk  
24 to this?

25 MR. LECKIE: I think the Intervenors could be helpful,

14mil  
1 yes.

2 CHAIRMAN BENNETT: Okay. I am very much disturbed  
3 about an attempt to question legitimate political activity.

4 MR. STOVER: Your Honor, I would just like to add  
5 to what Mr. Leckie has said in the first place, my complete  
6 concurrence in his theory that even legitimate political  
7 activity can be of great assistance in showing the tenor and  
8 purpose and character of all kinds of other activities by  
9 a corporation which is, as Mr. Avery has stated, intimately  
10 involved in politics at any number of levels in the course of  
11 its ordinary business.

12 I would secondly like to state that in our view  
13 the question of chilling which Mr. Avery has raised in his  
14 pleadings is a question of fact basically of psychological  
15 fact, if you will. Will the Duke Power Company be so terrified  
16 by the prospects of disclosing its political activities that  
17 it will cut down on them and cease to exercise the rights  
18 that it has? Now, this seems to me to make largely irrelevant  
19 the citations of cases such as Griffin, and Gideon, where the  
20 Applicant is really talking about the dimensions of its legal  
21 right rather than the question of whether it will be, as a  
22 practical matter, forestalled or prevented from exercising  
23 those rights in the future if the discovery that we have  
24 asked for is granted.

25 So I think that the real question that the Board



15mil 1 has to face on that point is in fact as a practical matter,  
2 will the disclosure of these activities and the introduction  
3 in evidence, perhaps, of a very small part of them -- perhaps  
4 none at all, if your Honors decide that the probative  
5 link is such that it would waste the time of yourselves and  
6 the litigants -- would that degree of disclosure so blacken  
7 the image of the Duke Power Company or cause it such trepidation  
8 that it will be hindered in the exercise of its political rights?  
9 We think not, your Honor. We think the Justice Department is  
10 perfectly right on that point.

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1 MR. FARMAKIDES: I am very unclear as to what I  
2 heard you say and what I heard Mr. Leckie say. Let's under-  
3 stand the parameters of how far you are going. Are you saying  
4 that even though this is legal political activity on the part  
5 of the Applicant that it should be considered as one of the  
6 factors towards reaching a conclusion as to whether or not  
7 the Applicant has engaged in activity inconsistent with the  
8 antitrust laws? Is that correct?

9 MR. STOVER: Are you asking me or Mr. Leckie?

10 MR. FARMAKIDES: Go ahead, sir.

11 MR. STOVER: I am saying --

12 MR. FARMAKIDES: Yes, or no. That is a fair ques-  
13 tion. I am curious.

14 MR. STOVER: Yes, I believe that's correct.

15 MR. FARMAKIDES: Assuming then that the other  
16 factors -- assuming this is factor A, assume five other factors,  
17 if all those were also legal activities or legally sanctioned  
18 activities of the Applicant, would you say that factors A  
19 through F or G, if all of those were legal activities that  
20 these could show an action inconsistent with the antitrust  
21 law?

22 MR. STOVER: Well, if these factors A through G  
23 that you speak of are all that make up the total of what has  
24 been alleged against the Applicant and the Board finds that  
25 all of them are lawful, then there would be presumably no

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1 antitrust inconsistent situation, your Honor. However, what  
2 we are -- what I think we are dealing with here, Judge  
3 Farmakides, is a situation where Mr. Leckie and the Intervenors  
4 expect to be able to show certain activities which are squarely  
5 unlawful under the antitrust laws.

6 Noerr and Pennington tell us that political  
7 activity, even of a somewhat underhanded --

8 CHAIRMAN BENNETT: Horribly underhanded --

9 MR. STOVER: Yes, your Honor, horribly under-  
10 handed, that that type of political activity is a violation  
11 of the Sherman Act. Nor is it scolding by itself a  
12 violation. Pennington said, which Noerr didn't have to say,  
13 that even in conjunction with other anticompetitive conduct,  
14 the political activity cannot be labeled as a Sherman Act  
15 violation, but it can be brought in as to those other activities.  
16 They might be price-fixing, price discrimination, what-have-  
17 you -- but it can be brought in to show purpose and design of  
18 the other activities, and I think Mr. Leckie's example of  
19 the municipal system which is first prevented from building  
20 its own generation and then is put in an anti-- in a situation  
21 where a monopoly thereby preserved is exercised on it with  
22 greater and greater force, is a very good one. I think that  
23 points it up very clearly.

24 CHAIRMAN BENNETT: You know the situations  
25 where applications have been voted down for municipal electric

1 systems. Now, that occurs.

2 MR. STOVER: We know about them in the sense  
3 we know the dates and cities and size of the votes, that type  
4 of thing.

5 CHAIRMAN BENNETT: So you do have that one  
6 indication of where this is a situation where there has been  
7 a voting down of this.

8 MR. STOVER: Yes. We know, we know that, your  
9 Honor.

10 CHAIRMAN BENNETT: I take it you are able to know  
11 who appeared against the bill, right?

12 MR. STOVER: There have been situations where  
13 the participation of the Duke Power Company has been public;  
14 examples such as the McQuinn and Williamson cases in the late  
15 '30s when Duke's involvement was very close with the opposi-  
16 tion to the High Point, city of High Point's hydro project.  
17 But there may be unsuspected yet very vital and intimate and  
18 provative connections, and I think we also have to deal with  
19 another level of this question, Judge Bennett, which has been  
20 raised in the pleadings. That is the sham exception to the  
21 Noerr and Pennington doctrine.

22 Now, I don't pretend to be an expert on the sham  
23 exception, but it would seem to me logical that if the  
24 activity, political or litigative, of a party to an antitrust  
25 suit is to be characterized as a sham by a tribunal, that

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1 tribunal would like to have before making up its mind some  
2 indications about what the company's interior motives were in  
3 bringing it. Is this something which is a kind of a lawsuit  
4 filed automatically, whenever a competitor rival attempts to  
5 do something? Was there a -- is there a serious --

6 CHAIRMAN BENNETT: You can put the man on the  
7 stand at the hearing and ask him, can't you? You can put the  
8 president of the company on and say, "Was this a practice  
9 here?"

10 MR. STOVER: Yes, that is one way, and you can --

11 CHAIRMAN BENNETT: And you can bring in some  
12 people who were in the municipalities who know what the  
13 practice was, can you not? If he gives you an answer which  
14 you think is wrong, you can do that.

15 MR. STOVER: Yes, that's right.

16 CHAIRMAN BENNETT: This business of wanting to  
17 have in advance all the papers that might possibly have some  
18 bearing on the subject is something that I am afraid goes  
19 against our fishing-expedition proposition in addition to being  
20 a matter which might be chill-- have a chilling effect on  
21 legitimate political activity.

22 MR. FARMAKIDES: I would like again, if I might,  
23 this time to direct a question to Mr. Leckie.

24 MR. LECKIE: Yes, your Honor.

25 MR. FARMAKIDES: I want to obtain the outside

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1 parameter of your argument. As I understood you, the lawful  
2 activity of the Applicant in this case is one of the factors  
3 to be considered by the Board, the lawful activity. I threw  
4 out a question, assuming there were five other factors, and  
5 they were all lawful. But would the sum total of all those  
6 factors, if they were all lawful -- might they indicate  
7 action inconsistent with the antitrust laws?

8 MR. LECKIE: No, your Honor. If all the activities  
9 are perfectly lawful, there is no inconsistency with the anti-  
10 trust laws.

11 MR. FARMAKIDES: All right.

12 MR. LECKIE: The point is, you should be the  
13 ones to determine if all the activity is perfectly lawful.  
14 You can't determine it unless we present it to you, and we  
15 can't do that unless we get it on discovery. Mere discovery  
16 isn't going to chill Applicant's rights.

17 MR. FARMAKIDES: Thank you.

18 CHAIRMAN BENNETT: Mr. Avery, do you have some-  
19 thing you want to say? Are you going to give us this informa-  
20 tion now as to how many times -- give the government this  
21 information as to how many times you brought lawsuits and how  
22 many times you appeared to take a position, and what the  
23 interior memorandum of your concern was about the policy on  
24 this subject?

25 MR. AVERY: No, Mr. Chairman, we are not prepared

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1 to change the position we outlined in our objections and in  
2 our reply. I take it that -- I might say that as an intro-  
3 ductory remark, there was no discussion in this colloquy that  
4 is going on in the last several minutes as to any retreat on  
5 the part of the department from its position. So I take it  
6 we are talking about the totality of the request. We feel  
7 that --

8           CHAIRMAN BENNETT: I gather that there is no  
9 retreat from the position that the Justice Department and  
10 Intervenors took in their request.

11           MR. AVERY: So we are talking about the totality  
12 of that request. We feel very strongly about this matter.  
13 We feel that an attempt is being made to invade protected  
14 constitutional rights of this corporation.

15           Moreover, we feel that the standards, the dis-  
16 covery standards are being ignored. This was something I  
17 alluded to in discussing the political activities. There is  
18 a question of relevance that has to be considered in connec-  
19 tion with discovery and it seems to us that you should begin  
20 your consideration of relevance with the discoverer's statement  
21 of relevance. It is up to them to tell you why it is relevant.

22           We think that the Justice Department's theory  
23 on relevance as stated in their pleading, and as repeated  
24 this morning by Mr. Leckie, is a pure question-begging and  
25 circular kind of reasoning. They say we doubt it, we don't

1 make any bones about that. We said in our pleading that  
2 we are, by the nature of our business, thrust into the  
3 political arena. We don't --

4 CHAIRMAN BENNETT: You also say that is part of  
5 your bu. ness, right, and it is perfectly legitimate?

6 MR. AVERY: Exactly.

7 CHAIRMAN BENNETT: You try to get the munic'-  
8 palities from not creating a competitor.

9 MR. AVERY: That's right.

10 CHAIRMAN BENNETT: That is your position.

11 MR. AVERY: That is one example. We are  
12 inevitably found in the --

13 CHAIRMAN BENNETT: When people get on the stand  
14 and testify here, they will not retreat from that position  
15 and they will tell us all about it.

16 MR. AVERY: Yes, sir. If the Justice Department  
17 theory of relevance is that we engaged in these activities  
18 so therefore they can find out about them -- there is no  
19 standard of relevance. Anything could be discovered under  
20 that theory.

21 As I pointed out, I hardly need to spend time  
22 on it, it begs the question as to Noerr and Pennington. It  
23 does not face up to the holdings of Noerr and Pennington  
24 that political activities are not violative of the antitrust  
25 laws.



1 CHAIRMAN BENNETT: On the other hand, you have  
2 been in the Justice Department yourself, and I am sure that  
3 you recognize that when you have a hard little piece of  
4 paper in your hand which shows that there was a discussion  
5 by the board of directors of the Duke Power Company and they  
6 decided as a matter of policy -- I am imagining these  
7 things, this is not anything that is the fact, this is an  
8 imagination on my part -- that in every case in which there  
9 was a municipal authorization for a municipal plant that Duke  
10 Power would go out and spend millions of dollars seeing that  
11 those people didn't get elected again. You would love to  
12 have a piece of paper like that when there was one, when you  
13 were in the Justice Department.

14 MR. AVERY: That may be true, although I hope  
15 I wouldn't have gone to the lengths that Mr. Brand and Mr.  
16 Leckie have gone in trying to get it.

17 CHAIRMAN BENNETT: Well, now --

18 MR. AVERY: Can I pursue that point, the point  
19 that you raise?

20 CHAIRMAN BENNETT: Yes.

21 MR. AVERY: It was something you or Mr. Farmakides  
22 alluded to in the discussion. The interesting thing, and very  
23 interesting thing, is what is in the pleadings. If you  
24 discuss relevance, look at the pleadings. They have alleged  
25 practically nothing. They say we have opposed EP.. That is

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1 true, we have made no bones about it. We oppose EPA.

2 The only other thing, if you look at the Justice  
3 Department letter, which I think you have to take as the basic  
4 pleading, the only other thing referred to in this area is  
5 an apparent statement, they allege a statement may have been  
6 made -- they don't say it was made -- may have been made that  
7 we would oppose efforts initiated by the municipals, the  
8 adjudicatory efforts initiated by the municipals. That is  
9 all alleged against us.

10 Look at what has been alleged by the Intervenors.  
11 They list in their prehearing statement they included, I  
12 guess, what they thought was their best case in this regard.  
13 There was nothing other than a group of public open statements  
14 that we have made of our position on public power's use on  
15 EPIC.

16 Now, the claim might be being made, well, we  
17 have to get discovery to know about this. But as you have  
18 pointed out in your discussion earlier, if these things were  
19 going on, they would know enough about them to make an allega-  
20 tion.

21 If we were engaging in litigation, some course  
22 of litigation, California trucking type of situation, they  
23 would know about it. They would have alleged Duke Power has  
24 brought the following cases and they would list them. Then  
25 they might talk about whether they are entitled to the documents

porters, Inc.  
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1 that underlie that.

2 As to other activities in the political arena, if  
3 they were getting blocked from legislation or if there were  
4 legislation being passed blocking them, they would know about  
5 it and they would be able to allege it. There is no such allega-  
6 tion here, and this is absolutely nothing but a pure fishing  
7 expedition, and done on the ground -- I was glad to see you  
8 shared my shock with it -- on just the wrong approach.

9 Dragging in a --

10 CHAIRMAN BENNETT: Don't count on the way I treat  
11 counsel as to what my position is going to be, because it is  
12 my practice to try and take the opposite position of any  
13 counsel who is arguing before me. So don't --

14 MR. AVERY: The technique I am familiar with.

15 CHAIRMAN BENNETT: Don't count on anything like  
16 that. That is another way of trying to develop his full argu-  
17 ment. Your statement is that we won't give anything about  
18 political activity, we won't give a list of the lawsuits  
19 we engaged in, that is?

20 MR. AVERY: That's correct. I would like to talk  
21 about -- I have talked about relevance, and I hope I have  
22 indicated there has been no showing of relevance and one could  
23 have been made if --

24 CHAIRMAN BENNETT: I don't think you can take a  
25 letter as the limits, because the learning in the courts has

1 been recently that you give somebody a notice kind of a  
2 complaint and then you develop what the real facts are through  
3 discovery. I just wouldn't bear too hard on that one, Mr.  
4 Avery, because that is just contrary to the present trend of  
5 our litigation.

6 Our present trend of litigation, particularly in  
7 administrative proceedings, has been a sort of a notice state-  
8 ment and then proceed, proceed in an attempt to develop that  
9 precisely in the prehearing conference, and that is what I am  
10 attempting to do here.

11 MR. AVERY: I understand that, your Honor, but this  
12 becomes important in this particular context. There is a tie-  
13 in between the relevance point I am making and the privilege  
14 on chilling point we make in regard to this. It is our con-  
15 tention that the department has a special burden with these  
16 particular activities of demonstrating relevance because it  
17 is perfectly apparent -- and I think you are aware of it, that  
18 there will be a chilling effect.

19 The department made what I consider to be a dis-  
20 ingenuous argument as to --

21 CHAIRMAN BENNETT: You say this is --

22 MR. AVERY: We have not relied on that, I don't  
23 know whether it is harassment or not. The point is that it is  
24 perfectly apparent that if a rule is established by this Board  
25 or by this Commission that documents in this particular area

12  
1 can be thrown open to anybody who can come in and make the  
2 most general kind of claim under the antitrust laws that  
3 there will be a chilling effect on the exercise of this  
4 corporation's First Amendment rights. It has those rights,  
5 it is entitled to exercise them as any other citizen in this  
6 country may.

7 It seems indisputable that if the rule is established  
8 that on the flimsiest kind of charge and the most broad kind  
9 of charge, all of the files with regard to your exercise of  
10 your rights of free speech may be thrown open, and when you  
11 take the practical situation as to what happens in the  
12 political arena with material like that, I think that you  
13 can't --

14 CHAIRMAN BENNETT: Do you think anybody will  
15 intimidate Duke Power into not exercising their First Amendment  
16 rights?

17 MR. AVERY: I think that Duke Power or any corpora-  
18 tion which is subject to the rule that its internal discussions  
19 as to its political activities are thrown open at the  
20 slightest excuse to its political opponents will be impaired  
21 in the exercise of those rights.

22 Now I don't know what you mean by intimidated. If  
23 you mean scared out of doing it, I don't know, and I can't  
24 speak for the corporation. But that is not the standards.  
25 Those rights are constitutionally protected, they cannot be

1 impaired. Even if it is a slight impairment of those  
2 rights, it is improper, should not be done at all. If it is  
3 going to be done at all, it should only be under the strongest  
4 showing that a strong need exists.

5           Such a showing could have been made. They could  
6 have made the allegations, the information would have been  
7 available to them; they have not done so, and there is no  
8 basis here on which this Board should step in and impair the  
9 constitutional rights of this corporation by throwing these  
10 files open to these parties.

11           CHAIRMAN BENNETT: We will take a short recess,  
12 gentlemen.

13           (Recess.)  
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CHAIRMAN BENNETT: Gentlemen, if you would come to order, please. Ladies and gentlemen, the Board has considered this matter -- not only now but in reading the briefs and we had a meeting yesterday when we discussed a number of these things and your arguments have been very helpful to us -- but we believe at this time, that we will sustain the objection to the information with respect to the political activity. That 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.

But the generalized request here, we will sustain the objection to.

MR. STOVER: Your Honor --

CHAIRMAN BENNETT: Let's go into the territorial understandings with the state.

MR. STOVER: Your Honor, may I ask for a point of clarification on your ruling?

CHAIRMAN BENNETT: Yes.

MR. STOVER: You spoke of political activity. Are you including in that --

CHAIRMAN BENNETT: The legal activity, the litigation activity.

MR. STOVER: May I then make just one statement which perhaps may be carried in mind until we make a second

2  
1 attempt as your Honor has suggested -- I was reminded by  
2 co-counsel after I had spoken on the subject that the Otter  
3 Tail case does establish that investigation, I should say  
4 litigation -- of course, that is a matter of degree --

5 CHAIRMAN BENNETT: But that case is still before the  
6 Supreme Court.

7 MR. STOVER: Yes, sir.

8 CHAIRMAN BENNETT: I said without prejudice, you  
9 know, you may bring that to our attention. I read the briefs  
10 in the Otter Tail case. Mr. Brand was kind enough to get  
11 them for us in another matter.

12 So I recognize that this thing is still a little  
13 bit up in the air. But that is another reason why we should do  
14 this without prejudice.

15 MR. BRAND: I would like to make an inquiry as to the  
16 Board's ruling.

17 CHAIRMAN BENNETT: We have said we will sustain  
18 the objection now.

19 MR. BRAND: Yes, your Honor, but --

20 CHAIRMAN BENNETT: We say that is without  
21 prejudice to something else which may be  
22 done at some other time provided there are additional legal  
23 significance as decided by the Supreme Court in the Otter Tail  
24 case. If this goes one way, there may be a reason why we  
25 should give you all kinds of discovery. The second thing is,



1 I want to be sure that you are specific about what you are  
2 asking for and not asking for a generalized thing.

3 MR. BRAND: The one question I have though, is  
4 in practical administration of the Board's ruling there are  
5 a great number of requests that we have in the request for  
6 documentary production which do not on their face request  
7 documents relating to political activity. In the course of  
8 supplying documents with respect to these requests, what we are  
9 concerned with is the Board saying if the document has any con-  
10 nection at all with the government, that that document should  
11 not be included in the response to that request?

12 CHAIRMAN BENNETT: I don't think we have gone that  
13 far. This is merely a situation in which they have asked for  
14 political -- you have asked for political activity and legal  
15 activity. We are not going to give you the broad request that  
16 you wanted there.

17 We say we do this without prejudice. We are cogni-  
18 zant of the fact that the Otter Tail case may change the  
19 legal situation here. May. We are not sure it will.

20 MR. BRAND: Yes, your Honor. But the Board's response  
21 -- the thing that concerned me greatly is that we are  
22 concerned that in all the other requests that we have made, where  
23 we are asking for items that were not objected to as  
24 relevant and material, that there may be a document which  
25 has some connection with government in some way and we are

1 concerned that in the practical administration of this, why  
2 those documents won't be produced.

3 CHAIRMAN BENNETT: I would assume they would be  
4 produced if they were not objected to, if the items  
5 were not objected to, even though they may have some incidental  
6 effect on this general situation.

7 All right, gentlemen, let's go to the territorial  
8 restrictions objection.

9 MR. AVERY: Mr. Chairman, before Mr. Leckie  
10 starts, I noticed you said you had gotten the briefs in the  
11 Otter Tail case? Did you have all of them? I didn't know  
12 whether the government had produced only its brief.

13 CHAIRMAN BENNETT: No, I just had the briefs by the  
14 intervenors and by the other people and we asked for the  
15 other ones and we have not gotten them yet.

16 We presumably will.

17 MR. AVERY: We will see to it that you get all the  
18 briefs.

19 CHAIRMAN BENNETT: Yes, fine. Mr. Avery, assuming  
20 that we did -- and I am saying to everybody here today --  
21 that if the Supreme Court comes down with a decision which  
22 radically changes the situation as the briefs indicate the  
23 Department of Justice is urging, I think the Department of Justice  
24 is creating a situation where this is what they think the law  
25 ought to be with respect to this matter and whether that is

1 going to be the law or not we can't tell until we have heard  
2 what the Supreme Court says.

3 We will be glad to have the other briefs, but I  
4 don't think you need concern yourself with the fact of --  
5 we have examined these briefs to see what the problems are  
6 and the positions being taken.

7 MR. AVERY: I understand, Mr. Chairman, I just  
8 thought -- I wasn't thinking in terms of this ruling, I  
9 thought they would be of general interest to you.

10 CHAIRMAN BENNETT: We would be glad to have them.  
11 On the other hand, we don't want to put a burden on anybody to  
12 supply it if they don't want to.

13 MR. AVERY: We will be glad to do that.

14 CHAIRMAN BENNETT: We asked for this in another  
15 proceeding.

16 MR. BRAND: If I might make a statement, your Honor,  
17 two Boards have asked for this, the Alabama Board and the  
18 Michigan Board. This Board has not but we would be perfectly  
19 pleased to supply this panel with copies of the same materials  
20 we have supplied other panels, if the Board so desires.

21 CHAIRMAN BENNETT: I think it is desirable but  
22 don't send me two copies because I am afraid I am going to have  
23 to hire another house to hold this material.

24 MR. BRAND: We would be very pleased to present  
25 Judge Turbridy and Judge Farnakides with these materials.

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1 CHAIRMAN BENNETT: We would be glad to have any of you  
2 submit them.

3 MR. BRAND: We listed the briefs in the transmittal  
4 letter. We supplied the government's brief in Otter Tail, the  
5 brief of the Missouri Basin Agency, municipal agency, the  
6 brief of APPA, and in the Gulf States versus FPC Case we  
7 supplied the government brief, the brief of the cities of  
8 Lafayette and Plaquemine, the APPA brief, and in one of the two  
9 cases that I have mentioned, we supplied the brief of the FPC.

10 MR. AVERY: All right.

11 CHAIRMAN BENNETT: I don't think I have gotten the  
12 brief of the FPC.

13 MR. BRAND: Your Honor, I believe we supplied the  
14 brief of the FPC in the Gulf States case.

15 MR. AVERY: As I understand, Mr. Brand has supplied  
16 briefs on one side of the issue, we will see that you get the  
17 briefs on the other side.

18 CHAIRMAN BENNETT: Very well. The only reason we look  
19 at these now is to see what the question is for the Supreme  
20 Court. That is one of the reasons why we decided here we  
21 should grant your motion without prejudice because it may be that  
22 the facts will turn out to be different.

23 Or the law may turn out to be different. May we  
24 go to the territorial understandings?

25 MR. LECKIE: Yes, your Honor. Applicant has declined

1 to produce documents concerning territorial assignments under-  
2 taken following the enactment of legislation by North and  
3 South Carolina. This discovery request raises the question  
4 that -- Applicant would refuse to provide these documents  
5 because it claims anything on these is exempt from our motion  
6 under Parker v. Brown. We disagree. We know what Parker v.  
7 Brown said.

8 We also believe there are limits to how far the case  
9 goes and that subsequent cases have demonstrated those  
10 limits. Parker v. Brown itself said that states can't  
11 authorize the violation of the anti-trust laws nor direct the  
12 violation of the anti-trust laws. The Swaigman Case  
13 following Parker v. Brown was an example of where a state  
14 in fact --

15 CHAIRMAN BENNETT: Was that the Swaiger Case?

16 MR. LECKIE: Yes. For example, the case where the  
17 state was found to have ordered the violation of the  
18 anti-trust laws, this was found to be improper. We have others  
19 such as the Woods Case, the Whiton vs. Pat Pool Case.

20 CHAIRMAN BENNETT: What do you want, that is my  
21 point. What do you really want and why do you need it.

22 MR. LECKIE: There are a number of possibilities,  
23 your Honor. One is the state went beyond its authority in  
24 ordering the territorial restrictions. This may not be --  
25 this Applicant indicates it is a moot point because it claims the

1 state didn't authorize any wholesale territorial restrictions,  
2 and that it doesn't object to producing those documents, so  
3 that it is pretty well out of the picture.

4 CHAIRMAN BENNETT: The state has no jurisdiction  
5 over the wholesale, right?

6 MR. LECKIE: That is correct. Including authorized  
7 restrictions.

8 CHAIRMAN BENNETT: You just want retail then.

9 MR. LECKIE: If the state did or the Applicant  
10 presumed the state authorized wholesale restrictions, we  
11 want those. But we accept the Applicant's statement that retail  
12 are the only restrictions involved.

13 CHAIRMAN BENNETT: How is the retail territorial  
14 restriction going to be pertinent to inconsistencies with the  
15 federal anti-trust laws?

16 MR. LECKIE: There is a possibility that the state  
17 Public Service Commission went beyond what they were  
18 authorized to do by the state legislature.

19 CHAIRMAN BENNETT: Isn't that a matter of public  
20 record that you get from two state legislatures. Why do you need  
21 to go to the Respondent to get that?

22 MR. LECKIE: Because Applicant is here in this  
23 proceeding having applied for a license and he is attempting  
24 to establish that it has not been guilty or responsible  
25 for a decision inconsistent with the anti-trust position.

1 MR. TUBRIDY: You are stating what the Applicant  
 2 did was to comply with regulations and you state the regulations  
 3 are illegal because it went beyond the powers of the person  
 4 that put out the regulations. I would like to know what you  
 5 did say.

6 MR. LECKIE: We are saying there is a possibility  
 7 that the state Public Service Commissions in interpreting  
 8 what the state statute said, had gone beyond what the  
 9 state statute allowed.

10 MR. TUBRIDY: And they complied with what the  
 11 Commission did when the Commission went beyond what was  
 12 entrusted to them. Now you are tagging them with violating  
 13 because they are entitled to what they did because the  
 14 Commission said it was all right?

15 MR. LECKIE: We consider that would be relevant  
 16 information as to be information inconsistent with the anti-  
 17 trust laws. But that is not the main point. The main  
 18 point is what the Commission and legislature authorized the Appli-  
 19 cant to do.

20 MR. TUBRIDY: Has anybody in the state attacked  
 21 what the Commission did?

22 MR. LECKIE: We don't know if anyone in the state  
 23 attacked what the Commission did. The point is it is  
 24 an issue in this proceeding where the Board must determine  
 25 whether there was a situation inconsistent with the anti-trust

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1 laws. Now, by example -- the same one I listed in our brief --  
 2 let's say the state Commission authorized Applicant to bargain  
 3 with other utilities to set up a territorial division between  
 4 them. But did the state authorize Applicant to use its  
 5 monopoly power so as to determine where the line would be  
 6 drawn? For example, by saying we will draw the line here,  
 7 if you don't want it here, we won't sell you power at wholesale  
 8 anymore, we don't have to.

9 Now if Applicant did that, and that would be a document  
 10 concerning a territorial restriction ordered by the state --  
 11 not the restriction itself but a document concerning it --  
 12 which is what Applicant refuses to produce -- if Applicant  
 13 did that, we believe it is relevant and it would show at  
 14 least an inconsistency with the anti-trust laws.

15 CHAIRMAN BENNETT: All you want is any statement made  
 16 by them to another party to one of the negotiations taken pursuant  
 17 to the anti-trust laws in which they are utilizing their  
 18 monopoly power to require the other party in the negotiations  
 19 to adopt a particular position?

20 MR. LECKIE: Yes, your Honor.

21 CHAIRMAN BENNETT: That is all you want.

22 MR. LECKIE: Documents demonstrating that use of  
 23 monopoly power.

24 CHAIRMAN BENNETT: Wait a minute. You are looking  
 25 for documents which take that position, don't you?

owers, Inc.  
25



1 MR. LECKIE: The documents may not say so on their  
2 face.

3 CHAIRMAN BENNETT: How is anybody going to find them  
4 then?

5 MR. LECKIE: Because the request was for documents  
6 concerning the territorial restrictions regardless of whether  
7 they were ordered by the state or not. If we receive those  
8 documents, we will receive anything that may evidence a  
9 misuse of monopoly power concerning those restrictions. We  
10 are not attacking the state having ordered the retail  
11 restriction.

12 CHAIRMAN BENNETT: You are telling me all you want as  
13 I understood you, is an abuse by reason of the fact that these  
14 people have very great power in the negotiations which should  
15 be equal negotiations between two parties.

16 MR. LECKIE: Yes.

17 CHAIRMAN BENNETT: Is that what your position is?

18 MR. LECKIE: But we believe we should be the initial  
19 judge of the abuse rather than Applicant saying we are sorry,  
20 we didn't abuse our monopoly power and therefore, we have no  
21 documents.

22 CHAIRMAN BENNETT: Maybe that is their position.

23 MR. LECKIE: But if they produce all the documents  
24 relating to their negotiations on territorial restriction, we  
25 can judge it.

1 CHAIRMAN BENNETT: I know, but if you produce all  
2 the documents on that theyry, isn't that the very essence of  
3 a fishing expedition?

4 MR. LECKIE: No, your Honor, because we believe  
5 they are relevant to our determination and then to our subse-  
6 quent production in evidence of misuse of monopoly power with  
7 regard to territorial restrictions. We are not limited to  
8 merely the key documents that will prove our case. Discovery  
9 doesn't limit things that far. We believe relevancy includes all  
10 of their negotiations with regard to territorial restrictions.  
11 Relevancy at this point in the discovery phase is a lot broader  
12 than relevance of evidence to prove something at trial.

13 CHAIRMAN BENNETT: I think that is pretty obvious  
14 because the rule on discovery seems to be "that will lead  
15 to evidence." We have already ruled that in permitting you  
16 to have the general statement with respect to their files,  
17 that you are entitled to more. But this material, we have  
18 difficulty seeing how when the state provides a method by  
19 which a line is to be drawn -- unless there is something in  
20 the papers you want produced that shows that this is done  
21 in an illegal fashion or that there is an abuse of monopoly  
22 power on the face of the document -- how that ever will be  
23 shown.

24 MR. LECKIE: It may be not on the face of the  
25 document, but we may be able to use it with testimony or other

2mil 1 documents to prove the point of territorial restrictions in  
2 an unlawful manner.

3 MR. TUBRIDY: What would be an unlawful matter,  
4 that they did it pursuant to what the state told them to do  
5 and no one objected to it. Now what would be unlawful in  
6 what they did?

7 MR. LECKIE: Your Honor, the state, we believe,  
8 ordered them to negotiate territorial agreements. If in that  
9 negotiation, or in those negotiations with the many utilities  
10 that were concerned, if they misused their monopoly power --

11 MR. TUBRIDY: How? This is the question. How can  
12 they misuse something when they are doing something pursuant  
13 to what the state tells them to do?

14 CHAIRMAN BENNETT: This is something done by the  
15 state.

16 MR. TUBRIDY: I cite you Lumbee River Electric  
17 Membership Corporation, 3 North Carolina Appeals 318. "The  
18 principal purpose of this section is to broaden the orderly  
19 service areas as among competing suppliers of electricity  
20 and therefore eliminate unnecessary duplication of electrical  
21 line facilities." This is what the Commission is doing.  
22 They did this pursuant to what directions were in this statute.  
23 Now what could they be doing illegal?

24 MR. LECKIE: Your Honor, they negotiated pursuant  
25 to statute, granted; but if they misused their monopoly power

3mil 1 by saying, "If you don't draw the line here, we won't sell you  
2 power at wholesale, or we will go in for an increase in the  
3 wholesale rate. The state didn't order them to do that. The  
4 state can't authorize them to misuse monopoly power because  
5 that would violate the antitrust laws. The state can order  
6 them to negotiate and come to an agreement. But that is as  
7 far as it can bo.

8 CHAIRMAN BENNETT: Mr. Stover?

9 MR. TUBRIDY: Mr. Stover, do you want to talk to  
10 this?

11 MR. STOVER: I think I can give an example, Judge  
12 Tubridy --

13 MR. TUBRIDY: I wish you would.

14 CHAIRMAN BENNETT: Yes, I wish you would, because  
15 we are having trouble with it.

16 MR. STOVER: Suppose we have a city with a municipal  
17 distribution system and it is just about on the borderline  
18 between say Duke and Carolina Power and Light. Say at present  
19 it buys all its wholesale power from Duke. Now, obviously  
20 under this statute that we are talking about, Duke and Carolina  
21 are going to sit down and negotiate these retail territorial  
22 arrangements. Suppose that --

23 CHAIRMAN BENNETT: Aren't they selling wholesale  
24 Georgia at Duke, isn't this dealing solely with retail?

25 MR. STOVER: That is the point I am about to come

11 1 to, your Honor; suppose that the municipality which used to be  
2 quite close to the borderline and physically, therefore, had  
3 perhaps the capability of switching suppliers. When this  
4 agreement is published, the borderline is moved way over in  
5 this particular area, and they are now deep in Duke's terri-  
6 tory and right away the economic potential for switching  
7 suppliers, if CP&L should offer a better deal, is gone.

8 This is the use of an arrangement for allocation of retail  
9 territories which are under the jurisdiction of the North or  
10 South Carolina commission, to distort a wholesale market which  
11 is not under the jurisdiction of that state commission.

12 This is the kind of thing which the large companies, with the  
13 three large companies in the state, can trade off and I am sure  
14 that the -- that it is expected that under this statute they  
15 will trade off a piece of territory here for another piece  
16 over there.

17 But in doing so, they can affect the future location  
18 of transmission lines; they can affect the availability of  
19 wholesale power to a particular small system for more than one  
20 supplier in a very real way. This is not something which the  
21 state commission is supposed to do.

22 MR. TURBIDY: What part does the state commission  
23 play when they are negotiating and so on? Does the state  
24 approve it?

25 MR. STOVER: As I understand it, the state commission

1 invites them to sit down and negotiate the boundaries of this  
2 territorial arrangement and I will have to consult with  
3 Bouknight about the details of the negotiation. He knows  
4 much more about it than I do. It is approved by the state  
5 commission when an agreement has been arrived at.

6 MR. TUBRIDY: It is approved by the state commis-  
7 sion.

8 MR. STOVER: Yes. Could Mr. Bouknight perhaps  
9 give any more details?

10 MR. TUBRIDY: I wish he would. I would be delighted  
11 if he would.

12 MR. BOUKNIGHT: Yes, sir. We have one example, but  
13 it does not involve Duke Power. But it is close to the example  
14 Mr. Stover talks about. We have a situation in the eastern  
15 part of the state where the transmission lines of Virginia  
16 Electric Power Company and Carolina Power and Light Company  
17 close together near a large municipally-owned electric system.  
18 That territory was divided between CP&L and VEPCO and the  
19 result is that that city is now within VEPCO. When that city  
20 wrote Carolina Power and Light asking them to make a proposal,  
21 CP&L responded that that city was now in VEPCO's territory  
22 and because VEPCO had that territory assigned to it for retail  
23 purposes that CP&L did not intend to continue sufficient  
24 transmission facilities over that four or five-mile stretch  
25 to serve that city.

6mil 1 CHAIRMAN BENNETT: In other words, all you want is  
2 evidence which will show any instance where the wholesale became  
3 a wholesale allocation of territory by reason of the state  
4 requirements as to retail territorial restrictions?

5 MR. BOUKNIGHT: Yes, sir, directly and indirectly.  
6 Another indirect way which this can happen is that the  
7 cooperatives in North Carolina are also under this territorial  
8 statute. Each buys its power at wholesale from Duke in the  
9 Duke service area. Therefore, when Duke sits at the table  
10 with one of these cooperatives and the question is whether  
11 115,000 volt transmission line that comes by one of our cities  
12 is going to belong to a cooperative or is going to belong to  
13 Duke or perhaps to a competing investor-owned utility, Duke  
14 can use its muscle at that negotiations to determine who will  
15 own that line coming by one of our cities.

16 We don't know whether and to the extent that they  
17 have, but we do know the genesis of 1965 Territorial Act. We  
18 know this act resulted from an arrangement among the power  
19 companies in the state and --

20 MR. AVERY: Mr. Chairman, this is improper.

21 MR. BOUKNIGHT: Who drafted this act, brought it  
22 to the legislature, there it was approved; it is state action,  
23 but we know the design which led to it and we are interested  
24 in finding out to what extent that design was pursued to  
25 eliminate competition at the wholesale level.

7mil 1           CHAIPMAN BENNETT: Mr. Avery, how much, if any, are  
2 you willing to give these people voluntarily? If there is a  
3 situation now where this is utilized and it is demonstrated  
4 it was utilized for the purpose of allocating wholesale  
5 customers, that is not what the provisions of the statute  
6 provide for, is it?

7           MR. AVERY: No problem on that, Mr. Chairman? That  
8 is made clear, I think, in our reply. We are not objecting  
9 to documents which show a territorial allocation as to whole-  
10 sale. We never raised that objection. The objection we  
11 raised was to furnishing documents with regard to retail  
12 territorial allocation undertaken pursuant to statute. You  
13 have heard a lot of discussion here, conjecture about this  
14 and that. The municipals were not covered by this. The  
15 territorial allocations could place with the cooperatives.  
16 The municipals are excluded from the statute. They are not a  
17 system involved. So that Mr. Stover's fanciful example has  
18 nothing to do even with the statute. The negotiations took  
19 place with the cooperatives; the cooperatives aren't even in  
20 here.

21           If some muscle had been shown you might have expected  
22 them to be in here. Our objection goes to relevance. We just  
23 simply think that these documents are not relevant. Now, the  
24 Justice Department has given three reasons why they are  
25 relevant; one we have disposed of, the wholesale sales.



8mil 1 CHAIRMAN BENNETT: You didn't object to that one.

2 MR. AVERY: That's right. There was no objection.

3 The second reason they claim, which I feel incapable of dealing  
4 with, that perhaps it wasn't done in accordance with the  
5 statute. I don't know what they are talking about because  
6 they have not spelled it out. So what you get down to is this  
7 claim that maybe we used our muscle at the negotiating table.

8 Now without in any way conceding that we had, but  
9 simply accepting that as a premise for purpose of discussion,  
10 the argument they are making comes down to an emasculation  
11 of Parker v. Brown. What they are saying is state action can  
12 be overthrown and found to be a violation of the antitrust  
13 laws if you can show some activity violative of the antitrust  
14 laws involved in the exercise of state action.

15 The last thing Mr. Bouknight acknowledged before he  
16 sat down was that all of these allocations with these coopera-  
17 tives were submitted to the commission for its review and  
18 specifically were approved by the commission before they became  
19 effective.

20 Now that is the state action and state action is  
21 protected by Parker versus Brown. I might say in that regard  
22 we don't make the claim -- Mr. Leckie characterized our claims  
23 meant -- our claim is one of relevance. It is based on  
24 doctrines applicable to discovery. We are saying you have to  
25 judge a request for information by the standards of relevancy,

9mil 1 not the trial standards of relevancy, but the standards that  
2 apply to discovery. By those standards, because this is  
3 state action clearly reviewed and approved by the state, it is  
4 irrelevant. It cannot show anything violative of the anti-  
5 trust laws. Their argument as to looking behind the state  
6 action is nothing short of an attempt to emasculate the Parker  
7 v. Brown doctrine. So we think absolutely no showing of  
8 relevance has been made; no such showing is made in their  
9 pleadings; nothing has been said this morning that makes any  
10 of this material relevant, and they have not retreated from  
11 their request for all of this material and we continue to oppose  
12 that request as being irrelevant.

13 Thank you very much.  
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1 CHAIRMAN BENNETT: Gentlemen, the Board, as you know,  
2 has discussed this matter before and we have now heard your  
3 argument and in view of the concession by the Applicant that  
4 they will produce documents that have to do with allocations  
5 in the wholesale field, we will sustain their objection to  
6 the material that is directed by state action and approved  
7 by state action.

8 Again, if there can be some subsequent showing of  
9 some other factor which has not been shown so far, we do  
10 not say that something may not become relevant. But so far  
11 as the request which is now made, we will sustain the objection  
12 to it in view of the statement by the Applicant that they  
13 will produce the documents having to do with wholesale  
14 territorial restrictions.

15 Let's go to the next one.

16 MR. AVERY: Mr. Chairman, before we go to the next  
17 one, when you said you had not gotten a copy of our recent  
18 motion, I sent back to the office to get it and I can hand it  
19 out to you now.

20 CHAIRMAN BENNETT: All right.

21 All right, gentlemen, let's go to the next one.

22 The next matter is municipal and state elections.  
23 I think that that is really covered by our ruling on political  
24 activity, isn't it?

25 MR. FARMAKIDES: Yes.

1 MR. AVERY: I believe so, Mr. Chairman. That was  
2 a double-barreled objection. We had objected to that parti-  
3 cular interrogatory under two heads. Since you have sustained  
4 the objection under one, I really don't believe it needs  
5 discussing.

6 CHAIRMAN BENNETT: Do you gentlemen agree or do you  
7 want to discuss it further?

8 MR. LECKIE: We agree, your Honor.

9 CHAIRMAN BENNETT: All right.

10 Now, next comes all wholesale files with no  
11 limitation to the subject matter; is that correct?

12 MR. LECKIE: Yes, your Honor.

13 I would like Mr. Stover to go first, if he is  
14 willing, on this one.

15 CHAIRMAN BENNETT: All right, Mr. Stover. Direct  
16 your attention, if you will, sir, to the unreasonable searches  
17 and seizures problem.

18 MR. STOVER: Your Honor, forgive me while I get  
19 the questions themselves.

20 Basically, we have asked here for the documents  
21 contained in the company's individual files regarding --

22 CHAIRMAN BENNETT: You ask for everything in those  
23 individual files, haven't you? You don't limit it in any way.  
24 You are just saying bring these files in and let us look at  
25 them.

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1 MR. STOVER: Well, the files themselves, your  
2 Honor, we thought were reasonably limited in their scope.

3 CHAIRMAN BENNETT: How many are there?

4 MR. STOVER: The wholesale electric customers  
5 I believe there are 24 or 25 of the Duke Power Company and  
6 that would include just municipals. They are all municipals,  
7 your Honor.

8 CHAIRMAN BENNETT: Are there not cooperatives, too?

9 MR. BOUKNIGHT: I believe there are 24 munici-  
10 palities and 13 cooperatives.

11 CHAIRMAN BENNETT: So it is really 37 rather than  
12 24.

13 MR. STOVER: We believe that the limitation to  
14 categorize is sufficiently narrow and --

15 CHAIRMAN BENNETT: Where are the categories?

16 MR. STOVER: These wholesale customers. We  
17 understood the Applicant's objection, for example --

18 CHAIRMAN BENNETT: Let me ask you a question.  
19 Suppose the Applicant's truck ran into a light pole on a  
20 municipality and there was a lot of correspondence in this  
21 file about that. Is that of any possible interest to this  
22 proceeding?

23 MR. STOVER: It would be very, very marginal, if  
24 any, your Honor. But that isn't the point.

25 CHAIRMAN BENNETT: It wouldn't have anything to do

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1 with it, would it?

2 MR. STOVER: We do not know at this point, your  
3 Honor, whether that will be the sole content of these files  
4 or not.

5 CHAIRMAN BENNETT: Shouldn't there be a limitation  
6 as to what types of information you want out of these files?  
7 You can't just look in somebody's files unless you specify  
8 what kind of material you are looking for. You can't just  
9 go out and say I want everything that is in this file, it  
10 seems to me.

11 MR. STOVER: With the assistance of the file indexing  
12 system we may be able to do this with a greater degree of  
13 specificity than we were able to do in our original request.  
14 This is one of the reason why the --

15 CHAIRMAN BENNETT: I think they have said they will  
16 give you that now. But what I want to know is: What  
17 particular topics are you going to want in those folders? You  
18 certainly don't want accident reports like the one I mentioned --

19 MR. STOVER: That is right.

20 CHAIRMAN BENNETT: -- if there are any. I don't  
21 know that there are.

22 Do you want something that relates to retail rates?  
23 Do you want something that relates to wholesale rates? Do  
24 you want something that relates to somebody else? I mean,  
25 you are just not -- it seems to me you have to specify there,

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1 not just ask for everything in the files.

2 MR. STOVER: Yes, your Honor.

3 CHAIRMAN BENNETT: Specifically when there are 37  
4 of them.

5 MR. STOVER: We have indicated some categories  
6 under question 13, your Honor, for example, which I think is  
7 fairly representative.

8 CHAIRMAN BENNETT: Do you want to look at all of  
9 them?

10 MR. STOVER: To all customers?

11 CHAIRMAN BENNETT: No, all the files.

12 MR. STOVER: We have, for example --

13 CHAIRMAN BENNETT: Let me look at it.

14 MR. STOVER: This is on page 14 of our request. We  
15 have listed, for example, files related to any elected or  
16 appointed official of any municipal wholesale customer. We have  
17 specified retail or wholesale competition relating to such  
18 customers and analysis in the Duke files of the customer rates,  
19 et cetera. So we have here a somewhat narrowly defined  
20 category of information that we are seeking.

21 We have obviously -- the accident report that you  
22 spoke of, obviously, would not fall into these kinds of  
23 categories in the normal course of affairs. I think the question  
24 is perhaps somewhat similar to one that the Board raised  
25 with Mr. Leckie at the outset of the proceedings about the

1 extent of the filing index which was wanted and Mr. Leckie,  
2 if I recall, said they were looking for files having to do  
3 with the business, the electric system business of the company.

4 CHAIRMAN BENNETT: That is pretty broad, isn't it?

5 MR. STOVER: But for an index it would be naturally  
6 broader.

7 CHAIRMAN BENNETT: Yes, that is my understanding,  
8 too, that they will give you a document, I think, which shows  
9 the present system of filing adopted by the company.

10 MR. STOVER: Yes, but I am --

11 CHAIRMAN BENNETT: My problem is -- I have looked  
12 at 13 -- is that you are describing files but you are not  
13 limiting it to the type of information in those files, you are  
14 just saying let us look at those files and we will see if  
15 there is any information in there that will be useful to  
16 us.

17 Isn't that nothing more than a fishing expedition?

18 MR. STOVER: We are not able at the stage of  
19 drawing up a discovery request to describe particular  
20 documents, your Honor.

21 CHAIRMAN BENNETT: I am not suggesting you do. What  
22 I am suggesting to you is that you have to have documents  
23 referring or relating to particular subject matter, Mr. Stover,  
24 and you don't do that.

25 MR. STOVER: What we have here, your Honor, is we



7  
1 have referred to files relating to particular subject matters.

2           CHAIRMAN BENNETT: That is right. You say all  
3 files that do this. What I am saying to you is, you say  
4 all right, all wholesale files and the documents in those  
5 wholesale files referring or relating to particular topics,  
6 not everything in the files like automobile accidents and the  
7 insurance and anything else that might happen to be in those  
8 files or elections materials.

9           MR. STOVER: This list under question, the question  
10 13, your Honor, was probably drafted on the assumption that --  
11 and I am subject to correction from the Department if I am  
12 wrong on this and I hope they will speak up -- that the  
13 files would be -- the filed folders, if you will, would be  
14 fairly specific. In other words, there would be a file on  
15 retail and wholesale competition with the City of Shelby  
16 and another one would be labeled retail and wholesale  
17 competition with Lexington and so forth.

18           So that the file and the documents might be co-  
19 terminus.

20           CHAIRMAN BENNETT: Well, now let me assume we don't  
21 do it that way. We don't know at the moment. Let me assume  
22 that what they do is they put every piece of correspondence  
23 with the municipality in one file folder and you are asking  
24 for that file folder to be produced.

25           Now, there may be all kinds of stuff in there that

1 is none of your business or anybody's business -- or none  
2 of our business anyway.

3 MR. STOVER: I think I can say what we said before  
4 in our discussions with the Applicant that we will be happy to  
5 do the searching, the physical searching if the problem is  
6 one of burden.

7 CHAIRMAN BENNETT: It is not a problem of burden,  
8 it is a problem of unreasonable searches and seizures under  
9 the Constitution which applies even though it is a grand  
10 jury proceeding. You can't issue a broadside subpoena in a  
11 grand jury proceeding. You can't ask for all files with  
12 wholesales and expect to get it anyway.

13 If there are 37 files involved, that is a broad  
14 request.

15 MR. STOVER: I would continue to take the position,  
16 your Honor, and I am sorry I can't make it more specific for  
17 you --

18 CHAIRMAN BENNETT: I am at the opposite position to  
19 draw you out as to what you want. Do you want all of that or  
20 do you want to limit it to files or information in those files  
21 referring or relating to particular topics?

22 MR. BOUKNIGHT: May we have a moment, your Honor?

23 CHAIRMAN BENNETT: Yes, let's take a short recess.

24 (Recess.)

25 CHAIRMAN BENNETT: My colleagues suggest we break

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1 for lunch and come back at 1 p.m.

2 (Whereupon, at 11:50 p.m., the hearing was recessed,

3 to reconvene at 1 p.m., this same day.)

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arl 1                   AFTERNOON SESSION

2                                   (1:00 p.m.)

3                   CHAIRMAN BENNETT: Will you come to order, please.

4                   All right, we are in the middle of an argument  
5 being made over all files, is that right?

6                   MR. AVERY: Could I have one moment, Mr. Chairman?  
7 With the move I am scattered around a little, and I am not  
8 sure exactly where I am here.

9                   CHAIRMAN BENNETT: All right.

10                   (Discussion off the record.)

11                   CHAIRMAN BENNETT: All right, proceed.

12                   MR. STOVER: Mr. Chairman, we discussed among  
13 ourselves this problem that we were working on before lunch,  
14 and Mr. Leckie has a suggestion which I think may alleviate  
15 the problem. So I would like to yield to him.

16                   MR. LECKIE: Mr. Chairman, I would like to point  
17 out that we only want items which have some bearing on the  
18 ability of the wholesale customers or possibly the potential  
19 sellers to those customers to compete at wholesale and retail.  
20 That is the only reason we want the items in 13 and 17.

21                   CHAIRMAN BENNETT: Anything that refers or relates  
22 to --

23                   MR. LECKIE: The ability of that --

24                   CHAIRMAN BENNETT: The ability of that particular  
25 customer to compete?

1 MR. LECKIE: Yes, sir. We are willing to permit  
2 Applicant to be the judge as to whether a document requested  
3 under 13 and 17 would fit that category. We hope they would  
4 be liberal in making that determination.

5 We realize that not everything on its face is a  
6 blatant document referring to this matter.

7 CHAIRMAN BENNETT: I take it that is acceptable,  
8 Mr. Avery?

9 MR. AVERY: Could I have just a moment, sir?

10 CHAIRMAN BENNETT: Yes.

11 (Discussion off the record.)

12 CHAIRMAN BENNETT: Mr. Avery?

13 MR. AVERY: Well --

14 MR. BOUKNIGHT: Your Honor, we would like to  
15 clarify a bit, if we may, to say for a nonprofit corporation  
16 to compete at retail and its ability to secure a competing  
17 source of wholesale power supply sales.

18 MR. TUBRIDY: What paragraph are you speaking of  
19 now?

20 MR. LECKIE: Your Honor, this is 13 and 17.

21 CHAIRMAN BENNETT: 13, 14, 15, et cetera.

22 MR. LECKIE: No, directly numbers 13 and 17.

23 MR. TUBRIDY: All right.

24 CHAIRMAN BENNETT: Okay.

25 MR. AVERY: Mr. Chairman, could I have -- this is

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1 a joint request now. Mr. Leckie said one thing, Mr.  
2 Bouknight has modified it. Is that the request? The joint  
3 request?

4 MR. LECKIE: We meant the same thing, the ability  
5 to secure competing bulk power supply as part of the ability  
6 to compete.

7 MR. AVERY: So we're talking about items contained  
8 in the files, the wholesale customer files which refer or  
9 relate to the ability to compete at retail or the ability  
10 to compete -- to secure a competing source at wholesale. Is  
11 that it?

12 CHAIRMAN BENNETT: Right.

13 MR. LECKIE: Yes.

14 MR. AVERY: Let me have another moment, please.

15 (Discussion off the record.)

16 MR. AVERY: Mr. Chairman, I have had an opportunity  
17 to discuss this with my colleagues here. I think that that  
18 would be an acceptable compromise on this particular item for  
19 us. I certainly would recommend it to our client. Now I  
20 have not -- there is no one here from the Duke Power Company  
21 and I really do not feel authorized to make a final commit-  
22 ment without checking with them. But it would be our recommenda-  
23 tion that they accept that as a compromise.

24 CHAIRMAN BENNETT: We think it is reasonable and  
25 we will so order.

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1 MR. AVERY: All right, sir.

2 CHAIRMAN BENNETT: So, that's what we will do.  
3 These requests that cover the waterfront, you just can't do  
4 it for.

5 MR. AVERY: That's right.

6 CHAIRMAN BENNETT: We will do this in the manner  
7 indicated -- files and wholesalers of which there are about  
8 37, I understand.

9 MR. AVERY: I want to correct -- we checked during  
10 the lunch recess, there are more than 50.

11 CHAIRMAN BENNETT: All right. You look through  
12 and get those matters that refer or relate to the ability  
13 to compete at retail or their ability to secure this at whole-  
14 sale. That is a limited request, and I think it is reasonable.

15 Go to the next one.

16 MR. BRAND: May I inquire, your Honor? The ability  
17 to secure competing supply at wholesale, that would include  
18 self-generation, would it not?

19 CHAIRMAN BENNETT: I would suppose so, yes.

20 MR. BRAND: Thank you.

21 CHAIRMAN BENNETT: Let's go to this, documents  
22 asserting or denying regulatory jurisdiction. I have been a  
23 little confused about what you are after there, Mr. Leckie.  
24 It would seem to me that any statement that is made to a  
25 regulatory group about what the jurisdiction was is really

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1 what the lawyers say it is in the particular instance. Is  
2 this going to be really of help to you?

3 MR. LECKIE: Yes, your Honor, we believe it will be.

4 CHAIRMAN BENNETT: Why?

5 MR. LECKIE: Applicant has raised the issue in  
6 this proceeding and its pervasive regulation by state and  
7 federal regulatory agencies. We want to be able to answer  
8 its contentions that it is pervasively regulated and that your  
9 Board should not order certain relief or make certain findings.

10 In order to do this, we have to know the specifics  
11 of the regulation, the state and federal regulations.

12 CHAIRMAN BENNETT: Now you are talking about the  
13 last one, and I am talking about documents asserting or  
14 denying regulatory jurisdiction.

15 MR. LECKIE: That's correct, your Honor, that is  
16 what I am addressing at this point.

17 CHAIRMAN BENNETT: Well --

18 MR. LECKIE: If we know the specific nature of  
19 Applicant's claims in the past as to what can be regulated and  
20 what cannot be regulated by federal and state authorities,  
21 we will be able to better prepare our case. The whole point  
22 is rebuttal to what we believe Applicant will do.

23 CHAIRMAN BENNETT: Mr. Leckie, suppose I -- suppose  
24 they said you have no jurisdiction to regulate this, and then  
25 the regulatory commission -- you are mistaken. We have and



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1 we take it. How does that assertion help you?

2 MR. LECKIE: The assertion would be a position that  
3 the company has taken in the past.

4 CHAIRMAN BENNETT: All right. So what? It doesn't  
5 establish that this is within the regulatory authority of  
6 that commission, does it?

7 MR. LECKIE: No, your Honor, but it is --

8 CHAIRMAN BENNETT: Unless there is an appeal from  
9 that, the regulatory commission's statement of its own  
10 jurisdiction is controlling, isn't it?

11 MR. LECKIE: Yes, your Honor, but obtaining these  
12 statements from Applicant would give us a lead to finding  
13 where and when in regulatory proceedings that they have made  
14 claims and therefore when the regulatory agencies have  
15 determined those claims. It is -- we feel it is proper and it  
16 is a suitable method for us to get this information from  
17 the Applicant rather than --

18 CHAIRMAN BENNETT: It is my understanding that you  
19 agree to accept samples of certain things, but you refuse to  
20 accept a time limit. Now if there has been a decision by  
21 the Supreme Court, as I understand you claim there has --

22 MR. LECKIE: That was --

23 CHAIRMAN BENNETT: Why should you get anything  
24 prior to that decision? It's been settled, that is clear,  
25 isn't it?

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1 MR. LECKIE: Your Honor, the Colton case determined  
2 that wholesale sales were subject to federal jurisdiction,  
3 the states could not regulate.

4 CHAIRMAN BENNETT: What does it make if  
5 before that position Duke took the position to the contrary?

6 MR. LECKIE: But the Colton case is a narrow  
7 holding, namely that they were subject to federal jurisdiction  
8 tion. This doesn't cover any individual matter that the  
9 company might be bringing before the commission.

10 CHAIRMAN BENNETT: Well, it seems to me that it is  
11 a question of law as to whether or not there is jurisdiction  
12 and the assertion or lack of assertion on the part of an  
13 Applicant is not persuasive as to what the law is.

14 MR. LECKIE: No, but it is, your Honor, useful  
15 to us in determining what situations have come up. For  
16 example, a situation where Applicant has been asked to inter-  
17 connect and coordinate with another system -- even though it  
18 may be jurisdictional with the FPC, it may have claimed at  
19 that time that the jurisdiction did not amount to -- was not  
20 sufficient to authorize the FPC to give particular relief.

21 CHAIRMAN BENNETT: What if they did claim and the  
22 FPC said no? It is sufficient. Suppose it went to the  
23 Supreme Court and the Supreme Court agreed? What relevancy  
24 to this proceeding has the fact that the Applicant took a  
25 particular position? That is what I have difficulty with.

1 MR. LECKIE: There are many such assertions of  
2 jurisdiction or lack of jurisdiction that never go to trial,  
3 never come to a determination by the Federal Power Commission  
4 or a state agency or the Supreme Court. It is merely a state-  
5 ment in a filing by the Applicant to the particular commission  
6 and it never goes beyond that. It is just accepted for filing.  
7 There is no court decision or --

8 CHAIRMAN BENNETT: Isn't this statement all in  
9 the public utility file of the commission?

10 MR. LECKIE: Yes, all of the filings are available  
11 in the commission files, state or federal.

12 CHAIRMAN BENNETT: Why should we require the  
13 Respondent to produce these things if you have them already?  
14 Or if they are available already?

15 MR. LECKIE: We don't have them available already,  
16 your Honor. We believe the Applicant can give us a list  
17 using sampling of documents as to what specific situations  
18 they have made filings asserting nonjurisdiction.

19 CHAIRMAN BENNETT: I am worried about the 13th  
20 amendment to the Constitution now.

21 MR. LECKIE: Excuse me, your Honor?

22 CHAIRMAN BENNETT: Involuntary servitude. You  
23 will forgive me from time to time if I joke a little bit,  
24 but I find these hearings get so tense and people concern  
25 themselves so. I am teasing you on that one. Forget it. I

1 never tease people if I dislike them, so don't concern yourself  
2 with that.

3 (Laughter.)

4 I am disturbed about your seeking discovery of  
5 really an ambiguous situation; when you are trying a lawsuit,  
6 you take a position and that position may be contrary to the  
7 law of a particular time. Is that statement of any probative  
8 value as to whether their action is inconsistent with the anti-  
9 trust laws?

10 MR. LECKIE: Your Honor, we are not claiming it is  
11 of probative value. It is a lead to evidence.

12 CHAIRMAN BENNETT: What is the evidence that you  
13 are looking for?

14 MR. LECKIE: Evidence as to where specifically the  
15 federal and state regulatory agencies have taken jurisdiction  
16 over particular matters concerning Applicant. Applicant is  
17 going to raise the -- has raised the question of pervasive  
18 regulation. We want to be able to come back and show that the  
19 regulation is not in fact so pervasive, that there is room for  
20 the antitrust laws to operate. We feel this will help us do  
21 so if we know the limits of the regulations.

22 CHAIRMAN BENNETT: And you feel that -- you indicate  
23 you want samples of statements with no time limit?

24 MR. LECKIE: Applicant objects to producing docu-  
25 ments asserting or denying federal jurisdiction prior to 1965.

10  
1 That was the Colton case.

2 CHAIRMAN BENNETT: Yes.

3 MR. LECKIE: We are saying there is a possibility  
4 of a situation having arisen where the Applicant may have  
5 filed prior to the Colton case which would not have been --  
6 which the Colton case would not have changed or would not  
7 have applied to. With the Colton case, that case said that  
8 the companies were subject to federal jurisdiction, but there  
9 may have been many instances of filing with the Federal Power  
10 Commission prior to Colton on specific matters where Colton  
11 would not have mooted what the company had said before.  
12 That is why we ask for material on the federal side prior to  
13 '65.

14 Thank you.

15 MR. STOVER: There are a couple of small points  
16 that might be added here. The document request number 30 is  
17 not addressed solely -- and I don't think Applicant has read it  
18 as being addressed solely -- to documents that have been for-  
19 warded to a regulatory commission. And there is also the  
20 situation which I think could very realistically arise where  
21 a wholesale customer, for example, or a -- say a wholesale  
22 customer writes to the company and says, "We would like an  
23 additional delivery point. Will you give it to us on mutually  
24 agreeable terms, because if not, we may feel that we have to  
25 take it to the Federal Power Commission under Section so-and-so."

1 CHAIRMAN BENNETT: They will say the Federal Power  
2 Commission has no jurisdiction.

3 MR. STOVER: Yes, one, we will not give it to you;  
4 and, two, the FPC will never make us do it. That may never  
5 go to the FPC to be decided. So there are cases where it  
6 does not necessarily come up to the five gentlemen at the FPC  
7 to make a decision.

8 CHAIRMAN BENNETT: Are you saying that by mis-  
9 interpreting the law in this respect they are extending their  
10 monopoly? Is that your theory? I am trying to get the theory  
11 of all of this.

12 MR. STOVER: There can be a situation in which  
13 by resisting the application in this way of a regulatory  
14 statute they discourage the growth or the expansion of the  
15 operations of systems that compete with them at retail.

16 CHAIRMAN BENNETT: But the other man still has  
17 the right to go to the commission to find out whether he is  
18 right or wrong, doesn't he?

19 MR. STOVER: He has the right, yes.

20 CHAIRMAN BENNETT: You say the fact they take this  
21 position, knowing it is wrong, gives him in effect an added  
22 lever which he is using to create more monopoly power to  
23 himself? Is that your theory?

24 MR. STOVER: I think that is a reasonable position,  
25 yes, sir.

1 CHAIRMAN BENNETT: All right. I get your point.

2 MR. STOVER: There is one other small point I  
3 would like to bring up on the company's objection. They  
4 have drawn a distinction in their filing of objections under  
5 this heading between documents that assert that the Applicant  
6 is subject to a particular class of jurisdiction, and those  
7 that assert that it is not. They have asked the Board to  
8 strike request 30.

9 I am quoting now: "Strike request 30 to the  
10 extent that it includes assertions that Applicant is subject  
11 to federal or state regulatory jurisdiction."

12 I think, your Honor, that this is not a realistic  
13 distinction to make. Very often when somebody in a position  
14 of a regulated company is asserting that it is subject, for  
15 example, to jurisdiction of North Carolina Utilities Commis-  
16 sion, what it is really saying is that we are not subject to  
17 federal jurisdiction. We refer to the Colton case where --

18 MR. TUBRIDY: You mean they are not, or certain  
19 activities they engage in are not? One doesn't exclude the  
20 other.

21 MR. STOVER: Yes, but as to such and such an activity.

22 MR. TUBRIDY: All right. There is a difference  
23 between what you said and what you really meant then. You  
24 said not subject to federal jurisdiction.

25 MR. STOVER: I should have said activities, that

1 is what they have said here, and that is what the document  
2 request refers to. But to pitch it on the piece of paper here  
3 that we are or are not subject is an exultation of  
4 error over substance as far as the request is concerned.

5 CHAIRMAN BENNET: Mr. Avery, do you want to answer?

6 MR. AVERY: Yes, I do, Mr. Chairman. Particularly  
7 I want to since Mr. -- as you know, Mr. Stover did not file  
8 the document in response to our objections and we are hearing  
9 their arguments for the first time here this afternoon.

10 CHAIRMAN BENNETT: Well, the Justice Department  
11 pretty well covered the waterfront.

12 MR. AVERY: Except I don't think the Justice  
13 Department raised the points Mr. Stover has just raised.  
14 Basically, your Honor, our objection -- first of all, it is a  
15 limited objection. We have tried to be reasonable on this and  
16 we tried to suggest an alternative route. What we think here  
17 is that they are trying to kill a fly with a sledge hammer.  
18 There is a reasonable way to go about getting this information  
19 that might be helpful, but instead of taking a reasonable  
20 approach, what they have done is ask us to undertake a rather  
21 exhaustive search of everything we filed with any regulatory  
22 agency, or indeed our entire files, to see every time we have  
23 ever talked about the jurisdiction question.

24 When you press them, as we did in our objections,  
25 and as you did in your questions, you find that they are



1 really looking for something else. They are trying to focus  
2 on certain specifics in which jurisdiction might be, or the  
3 lack of it might be germane here. I think frankly that a  
4 denial of this request and an indication they could pursue  
5 this by appropriate interrogatories, which they still have  
6 the right to do, would really be the sensible way to solve  
7 this problem.

8 They can then focus more narrowly in on the  
9 information they are interested in, apparently.

10 Now, turning to some of the things Mr. Stover  
11 said. He was discussing the possible use of jurisdictional  
12 assertions in negotiations. Well, the example he specifically  
13 quoted, we are not objecting to because he talked about  
14 an example where an assertion was made of a lack of jurisdic-  
15 tion, and as he later pointed out our objection goes only to  
16 documents in which there is an assertion that jurisdiction does  
17 exist. An objection which we make because it will pick up a  
18 great mass of totally useless material.

19 CHAIRMAN BENNETT: That argument is pretty good,  
20 Mr. Avery, to the extent that you assert one has jurisdiction,  
21 maybe that is to the exclusion of the other.

22 MR. AVERY: I really don't think that's true. I  
23 think that -- that technically may be true, but again I  
24 think they are asking us to go through a great mass of material  
25 possibly looking for -- I don't know whether any of them

1 exist. It is all conjecture. It is pure fishing. There is  
2 no indication whatever that anything like this exists.

3 But putting that aside, rather than let them do it  
4 in this way, it seems more sensible to deny this request.  
5 They indicated in their answer to our objection that they  
6 were really interested in our position as to jurisdiction where  
7 the subject of that jurisdiction is at issue. We have no way  
8 of knowing what is at issue. They have not told us as to where  
9 they disagree.

10 CHAIRMAN BENNETT: Isn't this all a legal question?

11 MR. AVERY: That was my next comment. I was saving  
12 that for my smash finale. They are not asking -- discovery  
13 ought to be directed toward evidentiary material in any event.  
14 They are not asking for that. They are asking for debating  
15 points in a brief. They want to have --

16 CHAIRMAN BENNETT: On the other hand, they seem to  
17 suggest that maybe there is a situation where the Applicant  
18 said to somebody, "We are not subject to South Carolina  
19 jurisdiction in this regard," and thereby got these people to  
20 agree to something they would not have otherwise have done,  
21 had the other party realized that they did have that right.  
22 Now it is a question of mistake of law.

23 MR. AVERY: We have not objected to that. If that  
24 is the document they are looking for, we have no objection.  
25 We are objecting to the blanket request to every document

1 which we assert jurisdiction does exist. If that document  
2 exists that you speak of, sir, we will furnish it. We have  
3 no objection.

4 As to the broader request, I think another way of  
5 going about it is much more sensible, to let them --

6 CHAIRMAN BENNETT: Let me go to something. Isn't  
7 that satisfactory to you, really? He agrees that you --

8 MR. STOVER: Your Honor, Mr. Avery says they have  
9 not objected to the production of denials of jurisdiction,  
10 but that is -- isn't it true that the company has objected --

11 MR. AVERY: To pre-1965, yes. I apologize. We  
12 are objecting to pre-1965 federal assertions, because of the  
13 Colton case, and the arguments spelled out in our brief.  
14 I won't take your time to repeat it.

15 CHAIRMAN BENNETT: It seems the Colton case is a  
16 pretty good argument. Isn't -- at that time there was a  
17 question as to whether or not they were subject to the juris-  
18 diction of the Federal Power Commission in that respect.  
19 Right? The wholesale rates, that is?

20 MR. STOVER: There was a question as to wholesale  
21 rates.

22

23

24

1 CHAIRMAN BENNETT: You can't hang somebody for  
2 taking a position where the law is not clear, can you?

3 MR. STOVER: You cannot perhaps criticize someone in  
4 1964 for taking a position similar to the one the Court of  
5 Appeals took in the Colton Case which was opposite as I recall,  
6 to the Supreme Court's position. But I think Mr. Leckie's  
7 point was that the Colton Case decided only really the one thing.

8 The Colton case did not dispose of all the possible  
9 questions as to the authority of the FPC to order connections under  
10 Section 202 of the power acts. Some of those questions --

11 CHAIRMAN BENNETT: They didn't dispose of the Wheeling  
12 proposition in that case, either, did they?

13 MR. STOVER: No. Mr. Avery's objection as I understand  
14 it though, would eliminate from the discovery all denials of  
15 jurisdiction, of federal jurisdiction, of whatever activity, prior  
16 to Colton. He will correct me, I am sure, if I am wrong but  
17 that is the way I read his objection.

18 CHAIRMAN BENNETT: Here is the point, Mr. Avery.  
19 Suppose it is a wheeling situation and you denied that the  
20 Federal Trade Commission or the Power Commission had jurisdic-  
21 tion. You would have been right.

22 MR. AVERY: Yes, sir.

23 CHAIRMAN BENNETT: If Federal Power Commission said  
24 they didn't have jurisdiction.

25 MR. AVERY: Yes, sir. The point that I wanted to make

1 on that was Mr. Leckie said he was looking -- you asked him  
2 why he was looking for the assertion as to federal  
3 jurisdiction pre-Colton. He said because then we will know the  
4 cases in which they asserted lack of jurisdiction and we can  
5 look at those cases. If that is all they want, why don't they  
6 ask us in interrogatories as to what filings we made at the  
7 FPC prior to 1965 with regard to these things.

8 CHAIRMAN BENNETT: Is that satisfactory to you?

9 MR. AVERY: Then we can answer a properly framed  
10 interrogatory. But to ask us to make this tremendous file  
11 search and to go through all these files to read every  
12 document we ever filed with a regulatory commission to see if this  
13 is --

14 CHAIRMAN BENNETT: You are saying this is burdensome  
15 and you will be happy to give them the other thing?

16 MR. AVERY: We are saying it is not evidentiary  
17 material they are seeking. The burden argument is the  
18 pragmatic approach you mentioned this morning. What I am  
19 saying to the extent there may be some relevant information  
20 in this area that they could seek. There's a better way to  
21 go about seeking it, to use interrogatories which focus  
22 sharply on the specific facts they are interested in. If you  
23 deny this request and indicate they can pursue the information  
24 through an appropriately drawn interrogatory, they will end up  
25 with the information they need but we won't have to go

1 through an essentially meaningless exercise.

2 CHAIRMAN BENNETT: What do you say to that, Mr.  
3 Leckie?

4 MR. LECKIE: We are not asking only for filings with  
5 the FPC or other agencies, we are asking for documents wherein  
6 assertions of this type were made. So their filings would  
7 not do the job.

8 CHAIRMAN BENNETT: Why not. If you have the filings  
9 that they made, then you now know in what proceedings you can  
10 look at the actual record, don't you?

11 MR. LECKIE: We do for certain proceedings where  
12 one filings resulted in a proceeding. But in many cases, the  
13 filing doesn't result in a proceeding and in many cases, the  
14 filings are never made.

15 CHAIRMAN BENNETT: The Federal Power Commission doesn't  
16 keep records like that?

17 MR. LECKIE: The Commission keeps records of filings,  
18 yes, your Honor, but not of assertions of jurisdiction.

19 CHAIRMAN BENNETT: But not of assertions to some other  
20 person like a wholesaler?

21 MR. LECKIE: That is correct. We asked for  
22 samples of such a -- excuse me, of such assertions in this case.  
23 We were not asking for anything more than really what Applicant  
24 could provide if we did it in interrogatory form. We felt  
25 the document request form using samples based on discussions

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1 with Applicant would suffice. We felt it would not be any more  
2 burdensome than subsequently furnishing interrogatory answers.

3 MR. AVERY: Could I have a moment or two, Mr.  
4 Chairman?

5 MR. TUBRIDY: What do you intend to prove with that  
6 information, Mr. Leckie?

7 MR. LECKIE: We intend to counter assertions on the  
8 part of the Applicant as to pervasiveness of its regulatory  
9 jurisdiction.

10 MR. TUBRIDY: Based upon the fact that what they  
11 say in there was erroneous. They made no proper claim to the  
12 assertions contained in that document?

13 MR. LECKIE: Your Honor, based on the fact, it is  
14 likely that Applicant isn't being specific enough when he claims  
15 pervasive regulatory jurisdiction before you.

16 MR. TUBRIDY: In case they applied for what they  
17 didn't expect the law to be? Is that what you are looking for.  
18 I don't disagree with what you are entitled to, I am asking  
19 you what you are asking us to do.

20 MR. LECKIE: I am not sure I follow your question.

21 MR. TUBRIDY: If they misinterpret the law, are  
22 you going to put that in evidence against them for us to find  
23 something improper with that, we will have to find mala fide.  
24 It wasn't a bona fide operation. It wasn't an honest mistake.

25 MR. LECKIE: This was mentioned by Mr. Bennett and by

1 Mr. Stover, the possibilities of using monopoly power and of  
2 making an assertion of regulatory jurisdiction or the lack thereof,  
3 knowing it to be false for lack of better purposes. This wasn't  
4 what I had in mind at the time I prepared the answer of ours to  
5 the Applicant's objections.

6 We were thinking of being able to specify, where  
7 the jurisdiction is and where it isn't and who has it. We feel  
8 this will help us do so, not so much to say that the Applicant  
9 is telling a different story now. That isn't our point. Our  
10 purpose is to delimit where the jurisdiction is and who has that.  
11 There is no malfeasance involved in this request.

12 MR. TUBRIDY: I see.

13 MR. RYEDY: I will take one more moment, Mr.  
14 Chairman, Mr. Tubridy's question really covered the first  
15 point I wanted to be sure was in here. That is, our basic  
16 contention is that this does not seek  
17 evidentiary material, it is not probative of anything. To the  
18 extent you will have to determine the argument of pervasive  
19 jurisdiction, you will do it on the basis of your exercise of  
20 judgment looking at the applicable precedents and statutes  
21 and what we may have said before will just have nothing to do  
22 with the decision of that question.

23 I don't want to have that basic question lost track  
24 of. The only other point was on the sampling question. I  
25 want to again emphasize that this so-called sampling is really



1 an impossibility because if you look at their answers, they are  
2 saying give us samples in those areas where regulatory jurisdiction  
3 is at issue. We don't know what is at issue and we couldn't  
4 possibly sample.

5 Frankly, it was that suggestion that led me to -- in  
6 reading their responses -- to think what they are really  
7 talking about is an interrogatory. They are trying the sampling  
8 technique really to turn a document request into an interrogatory,  
9 in effect, it is asking a question.

0 I really think the way to handle this is to deny this  
1 request and let them frame interrogatories and let us  
2 struggle with them and see what we can do.

3 MR. TUBRIDY: Before the Attleboro case you had  
4 a decision that the state could regulate even though you have  
5 an ICC. Then you have one customer out of how many thousands.

Suddenly, the whole scheme is pushed aside. Suppose  
some matter came up where a lawyer made an advice, now this is  
the law. The next day the thing is up in the Supreme Court  
and that isn't the law. How do you expect people advising  
in an operation of this kind where it is very fluid, extremely  
fluid, you try to find out what is ICC and what is not and you  
find out you sold to a customer who puts it into Interstate  
Commerce. Your product went on so these implications attach.

How are you going to expect people trying to direct  
and instruct what the operational law will be in this connection

1 and say oh, we did it wrong. But I think you will have a  
2 difficult time showing when there was something wrong honestly  
3 made under no real guidelines, and in fact, the law changes --  
4 I don't know what you are going to be able to get with it  
5 frankly.

6 MR. LECKIE: Your Honor, we are really trying to ascer-  
7 tain the various situations in which regulatory jurisdiction was  
8 claimed or denied. From those situations, we will be able  
9 to develop our defense to the pervasive regulation claimed.

10 CHAIRMAN BENNETT: Maybe we should see what the  
11 pervasive regulation claim is. Actually, in practice what is  
12 it.

13 MR. LECKIE: That is a possibility, your honor,  
14 but discovery will be cut off in this proceeding --

15 CHAIRMAN BENNETT: Not necessarily, we can order dis-  
16 covery at a subsequent time, I suppose.

17 MR. TUBRIDY: Could you give us some idea of how  
18 extensive -- how much of a burden answering this problem would  
19 be?

20 MR. AVERY: Well, you see, if you look at the  
21 request which is set out in full, either in the document or  
22 you can find it at page 16 of our objections --

23 CHAIRMAN BENNETT: Page 20 of the document.

24 MR. AVERY: All right.

25 They ask for documents and that is broadly worded.

1 MR. TUBRIDY: Page 30, you mean.

2 MR. AVERY: It requires a full file search but perhaps  
3 the most burdensome part is we would have to look at every single  
4 filing we have ever made with a regulatory commission.

5 MR. TUBRIDY: I read that Jersey case up there, they  
6 shipped seven-tenths of a mile, used one line, consolidated,  
7 got it and they sent excess back, and because it was  
8 excess they could use the overflow and because the  
9 purchaser from Jersey Central put it in Interstate Commerce,  
10 they were subject to filing with the ICC and subject to the  
11 ICC Act because their customer sold it.

12 If you had asked any lawyer, are you subject to  
13 the ICC, he would have said no, no. Who would ever  
14 think if you sell it to the customer and he puts it in ICC,  
15 you are under their jurisdiction?

16 MR. AVERY: You have raised two points in your  
17 comments, Mr. Tubridy; your first question had to do with  
18 burden. There would be some but our objection is not really based  
19 on that. Our objection is based on relevance and that brings  
20 us to the second point you made that any such assertion will  
21 have very little probative value, in fact, no probative  
22 value. Therefore, it is not relevant and discoverable.

23 CHAIRMAN BENNETT: Gentlemen, we have discussed this  
24 both yesterday and today and it is our feeling here that  
25 the request itself is extremely broad and we also considerably

doubt the relevancy and we feel, in addition to that, that jurisdiction is primarily a question of law here rather than a question of fact.

So, we are going to deny your request without prejudice in the second round to you being more specific. I don't know whether that is helping you or not. I understand the next problem is duplicate tax returns have been withdrawn, the request has been withdrawn.

For the specific federal power proceedings, what do you really want about that? It seems to me what you are asking for is a review of something that the Federal Power Commission has done.

MR. BOUKNIGHT: Judge Bennett, that is absolutely not what we want.

CHAIRMAN BENNETT: All right, what do you want?

MR. BOUKNIGHT: Here is what is going on over there. No. 1, on the rate case, Docket E7702, we want -- we consider that that case is a pricing effort. We say here that Duke's pricing is at the very heart of this proceeding and that we want to know the intent behind that pricing effort. This is the only place that we have to find that out. The Federal Power Commission has told us in the last case we were involved in over there that if we don't like the relationship between Duke's wholesale and retail rates, we can go to the North Carolina Commission and complain about it. Well, we are here

for that purpose and we are here complaining that this company has for years pursued a policy of pricing to these wholesale customers vis-a-vis the retail-industrial customers in North Carolina which removes us from competition for those wholesale customers, for those retail customers. The fact that they filed the proceeding at the Federal Power Commission is a matter of public record.

If some documents appear in response to this request that show that Duke considered before filing this proceeding whether to file first as to the wholesale customers or the retail-industrial customers and if a memorandum comes back, and here I use my imagination, I have no idea what is there -- if a memo comes back saying let's file first against the wholesale customers because there we can tighten their competitive situation then that says a lot about everything Duke has done in this proceeding and it says a lot about that pricing effort that won't appear on the face of Federal Power Commission proceedings.

CHAIRMAN BENNETT: Then what you want is any inner-office memorandum in the files of this company regarding the filing of this particular proceeding as to whether or not it will have an effect on competition.

MR. BOUKNIGHT: Yes, sir.

CHAIRMAN BENNETT: Both of those have to be there, one, an inner-office memorandum regarding the filing of this

1 particular proceeding in which there is a statement made of the  
2 effect of this filing on competition -- .

3 MR. BOUKNIGHT: Your Honor, I would hesitate on the  
4 inner-office memorandum requirements. It may be minutes of the  
5 meeting of some committee within the company.

6 CHAIRMAN BENNETT: I regard that as an inner-office  
7 memorandum. A report or something of that nature.

8 MR. BOUKNIGHT: That they knew --

9 CHAIRMAN BENNETT: With that is there any objection  
0 to that request?

1 MR. AVERY: Is that the position of the Justice  
2 Department as well?

3 CHAIRMAN BENNETT: It is my understanding that he  
4 was speaking for both.

5 MR. LECKIE: Yes, it is, your Honor.

6 MR. AVERY: We have already agreed to do that. We  
7 have modified Question 4 (g) in our discussions to read as follows:

8 "We agree to produce documents relating to 1, the intent for  
9 which rate levels or designs were initiated or maintained or  
0 2, the contemplated effect of those designs and we have agreed  
1 to do it and we are assembling those documents."

2 CHAIRMAN BENNETT: That is moot then.

3 MR. BOUKNIGHT: Very fine.

4 MR. AVERY: Do we have it understood the rest of  
5 that objection is sustained though, Mr. Chairman, because that

request was much broader than that. It asks for all documents.

CHAIRMAN BENNETT: I asked him what he wanted and he told me.

MR. BOUKNIGHT: That is to half of No. 8. There is another half. We are satisfied as to that half and we understood that in spite of the accommodation on 4-G to which Mr. Avery refers, that I objected to any mention of the present Federal Power Commission Docket. Since that is not the case, we are happy on that half of No. 9.

CHAIRMAN BENNETT: Then you are through.

MR. BOUKNIGHT: On that half, yes.

CHAIRMAN BENNETT: Give us the other half.

MR. BOUKNIGHT: The other one is the Green River Hydroelectric proceeding. Maybe I can tell you what has been going on. Since EPIC filed for the pump storage project about two years ago, the first thing that met us in addition to the blocks the power company finds between it and the hydro project was an effort to declare a certain position of it to be a scenic river under a new North Carolina Scenic River Act. That specific portion of the river which would have been declared scenic was between two hydroelectric projects operated by Duke and would have encompassed the dam site of our present project.

We think that is one of the specific types of efforts to influence legislation which is not broad and which might lead

1 us to some of the intent of other things that have happened  
2 here. The next thing that occurred in the Green River Valley  
3 was that the site of our proposed principal dam was purchased  
4 from a farmer by another landowner in that area, the  
5 Duke Power Company. Since that date, we have had to secure the  
6 permission -- EPIC has had to secure the permission of Duke  
7 to go on that land on each occasion for those studies contemplated  
8 by the Federal Power Act.

9 All in all, we think Duke's activities about that site  
10 and Duke's activities in litigating against that site have  
11 shown a very definite intention and some overt acts to remove  
12 us from ability to generate electric power and from ability  
13 to construct any type of project.

14 Now, the litigation aspects of it -- we, of course,  
15 have a sham exception in the Nore-Pennington Doctrine. Duke  
16 Power's intent in instituting the litigation -- Duke Power's  
17 plans to plan further harrassment of that project in the Green  
18 River Valley we think would be relevant here. Plus Duke Power  
19 Company in its petition to the Federal Power Commission  
20 there promised to oppose any application by these cities  
21 to build any type of project and we think that that includes  
22 both the vexatious litigation which the court in the Otter  
23 Tail case held was a per se violation of the Sherman Act.

24 Plus it contains a promise by Duke that regardless  
25 of the merits of the litigation, regardless of whether there are



1 substantive issues before any body or whether there are not,  
2 whether it is simply a sham, that we will still see Duke there  
3 oppoing us. We think documents backing up this are very  
4 specific and have relevancy to this inquiry.

5 CHAIRMAN BENNETT: Just what type of documents do you  
6 want?

7 MR. BOUKNIGHT: We would love to find a statement  
8 in Duke's internal memoranda or Board of Directors meeting  
9 of the executive committee or so on, explaining how they came about  
10 to buy this land in the Green River, what their intent was  
11 in buying the land, explaining their intent in entering this  
12 litigation.

13 Mr. A said something this morning that Duke had  
14 promised only to oppose us in proceedings which we  
15 commenced rather than commence proceedings against us. We all  
16 know anybody who wants to build an electric project has to commence  
17 proceedings for approval.

18 I think that is no approval.

19 MR. FARMAKIDES: When you say we, who are you  
20 talking about.

21 MR. BOUKNIGHT: About municipalities.

22 MR. TUBRIDY: You said ownership of land, who owned  
23 it?

24 MR. BOUKNIGHT: A farmer owned the land.

25 MR. TUBRIDY: I thought you said we owned the land.

1 MR. BOUKNIGHT: No, the farmer owned the land and  
2 Duke purchased it from them.

3 MR. TUBRIDY: All right. I am sorry. I misunderstood.

4 CHAIRMAN BENNETT: What you want then is any internal  
5 memorandum, report, anything of that nature that is inside  
6 the company which expresses the intent under which these  
7 proceedings are being brought or by reason of why these are  
8 brought?

9 MR. BOUKNIGHT: I will agree with that with one  
10 qualification, that is sometimes papers which show an effect  
11 which obviously is anti-competitive also show intent. I  
12 don't think that a piece of paper saying let us purchase the  
13 farmer's land in the Green River Valley --

14 CHAIRMAN BENNETT: Because this will have the effect  
15 of cutting off the EPIC?

16 MR. BOUKNIGHT: I think it would have to have all  
17 that.

18 CHAIRMAN BENNETT: Well, I don't think it would have  
19 to either. Anything that indicates attempt.

20 MR. BOUKNIGHT: Yes, that is all we are after.

21 CHAIRMAN BENNETT: What do you have to say to that,  
22 Mr. Avery?

23 MR. AVERY: I think Mr. Bouknight has done an  
24 excellent job of proving our point with regard to this  
25 basic thing. The objection we have to this whole area basically

1 is that they are seeking to relitigate a case that is being  
2 tried in the Federal Power Commission before this agency.  
3 You asked him to first of all -- I think it was significant  
4 that Mr. Bouknight got up on this one, not Mr. Leckie, not  
5 Mr. Stover but Mr. Bouknight who is actively involved in that  
6 litigation. We think they are relitigating that matter in here  
7 and litigate here or do it simultaneously in two forums, or  
8 they are seeking to use this proceeding to assist them in their  
9 prosecution of their litigation in another forum, either of  
10 which seems to me are indefensible and in many degrees a  
11 waste of time of this Board.

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1 CHAIRMAN BENNETT: Now, wait a minute. If this  
2 is the situation in which the internal memorandum of Duke  
3 shows that this was not an honest attempt to compete or to  
4 deal with something that they needed to deal with but it  
5 was a definite attempt to extend their monopoly power, then  
6 how can you say that is irrelevant to this proceeding?

7 MR. AVERY: Well, you are conjecturing as to what  
8 the document says.

9 CHAIRMAN BENNETT: That is the only document we  
10 suggest that you be asked to produce. If there is no such  
11 thing, you say so.

12 MR. AVERY: Interestingly enough, your Honor, the  
13 principal thing that Mr. Bouknight talked about as far as  
14 intent was concerned was the purchase of the land.

15 CHAIRMAN BENNETT: All right.

16 MR. AVERY: I can't really believe it is a Farmer  
17 Brown, however.

18 There is another question that goes directly to that  
19 question 4-J of the joint document request. That asks for  
20 documents at the policy level of the company regarding the  
21 purchase by the company of land in the Green River Valley  
22 comprising a part of the proposed site FPC 2700.

23 We raise no objection to that request and we are  
24 prepared to answer it. So we think that that --

25 CHAIRMAN BENNETT: & what?

1 MR. AVERY: 4-J.

2 CHAIRMAN BENNETT: Thank you.

3 MR. AVERY: It is on page 7, Mr. Chairman.

4 CHAIRMAN BENNETT: Yes, I see it.

5 MR. AVERY: That is the question about Farmer  
6 Brown's land.

7 Where we get into problems is where we see them  
8 seeking to import into this litigation the issues that are  
9 being tried simultaneously in another forum and we feel that  
0 that is a very important line and we should press it. That  
1 is the reason for my continuing this.

2 CHAIRMAN BENNETT: Aren't you going to get that  
3 material you want right in that?

4 MR. BOUKNIGHT: No, sir, that case is in abeyance.  
5 EPIC has been permitted a temporary permit to study the site.  
6 I don't think these things can turn on whether they were  
7 successful. In that case EPIC was fortunate enough to get  
8 the permit over Duke's objection. But nevertheless it is  
9 one act in what is apparently going to be a long line of overt  
0 acts to stop EPIC to generate power to these cities.

1 There is nothing going on in the FPC on this case  
2 right now.

3 CHAIRMAN BENNETT: But he says he will give you the  
4 information of the internal reports of the Duke Company  
5 having to do with the purchase of the land. This is one of

1 things that you are complaining about here.

2 MR. BOUKNIGHT: Right. That satisfies that as far  
3 as it goes.

4 There are other things we want. We want to know  
5 about the Scenic Rivers Act, too. We want to know if the Act  
6 I mentioned a few moments ago --

7 CHAIRMAN BENNETT: You mean this application they  
8 made to the legislature?

9 MR. BOUKNIGHT: We don't know who made the appli-  
0 cation to the legislature.

1 CHAIRMAN BENNETT: In any event there was some-  
2 thing in the legislature that passed the Scenic Rivers  
3 Act; is that right?

4 MR. BOUKNIGHT: That finally was passed but it  
5 did not include the Green River at the time. When proposed,  
6 it did include the Green River. I believe the Act was passed.  
7 I am not certain whether a Scenic Rivers Act was in fact passed  
8 but the Act pinpointing this particular site as a scenic river  
9 on which no hydroelectric development was to be pursued was  
0 introduced in the legislature of North Carolina. It was  
1 introduced as a result of one of the commissions appointed by  
2 the governor making a recommendation.

3 If Duke Power Company had a great deal to do with the  
4 recommendation made by that commission, then we submit that  
5 that is the kind of very specific anticompetitive activity

1 which goes right to the point of the intent of Duke's  
2 activities.

3 CHAIRMAN BENNETT: On the other hand, isn't that  
4 the very thing which this company has the right to do to appeal  
5 to a legislature or appeal to a commission?

6 MR. BOUKNIGHT: Your Honor, we agree they have the  
7 right to do that and we are not here trying to stop them from  
8 doing it or enjoin them from doing it as was done in the Noerr  
9 and Pennington cases. We are trying to take their action in  
doing it and put it before you and say it sheds a certain  
light on some other things this company is doing.

We think it is certainly discoverable for that  
reason. So we have the Scenic Rivers Act next.

The third thing is the intent which led to this  
litigation that Duke instituted or that Duke intervened in  
concerning the Green River project. We think that that liti-  
gation may well fall within the sham exception of the Nore  
case.

CHAIRMAN BENNETT: I thought we decided in one of  
the other requests that political activity and litigation  
activities, that so far as this request was concerned, without  
prejudice was sustained to your renewing your objection or your  
request after we get a decision in some of these cases before  
the Supreme Court so we will know what the law is on the  
subject among other things?

1 MR. BOUKNIGHT: Perhaps --

2 CHAIRMAN BENNETT: Why isn't that the answer to  
3 this at this time?

4 MR. BOUKNIGHT: Perhaps I misunderstood the ruling  
5 of this morning. My feeling on the timing of the Supreme  
6 Court case is that there is very little chance that we are  
7 going to get a decision on the Otter Tail case before  
8 hearing in this case.

9 I had understood -- perhaps incorrectly -- that  
0 we would have the opportunity through deposition or through  
1 more specific requests to pinpoint and to show the relevancy.

2 CHAIRMAN BENNETT: That is right. That may be adequate  
3 if you can show the relevancy.

4 MR. TUBRIDY: Are you familiar with the litigation  
5 at the FPC?

6 MR. BOUKNIGHT: Yes, sir.

7 MR. TUBRIDY: How far has that progressed?

8 MR. BOUKNIGHT: In this project?

9 MR. TUBRIDY: I don't know anything about it so I  
0 can't answer that.

1 MR. BOUKNIGHT: The way the licensing procedure  
2 works at the FPC, you come in and make application for a  
3 preliminary permit; if you are granted that permit, it gives  
4 you a right, something of a priority in asking for a license  
5 some three years down the road. During that three years you



1 are supposed to spend your time studying the site, seeing if it  
2 is a feasible site, report to the FPC regularly on the results  
3 of your studies.

4 After three years, if the holder of the permit  
5 decides that it wants to apply for a license on this property  
6 then it can come into the FPC and file all the very detailed  
7 things that it has to do to get a hydroelectric license. The  
8 purpose is to keep people from having to file full licenses  
9 applications before they find out the reservoir will hold water

10 There have been many cases of utilities going into  
11 projects like this and finding geologically it simply wouldn't  
12 work. You can't go on Farmer Brown's land or Duke's land or  
13 anybody else's so long as you are just an interested citizen.  
14 You have to go to the Federal Power Commission and get this  
15 preliminary permit, then you have certain rights and you can  
16 justify some investment. So that permit has been granted.

17 EPIC is performing the studies.

18 MR. TUBRIDY: EPIC will be the recipient of the  
19 license?

20 MR. BOUKNIGHT: Yes. EPIC is now pursuing the  
21 studies, EPIC along with -- EPIC is the recipient of the  
22 license. It is about half way through the study stage under  
23 this preliminary permit, therefore litigation at the FPC  
24 has lapsed for the moment.

25 Should EPIC or any successor to EPIC decide to apply

for a license in a very few years then we may have litigation before the FPC on whether or not a nonprofit corporation in North Carolina can do what EPIC wants to do.

But all of those will be questions of substantive law as to whether a nonprofit corporation can build a certain plant. What we are trying to focus on here is Duke's overall course of conduct in hounding, harassing and vexing anyone who would do such a thing at every forum that it can get into. This is, we think, a very specific case of that hounding. That is the way -- the way I understood the ruling this morning. I thought if we could focus on specific instances where there was no question of shing, no question of a chilling of Duke's overall rights to deal with the government on a day-by-day basis but to ask Duke why you instituted this particular litigation against this particular Applicant at this time. I thought we were free to do that.

MR. AVERY: May I have just a moment, Mr. Chairman?

CHAIRMAN BENNETT: Yes.

MR. AVERY: I should note for the record our complete disagreement with Mr. Bouknight's factual characterizations of what is going on in that case. I frankly am not completely familiar with it.

Mr. Watson, my colleague, is more familiar. He tells me that Mr. Bouknight's account of the case and Duke's position and his industry --

CHAIRMAN BENNETT: Is quite an exaggeration for the purpose of interest.

MR. AVERY: Well, I think you can get the flavor of that by his characterization. We come in and exercise our rights, which we have the right to do, in one case fore the FPC and raise issues and all of a sudden -- which we are not successful in. They get their permit. All of a sudden we are a vexatious litigator blocking them at every turn.

CHAIRMAN BENNETT: All right.

MR. AVERY: I just want to note for the record that we completely disagree with his characterization of our behavior and we again -- I think his account of it and what lies down the road clearly shows they are trying to use discovery here to arm themselves to litigate that case over there.

They can do it over there, you don't have to worry about it here.

CHAIRMAN BENNETT: I don't think that really makes too much difference, Mr. Avery. It seems to me this is a very specific request for any documents that relate to the purpose or intent which you people have on this particular proceeding. I think that they are entitled to have it.

I don't say we are going to admit it when they get it. But I think this is sufficiently specific. In other words you can't say it is a fishing expedition.

MR. TUBRIDY: This is the difference. The issues

1 are not the same that are being developed there. The issues  
2 are whether your company exercises vexatious activities against  
3 the individuals in that proceeding. It is not a question of  
4 who should or who shouldn't have it or who is better or rose;  
5 it is a question of whether the methods were vexatious;  
6 harassing them so they couldn't be successful.

7 CHAIRMAN BENNETT: The purpose behind it, which your  
8 documents presumably would show. Maybe they don't. If they  
9 don't, there is nothing there.

0 MR. AVERY: Well, I have one comment on that.

1 You have to be very careful in that regard. I think Noerr and  
2 Pennington make it very clear that if your purpose is -- if  
3 you are a bona fide party pressing your case, that is you  
4 think you have a case that can be made against a course of  
5 action, you have the right to do that and the facts that it  
6 may also have a competitively advantageous effect for you does  
7 not make it a violation of the antitrust laws.

8 I am not really quarreling with what you are saying  
9 now, your Honor, except I want it clearly understood that our  
0 understanding of Nore and Pennington is that you don't say  
1 it is all of a sudden an antitrust violation because it might  
2 be competitively advantageous to us if we win the litigation.

1 CHAIRMAN BENNETT: When they get to the point of  
2 offering the evidence and you get to the point of objecting to  
3 it, that is a different matter. We think this is sufficiently  
4 definite a problem to inquire into it. The inquiry is limited;  
5 you know what they have in mind; there is or is not such a  
6 memorandum or report and if there is, we think it ought to be  
7 produced, if not, why it isn't there. Now this is not to  
8 say that this document can be used for anything other than  
9 this particular lawsuit because it cannot at this point.

10 We also do not say that we will receive this  
11 document in evidence. We are just saying they have a right  
12 to look at it.

13 MR. AVERY: All right, I understand that is your  
14 ruling that, in response to 6(p), we will be required to produce  
15 internal memoranda including minutes, which express the intent  
16 for which our participation before the FPC with regard to  
17 the Green River project was undertaken.

18 CHAIRMAN BENNETT: That's correct.

19 MR. AVERY: The only other comment I would make is  
20 that we will comply with that order, of course; but I would  
21 like to reserve the possibility -- I have not seen these  
22 documents. I don't know what is in them -- I would like to  
23 reserve the possibility -- I don't think it takes a ruling now,  
24 but I want to mention it in case so when it comes up -- if  
25 we look at those documents and we think that they have absolutely

1 no antitrust significance whatever, but that it would disadvantage  
2 our client within the litigation at FPC, it might be we would  
3 want to bring those documents to you, to the Board for your  
4 review.

5 CHAIRMAN BENNETT: And direct the use of those  
6 documents.

7 MR. AVERY: Yes.

8 CHAIRMAN BENNETT: If there is good reason for it  
9 and you show good cause, perhaps we could issue such an order.

10 MR. AVERY: I don't know whether that would happen,  
11 but I want to mention that in case that came up later.

12 CHAIRMAN BENNETT: Without objection, so far as you  
13 people are concerned, that's all right, right? If they can  
14 show this particular piece of paper has nothing to do with the  
15 antitrust proceeding, you can't take that and put it into  
16 some other proceeding.

17 MR. BOUKNIGHT: Yes, we know we can't do that.

18 MR. LECKIE: We would hope the documents indicating  
19 anticipated anti-competitive effect would be brought in.

20 CHAIRMAN BENNETT: I think we understand that that  
21 is within the term intention. May we now go to the other  
22 matter.

23 I see it is getting late in the afternoon. We  
24 would like to get into the other questions here, some of them.  
25 I think this deals with the motion by the Applicant which

1 1 regards the Justice Department and the Intervenors' joint  
2 request. We think that the notations which we have made here  
3 indicate what should be done with respect to it. If somebody  
4 requires a clarification, they may move to resettle what we  
5 have said by proposing an order to us. In other words, if it  
6 is not clear in any respect as to what we ordered you to do  
7 and you want to propose an order to be settled on the subject,  
8 send us a copy of your proposed order with a copy to the other  
9 side and we will take their comments back and forth. I don't  
10 think it is necessary -- I think it's been clear so far --  
11 but that is the means by which if a problem develops, we  
12 can get to that.

13 Now, the first question the Applicant has is that  
14 they ask for certain data with respect to other services.  
15 I believe there was an objection by the Applicant to it. Now,  
16 I wonder if in this instance -- the Applicant asked for it.  
17 I wonder if the Applicant could tell us just what they intended  
18 by that request.

19 MR. AVERY: Yes, Mr. Chairman. The interrogatories  
20 that are covered by the first heading of objections by the --

21 CHAIRMAN BENNETT: Roman I, yes, that one.

22 MR. AVERY: We are seeking in these interrogatories  
23 two types of information. First, information as to industrial  
24 development activities in areas which are served with municipal  
25 services other than electricity. And secondly, the statistical

1 data as to the provision of municipal services other than  
2 electricity.

3 Now the Intervenor, by their objecting, are  
4 seeking to limit our inquiries as to municipal services other  
5 than electricity to direct inquiries which are  
6 incorporated in our Questions 18 and 19 about possible time  
7 agreements. They are suggesting to the Board that the only  
8 thing we should be permitted to ask about is direct questions  
9 as to whether time exists.

10 We defend the relevance of the questions objected to  
11 on several grounds. First of all, we think it is relevant to  
12 the claimed inability, the claim of inability on the part of  
13 the Intervenor to compete with Duke for industrial customers.  
14 They say they cannot compete with us for industrial customers.  
15 We think that that claim makes the material we are seeking  
16 relevant. We want to look into the efforts that they make  
17 to attract industrial customers.

18 They would restrict the inquiries to the  
19 municipality's effort to seek customers for the electric  
20 system. Now, it seems very obvious to us that that could pre-  
21 sent a distorted picture. If you are looking only at the  
22 instances where they are seeking electric customers, you might  
23 get one picture of the importance which electric services  
24 place in the competition between various areas for industrial  
25 service. But if you look at the whole picture, if you look at



1 the total industrial development effort which a municipality  
2 undertakes, then you might get a very different picture as to  
3 the role of electrical service in that competition.

4 CHAIRMAN BENNETT: You are saying that even though  
5 you may have -- take the worst case -- suppose it is very clear  
6 to us that Duke delivered, went about setting up a situation  
7 whereby the prices on electricity wholesale to the municipali-  
8 ties was such that when compared with their retail prices  
9 to the municipality's prospective customers was such that it  
10 was too small to get a profit. Suppose it is established.  
11 Now you say, yes, but the municipality urged people to come  
12 in here by giving them sewers and all other sorts of things  
13 of that nature.

14 Now if you had done that, what defense is there --

15 MR. AVERY: That is not a point --

16 CHAIRMAN BENNETT: -- to you? That somebody else  
17 is doing something which might be advantageous.

18 MR. AVERY: That is the second point. That is a  
19 second heading under which it might be relevant. I would  
20 rather cover the first point first. We are -- the claim is  
21 made that they cannot compete effectively with us for  
22 industrial customers. They make the claim that they cannot  
23 do that because of the price squeeze, to use the shorthand  
24 phrase for what you are talking about. We are entitled to  
25 explore that claim as a matter of discovery and one thing is

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2 undertakes, then you might get a very different picture as to  
3 the role of electrical service in that competition.

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5 you may have -- take the worst case -- suppose it is very clear  
6 to us that Duke delivered, went about setting up a situation  
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22 industrial customers. They make the claim that they cannot  
23 do that because of the price squeeze, to use the shorthand  
24 phrase for what you are talking about. We are entitled to  
25 explore that claim as a matter of discovery and one thing is

1 just how is the decision made by industrial customers as to  
2 where to locate?

3 CHAIRMAN BENNETT: Does it make any difference if  
4 the industrial customer says, "We will have to pay more for  
5 electricity here, but there are a lot of other services  
6 these people can give us"?

7 MR. AVERY: The tie-in has nothing to do with it.  
8 We are trying to find out how decisions are made by industrial  
9 customers as to where to locate because that is germane to their  
10 claim that they are not making the decision to locate in  
11 their municipalities because of the price squeeze. Of course,  
12 the premise of your question is that the price squeeze exists  
13 and that, therefore, perhaps these other elements are irrele-  
14 vant, but we don't think it exists. We --

15 CHAIRMAN BENNETT: If it doesn't exist on none of  
16 this, none of it is relevant.

17 MR. AVERY: Unless they come in with evidence show-  
18 ing that we have tried to get industrial customers and they  
19 might even show that the company itself had a long five-year  
20 effort to get that company and they could make the claim that  
21 is because of the electric rate difference.

22 CHAIRMAN BENNETT: They could make the claim, but  
23 they would have to establish that.

24 MR. AVERY: That's right. But we don't know what  
25 they will do. We want to know now; this is discovery; we

1 want to know the total picture, how they go about trying to  
2 get industrial customers.

3 CHAIRMAN BENNETT: I see a slight degree of fish  
4 line going through the air here on that, Mr. Avery.

5 MR. AVERY: Well, I can't agree that it is fishing.  
6 I think this is very specific narrow information, clearly germane.

7 CHAIRMAN BENNETT: I think you are going into some-  
8 thing that is outside of this. I grant you if these people  
9 said, "Look, you are not going to get sewer service or water  
0 service if you don't buy electricity from us," that might be  
1 a separate violation by the municipalities. That could be,  
2 of course, perhaps, in violation of the North Carolina statute  
3 having to do with the little Fair Trade -- little FTC Act  
4 they passed last year.

5 MR. AVERY: You are pressing me out to the second  
6 ground on which I claim relevance -- I will turn to that now --  
7 the question of tie-in.

8 CHAIRMAN BENNETT: I am pushing you on the first one  
9 because I think you are going into something that has no  
0 relevancy to the question provided they establish that you are  
1 engaging in a deliberate price squeeze.

2 MR. AVERY: We are now at the discovery stage. We  
3 are trying to prepare our defense. You are saying in the price  
4 squeeze is shown this information is irrelevant. One of the  
5 issues you will have to decide is whether or not there is a

price squeeze.

CHAIRMAN BENNETT: What does something else have to do with the price squeeze on electricity?

MR. AVERY: A great deal.

CHAIRMAN BENNETT: I don't understand. You tell me precisely what you want. What piece of paper do you envisage?

MR. AVERY: We want a description from them -- we want a description of their industrial development effort, the industrial development effort which each of these municipalities undertake, and we want a picture of the total effort. We don't want it narrowed to the electric customers.

Perhaps one of the points that come up more acutely, maybe it would be a little clearer with the second, Roman II of their objections, which is really a variation on the same point as they say. We ask for information as to industrial development activities -- efforts to attract industry to the municipality or the area in which it serves with municipality services. They say, no, that should be limited to a question asking about efforts by the municipality to seek customers for the electric system. Now one thing that could very easily happen, you could have a town down in North Carolina which has an industrial development department which seeks to attract industry to that area. But it is seeking it in the broadest sense talking about electric power, among other things,

1 but it does not have the charge of seeking electric customers.  
2 That town, if it is one of these Intervenor, could give us a  
3 negative answer. We do not seek to attract customers for  
4 electric service. Where they have an industrial development  
5 department down there or a consultant that is doing things  
6 very germane to our defense, that competition for industrial  
7 service is not -- for industrial customers is not based  
8 simply on price, but on a number of factors, then we wouldn't  
9 get one bit of information. Because the real question has  
0 been trunk indicated and narrow in focus and we lose the  
1 information we need.

2 CHAIRMAN BENNETT: Assume, for purposes of argument,  
3 again, that there is a price squeeze. Is it any defense to  
4 that price squeeze that these people, by superhuman  
5 efforts in other directions, are able to overcome and get  
6 customers? In other words, isn't your crime, if there is one,  
7 your inconsistency, let me say with the antitrust, that  
8 you have created a system with respect to the electric work  
9 and this other business is all over the dam?

0 MR. AVERY: I am not prepared to accept that as  
1 valid. I would have to think about that, that we wouldn't  
2 perhaps find a defense in some of these other elements. But  
3 the trouble I have with your reasoning is that you are assum-  
4 ing -- you are saying it is not relevant on the assumption  
5 that they have proved a price squeeze. You will have to find

out whether they have that going and they are going to be --

CHAIRMAN BENNETT: This other thing has nothing to do with whether you put a price squeeze on them.

MR. AVERY: Absolutely, it does. They are saying, "We lost these industrial customers because we could not offer it." We might want to say, "No, you lost them because the town education system was not very good," or I don't know. I can't think of a number of reasons. There could be any one of a number of reasons why a particular industrial customer did not decide to locate in this particular municipality and they are going to be claiming it is because of the price squeeze. We want to know whether it is that.

CHAIRMAN BENNETT: This is not an action for damages. This is a determination of whether or not the activities of this Applicant are inconsistent with the antitrust laws.

MR. AVERY: That's right.

CHAIRMAN BENNETT: All this other material of what somebody else does has nothing to do with the case.

MR. AVERY: That is not true because the inconsistency claim is the price squeeze. You can't decide whether there is a price squeeze without knowing the basis on which a customer does or does not decide to locate in a given place.

CHAIRMAN BENNETT: Let's take a five-minute recess.

(Recess.)

CHAIRMAN BENNETT: Okay, proceed.

MR. AVERY: I will take just a couple of minutes, Mr. Chairman.

During the recess, I had an opportunity to look at a couple of the other documents in the cases just to look for examples as to statements which make this material germane.

In the initial prehearing statement of the Interveners, page 4, they are discussing what they head the description of the parties, and they make the statement Duke and the cities compete for high load factor customers because these customers are of such high economic significance Duke has been highly successful in attracting such customers.

This illustrates what I am getting at. One of the issues that will be present in this case is the realities of competition between Duke Power Company and the cities for industrial load and it seems to me that unless we get the total picture as to how these industrial location decisions are made, we will be hampered in preparation of our case.

MR. FARMAKIDES: You are looking at the ability of the municipals to compete with Duke.

MR. AVERY: That is right.

MR. FARMAKIDES: That is why you want the sewage



1 and water and the rest.

2 MR. AVERY: That is right. You have to look at  
3 the entire development picture.

4 Just one other thing to show the other parties  
5 regard this type of material themselves as relevant in  
6 request 6-A of the joint discovery request. They ask for  
7 documents relating to the following: new electrical loads,  
8 area growth or development, and locations available for  
9 commercial or industrial development in areas in which  
0 such electrical load might be served by electric utilities  
1 other than the company. So, that, in terms is seeking the same  
2 documentation from us.

3 I think it is a clearly germane subject. I won't  
4 take additional time to argue about tie-in, that is spelled  
5 out in our briefs. I think the most important aspect of  
6 relevance is the overall relevance to developing our  
7 defense on competition for industrial customers. I think also  
8 this information is relevant to the tie-in issue.

9 CHAIRMAN BENNETT: If you say the other fellow  
0 is tying, that means he is a bad fellow, too.

1 MR. AVERY: I don't think we need to get into  
2 that point at this time.

3 MR. TUBRIDY: There is nothing wrong with tie-in.

4 MR. AVERY: Nothing wrong with tie-in?

5 MR. TUBRIDY: No. Buy a hat and you sell the coat

1 with it. It has to have -- Section 3 it has to effect  
2 competition.

3 MR. AVERY: It is also a Section 1 violation, can  
4 be.

5 MR. TUBRIDY: That is a question. I don't know  
6 if it is A, a man ties in, but Section 3 only provides which  
7 may effect competition. They can tie electricity in with  
8 water, there is nothing wrong with that.

9 MR. AVERY: I don't think you need to get into  
0 that.

1 MR. TUBRIDY: But you are using this tie-in word.

2 MR. AVERY: After participating in the U. S.  
3 versus Loess case, that is close to my heart.

4 In any event the issues which the Board must rule  
5 on are to set the guidelines for discovery, they do set  
6 out the possible looking into anticompetitive activities of  
7 the municipalities and under that standard this would be  
8 germane.

9 CHAIRMAN BENNETT: I think we in our order made  
0 it very clear that we thought that maybe you fellows agreed  
1 to a little broad set of issues and that while we let you  
2 do it for the purposes of initial discovery, we were still  
3 concerned that maybe they wouldn't prove to be the issues you  
4 try here.

5 MR. AVERY: As I say -- I don't want to forget

1 about the tie-in but the most important aspect of it is to  
2 developing our case with regard to the claim they cannot  
3 compete effectively for industrial customers hinges on a  
4 lot of this.

5 MR. TUBRIDY: What is the volume of business we  
6 are dealing in connection with the municipalities supplying  
7 industrial plants?

8 MR. AVERY: K lowatts sold?

9 MR. TUBRIDY: I was thinking in terms of dollars.

0 MR. AVERY: Dollar sales by municipals -- I don't  
1 know why I try to narrow it because I don't know anyway.

2 MR. TUBRIDY: I don't know how substantial this  
3 problem is.

4 MR. AVERY: I don't know. Maybe Mr. Bouknight  
5 can tell you.

6 What are the sales?

7 MR. BOUKNIGHT: I don't know in dollars. In  
8 1969 we had for the Federal Power Commission case a study  
9 made and we determined that no municipality was serving an  
0 industrial customer with a load of over 5 megawatts as  
1 contrasted with Duke, I believe, now they serve in the area  
2 of 140 or I think it is 174 we were told last week of that  
3 size.

4 MR. TUBRIDY: 174?

5 MR. BOUKNIGHT: Yes, 5 megawatts of business.

5  
1 That is what most engineers would call a large industrial  
2 customer. So that is the comparison between the cities  
3 and Duke.

4 MR. AVERY: My colleagues tell me we don't know the  
5 answer to your question but it is one thing we hope to  
6 find out in the discovery.

7 MR. TUBRIDY: I hope it isn't de minimus.

8 MR. AVERY: I don't know whether it is or not.  
9 We will just have to get the facts.

0 Thank you very much, Mr. Chairman.

1 CHAIRMAN BENNETT: Thank you.

2 Mr. Leckie, do you wish to speak?

3 MR. STOVER: I think it is up to us to respond to  
4 this.

5 CHAIRMAN BENNETT: Yes, I guess the Justice  
6 Department doesn't want to get in this fight, do they?

7 MR. STOVER: Probably not. We would love to have  
8 them, though.

9 First, your Honor, about the tie-in question which  
0 Mr. Avery raised at the end of his remarks, we fail to  
1 see what relevance the alleged tie-in would have in this case  
2 even though we undertook in what was perhaps an excess of  
3 generosity to answer two of the Applicant's questions about  
4 it. Simply because we do not see any way in which -- if it  
5 were proved -- that one of the cities had tied electricity

1 and another utility service that that would furnish any  
2 defense in behalf of Duke since the Stewart case abolished  
3 the defense of unclean hands and of course the Judge  
4 Tubridy's remarks are relevant also in this area.

5 On what Mr. Avery characterizes as his main point,  
6 it seems to us that this proceeding is necessarily and by  
7 definition about the rendering of electrical service and the  
8 attraction of electrical customers.

9 To say that you can attract a factory to the  
10 neighborhood of a particular city by pointing out the existence  
11 of sewage systems or for that matter an excellent network of  
12 roads or a high quality school system is not what is at issue  
13 here.

14 We are talking about competing electric utilities  
15 and to say that general industrial development of an area is  
16 somehow to be equated with the attraction of electric  
17 customers to that city's electric utilities begs the question.

18 Looking at some of the questions that Duke has  
19 propounded, No. 14-C -- which is on page 12 of their  
20 document request -- they have asked us to describe the  
21 efforts of the cities to attract commercial and/or industrial  
22 facilities to locate in the municipality or within the area  
23 served by any of its sewage, gas, water or electric facilities.

24 Well, we do not compete with Duke to render sewage  
25 service because Duke is not in the sewer business; the same

ty 7  
1 is true of water and gas. We have objected to this question  
2 so far as concerns the nonelectric utility services. We  
3 don't see what point they have here, we don't see any  
4 connection as long as there is a possibility that a new  
5 industrial establishment will come in to look at the  
6 situation, pick a site, connect up to the City of Lexington,  
7 let's say, for gas or sewage or water service, and go ahead  
8 and buy electricity from Duke.

9 What I am trying to say, your Honor, is that the  
10 fact that a municipality is able to offer gas or water or  
11 sewage service does not without more show that they would get  
12 electric customers they would not otherwise get.

13 The figures cited by Mr. Bouknight would tend  
14 to establish that. We are not saying -- and this is some-  
15 thing that Mr. Avery raised -- we are not saying that because  
16 of the price squeeze we have lost industrial customers to  
17 Duke. What we are saying is that a price squeeze exists and  
18 the fact we don't have industrial customers and have not had  
19 large industrial customers is probative of that price  
20 squeeze.

21 MR. FARMAKIDES: Isn't Mr. Avery also saying that  
22 the revenue that you receive from gas, water, sewage,  
23 that really goes to your ability to compete?

24 MR. STOVALL: There is nothing in question 14-C  
25 or in 72 or 73 which would in any way indicate that that is

1 the case.

2 Now they have asked elsewhere about transfers  
3 but this -- in the first place I am not at all sure this is  
4 a matter of defense if it be established there is a price  
5 squeeze in electricity. It seems to me that it is analogous  
6 somewhat to what I believe used to be called the "pass it  
7 on" defense in which someone would object that well, yes,  
8 charge a monopoly price but on the other hand my customers  
9 raised his prices and wasn't hurt.

10 This kind of defense has been just about uniformly  
11 rejected. To say that the -- if we were to assume that  
12 the Applicant said, well, yes, we have charged a price at  
13 which the cities could not compete for industrial customers,  
14 had they not some other resource, but, yes, they do have  
15 another resource, then this strikes us as no defense whatever.

16 Why should the cities have to plead their gas  
17 department to repair the damage done to their electric  
18 department by Duke's pricing policies is basically the question.

19 CHAIRMAN BENNETT: What are you willing to give them  
20 in this regard?

21 MR. STOVER: We have set out in our objections,  
22 your Honor, that as to No. 14-C we would like the Board to  
23 strike the reference to sewage, gas and water facilities and  
24 limit -- here I am moving over into II of our document -- and  
25 limit --

1 CHAIRMAN BENNETT: I and II you regard as together.

2 MR. STOVER: Yes, as to questions 14 and 15.

3 14-C and 14-D depend on 14-C and what preceded in 15. In  
4 14-C, as I said, we would like the Board to strike the  
5 reference to sewage, gas, and water facilities and to limit  
6 the question to the efforts to attract people to be served  
7 off the electric system which is, as I said, what the case  
8 is really about.

9 There are several other places, questions 14-A and  
10 B and 15 where the phrase "the area served by its electric  
11 facilities or the service area of the system" are used.

12 Now this does refer to the electric service area  
13 but it is still broader than the question of actually  
14 connecting an industrial or commercial establishment to the  
15 city's electric system. In other words, the area in  
16 which electricity is served, generally speaking, may include  
17 this table top, but in this corner of the table top here  
18 Duke may be serving a particular customer in that area.

19 So basically we would like to have these questions  
20 reduced to the parameters I have indicated, to actual efforts  
21 to bring in customers to our city's electric system.

22 Now in No. 70, you also objected to 72 and 73 in  
23 toto. This is pages 4 and 5 of our objections.

24 In No. 72 basically the Applicant has asked for  
25 the number of customers located outside the corporate limits



1 of the city and served with anything at all in the way of  
2 utility services, gas, water, sewage, or electricity.

3 Now, this would give the Applicant a number of  
4 customers who are outside the city limits and who are getting  
5 electric service. I don't think this would be probative  
6 of anything in particular.

7 No. 73 asks for the number of customers by class  
8 located outside the municipal limits and supplied with water  
9 or sewer service by the city and with electricity by someone  
10 else. This perhaps has some relevance though not much since  
11 as far as Mr. Avery's tie-in point is concerned -- if that  
12 point had any substance -- it would not establish why there  
13 was or was not any correlation between water service by the  
14 city and electric service by the city.

15 The burden of assembling this information seems  
16 to us to be far more than its value in the proceeding would  
17 justify.

18 CHAIRMAN BENNETT: Describe that for us, please.

19 MR. STOVER: I am informed by the people in the  
20 city government, your Honor, that as a rule -- this may not  
21 be true in every case -- they do not segregate their account  
22 cards by location within the city limits and without the  
23 city limits if they are served outside the city limits. It  
24 would mean going through all the ledger cards and sorting them  
25 into inside and outside and then finding which ones were

1 customers of the sewer or water systems but not of the sewer  
2 or water systems but not of the electric system. It would  
3 be a large effort of manual cataloging.

4 CHAIRMAN BENNETT: Well, can you offer any infor-  
5 mation here that will give them some light on the extent  
6 of your activity to secure industrial customers? Is there  
7 some practice that you have engaged in that you are --

8 MR. STOVER: We have undertaken and we will stand  
9 by our word on this, to answer questions 18 and 19 which are  
0 the ones that ask specifically about ordinances, rules and  
1 regulations requiring that any person take electric service  
2 from the municipality. In fact I think in some instances  
3 that has already been supplied.

4 We will answer No. 19 which is an extremely broad  
5 question starting out: Does the system of municipality,  
6 et cetera, now suggest, recommend, or require or has it ever  
7 suggested, recommended or required that a person or other  
8 entity served by the municipality's gas, water and/or water  
9 utilities also purchase electricity? It is very difficult for  
0 me to see how a question involving tie-in, whether you label  
1 it anticompetitive practice or not, could be any broader than  
2 that.

3 We have undertaken to answer Nos. 14-C and 14 and  
4 15. We will tell them about our efforts to attract electric  
5 customers for the municipal systems.

CHAIRMAN BENNETT: All right.

MR. STOVER: We do feel that it is --

CHAIRMAN BENNETT: You feel, one, it is burdensome, and, two, that it is of practically no probative value.

MR. STOVER: If we have to -- if we are to provide information on how we go about attracting a customer, let's say, for the city's water system, the only -- there could be no relevance unless, one, it were shown that we used the water system as a lever to get electric customers, and we have agreed to answer those questions.

MR. AVERY: Could I make just one very short observation before you decide?

CHAIRMAN BENNETT: Yes.

MR. AVERY: At one point in Mr. Stover's presentation he made a statement which I thought was perfectly illustrative of what I was trying to say. He said at one point that they don't have industrial customers and therefore the price squeeze is proved. Well, that is exactly what I am talking about. If they are going to rely on the lack of industrial customers as proof of the price squeeze then we ought to be able to look into all the reasons why they do or do not have industrial customers. That is what we want to do. Look into their industrial development, industrial attraction effort as a whole.

1 I have noted that statement in passing. I  
2 just wanted to point out that it really illustrated the point  
3 I am trying to make better than I had been able to do.

4 MR. STOVER: On that point, your Honor, we also  
5 plan to rely on Duke's prices. We also plan to rely on  
6 Duke's prices as evidence of the price squeeze. We are not  
7 going to come in and say we have few or no industrial  
8 customers, therefore, we are in a price squeeze.

9 MR. AVERY: I understand that, Mr. Stover, but you  
0 said also they regard as probative the planning of industrial  
1 customers. That is what we want to look into.

2 CHAIRMAN BENNETT: Okay, just a moment.

3 Off the record.

4 (Discussion off the record.)  
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CHAIRMAN BENNETT: We have having trouble finding 15-B.

MR. AVERY: There isn't any. I think it may be a misprint, Mr. Stover.

MR. FARMAKIDES: I assume the objection of the Intervenors referred to that.

MR. AVERY: Yes, we puzzled over that, too. 15 didn't have any subparts as originally promulgated.

MR. STOVER: If your Honors will forgive me, let me read number 15.

CHAIRMAN BENNETT: Take your time.

MR. TUBRIDY: We are having trouble, too.

MR. STOVER: I think it is one place in our objections where the designation 15-B occurs. That should be question 15, simply.

CHAIRMAN BENNETT: All right.

(Discussion off the record.)

CHAIRMAN BENNETT: Gentlemen, we have decided to deny the motion as to 14-C. So if you will supply that data, we will grant your motion to other paragraphs that are mentioned in here. 15 and 72 and 73.

Now we have objections to the EPIC data.

MR. AVERY: One moment, your Honor.

CHAIRMAN BENNETT: What do you really want with respect to the EPIC data, Mr. Avery?

MR. AVERY: All right, Mr. Chairman, let me tell you about that. Before I do so, could I get a clarification as to the ruling on 72?

CHAIRMAN BENNETT: Yes. That is out. We will not grant it.

MR. AVERY: I wanted to ask about one thing; that asked for data as to customers outside the municipalities' court limits presently served by the municipality with electricity, gas, water or sewage. Does your ruling state that we can't get it as to electricity, et cetera?

CHAIRMAN BENNETT: Yes. We felt that it is not worth that much in respect to the burden.

MR. AVERY: I thought the burden argument went against the -- but I don't want to press you. You have ruled.

CHAIRMAN BENNETT: All right. Again now, if there were additional material in the second round, if you feel you have additional reasons that you need this and you specify in greater detail, that's all right. But right now we are of this mind.

MR. AVERY: Now, let's see, we are skipping over Roman 2.

CHAIRMAN BENNETT: Roman 2 and Roman 1 are substantially the same thing. So we have ruled on both of those.

MR. AVERY: Roman 2 went to 14-A and B. I take it it is denied as to 14-A, B, and C?

CHAIRMAN BENNETT: C is granted.

MR. AVERY: You didn't mention 14-A and B.

CHAIRMAN BENNETT: We sustained the objection as to everything but 14-A.

MR. AVERY: Thank you, Mr. Chairman.

CHAIRMAN BENNETT: Now we are on EPIC. Page 6. Question 76.

MR. AVERY: One of the problems, of course, that we have -- I might mention at the outset -- with their objection under Roman 3, is that we don't know exactly what interrogatories they are objecting to. They say -- they mention on page 6 of their pleading, questions 59-A and 76-B, but they go on to say we do not provide an exhaustive list of questions in this category; apparently some they are objecting to which they have not specified.

CHAIRMAN BENNETT: If they have not specified, we will not grant their motion unless they are specified. We can't take some generalized objection, but I take it you are specifying 59-A, 76-B.

MR. AVERY: That's it. Those are the only ones they mention.

CHAIRMAN BENNETT: Is that right?

MR. STOVER: Your Honor, the reason for the lack of specificity is that the questions that we are involved in here do not -- are not specific in asking for EPIC material.

I would like, if Mr. Avery and the Board will permit me, to say that in Mr. Avery's response, I think he has given reason to believe we are not very far apart on this. We are not as far apart on this particular question as appeared to us. He has said that at the -- at the end of page 11 in his response -- I hope you forgive me for this long interruption -- that the Board should block Intervenor's attempts, et cetera -- where such materials are within the possession, custody or control of any party to this proceeding.

Well, now, the parties to this proceeding on the Intervenor's side are the cities, and to the extent that any of these EPIC documents are in their files, we do not object to supplying them.

MR. BOUKNIGHT: That's true.

MR. STOVER: So if Mr. Avery is not asking -- apparently from this last pleading he is not, and he will correct me if I am wrong -- for documents elsewhere than in the custody or control of the cities. If so, we have no disagreement.

CHAIRMAN BENNETT: In other words, you are willing to produce anything in your possession or control?

MR. STOVER: Yes,

CHAIRMAN BENNETT: That is all you want.

MR. AVERY: I don't understand this because we made it extremely clear in the discussions that preceded the



filing of the objections.

CHAIRMAN BENNETT: It is all settled then.

MR. AVERY: I would like to have one caveat, if I may. I don't want to be too unpleasant about it, but I don't want to have them avoid this request by simply taking materials out of their files and sending it back to EPIC. It should be anything with regard to EPIC which was in their files at the time the request was made.

With that understanding, that is all we were asking for. I don't understand why this is so confusing. I thought we made that clear. That is all we can ask for.

CHAIRMAN BENNETT: You know now what you have been asked for.

MR. STOVER: We did not feel it necessary to make any --

CHAIRMAN BENNETT: All right, the material within their files in response to your 59 --

MR. AVERY: And 76.

CHAIRMAN BENNETT: They will be complied with. To the extent that you have that information, you will reply.

MR. STOVER: If they are --

CHAIRMAN BENNETT: Or have had at the time of the request.

MR. STOVER: If there are any documents in response to any of these questions, we will answer.

1 MR. AVERY: I think our request was a broader one;  
2 if you look at the language of the request, it asks for efforts  
3 at developing generation and transmission and things like that.  
4 The objection was in response to that they shouldn't have to  
5 answer as to EPIC. I think -- I want to be sure we have  
6 reached an understanding that response to that question will  
7 be made including EPIC.

8 CHAIRMAN BENNETT: That is my understanding. They  
9 only objected to EPIC.

0 MR. AVERY: Okay.

1 CHAIRMAN BENNETT: Go to the next one. Next,  
2 the transfer approach position.

3 MR. AVERY: There is only one left, then.

4 CHAIRMAN BENNETT: The statutes, you have agreed  
5 to accept that?

6 MR. AVERY: That was a misunderstanding again. We  
7 tried to make clear that we accepted the validity of their  
8 position and we are not asking for legal opinions. Just to  
9 give us help in getting the local ordinances.

0 MR. STOVER: This is Roman 5?

1 MR. AVERY: Yes. There is no dispute as to that  
2 and the only one remaining is 4.

3 CHAIRMAN BENNETT: What do you really want?

4 MR. AVERY: We really want what we ask for.

5 CHAIRMAN BENNETT: All right, tell me what you ask

1 for. 24, 25-B, 28 through 32.

2 MR. AVERY: Right. We ask for certain data,  
3 specifically spelled out, relating to what we will call for  
4 a shorthand purpose, transfers. That is sort of equivalent  
5 of privates. These municipalities are not private corpora-  
6 tions, but to the extent that the revenues from electric  
7 service exceed the cost of providing that service, and to  
8 the extent that is the equivalent of profits, we want informa-  
9 tion as to that subject. That is what we have spelled out  
0 in those specific interrogatories.

1 CHAIRMAN BENNETT: Isn't it in such detail that  
2 they will have to have four accountants and three adding  
3 machines to figure it out?

4 MR. AVERY: That is not their objection. They have  
5 not objected on the ground of burden. They have objected on  
6 the ground of relevance. They offered this, that it doesn't  
7 do the job. They say if we stipulate the transfers are made --  
8 we don't think their stipulation says that, by the way -- but  
9 assuming it did say that --

0 CHAIRMAN BENNETT: We have had difficulty with the  
1 language of it, it smelled of the lamb a little bit but it was a  
2 slippery lamb.

3 MR. AVERY: Most importantly we regard this as  
4 extremely crucial.

5 CHAIRMAN BENNETT: What do you really want now?

MR. AVERY: All right. The claim is going to be made that there is a price squeeze that they can't compete with us. They can't buy the rate at which we sell and resell at a competitive rate, and so on. Now you cannot assess the validity of that claim without knowing how much play there is in their rates and if it was a private corporation, the play you would be talking about would be play, and you would look for it in an income statement of a private corporation on the bottom line, the net income line, and you talk about whether that net income is higher than it would need to be, to be competitive in the capital markets.

Here you are not talking about corporations, you are talking about municipalities. They say they are willing to stipulate that such -- that there are funds available for such transfers. But there is going to be no way that you can judge the validity of the price squeeze argument without knowing just how much -- what are the actual amounts of those transfers. Without that information --

CHAIRMAN BENNETT: You just want to know what the amount of the transfer is in each year? You have given us a lot of breakdown here which frankly we think is useless, sort of.

MR. AVERY: But that is what we want.

CHAIRMAN BENNETT: What you want and what you are going to get are two different things.

9 1 MR. AVERY: Can we go through them one by one?

2 CHAIRMAN BENNETT: You have to be reasonable about  
3 these things. If they can get you this from their records,  
4 isn't that what you want? You don't want to go out and make  
5 an independent audit or something, do you?

6 MR. AVERY: We have to have the -- the thing we have  
7 to have is usable figures. We have a problem because unlike a  
8 regulated private utility, there is no uniform accounting  
9 system, and so you can look at the publicly available informa-  
10 tion regarding these municipal systems and you can't get --

11 CHAIRMAN BENNETT: And it is buried.

12 MR. AVERY: That's right. So what we did was sit  
13 down and try to spell out carefully the information we need  
14 so it could be extracted from those records and supplied.  
15 There is nobody but them that can do it. It is terribly  
16 difficult to respond to you in the abstract.

17 I don't know whether we have to look at this,  
18 question by question. We want the amounts of the transfers.  
19 It gets complicated because the transfers are not necessarily  
20 always actual dollar transfers. Sometimes it is done in  
21 the form of services provided, less cost. But that is just as  
22 important.

23 CHAIRMAN BENNETT: In other words, they give free  
24 electric lighting on the street lighting?

Inc.  
25 MR. AVERY: Right. And that is very important.

1 CHAIRMAN BENNETT: I would assume that would have  
2 something to do with whether or not they are making a return  
3 which would permit them to sell at reduced rates. Of course,  
4 their bond issues have something to do with that, too, I  
5 suppose.

6 MR. AVERY: Right. If you ask the question in too  
7 simplistic a form, you will not get back useful information.  
8 We tried to do it -- we had our people working on this, of course;  
9 we tried to ask the questions as carefully as we could so  
10 we would elicit usable information. That is reflected --

11 CHAIRMAN BENNETT: Let's bear down on this. Have  
12 you gone into their accounting problems with them on it?

13 MR. AVERY: Yes. We have had long discussions with  
14 them about this. Essentially what they have said is that we  
15 will give you these annual reports which we are happy to have,  
16 but we think that without -- that these reports are going to  
17 bury these figures, and if they are not required to give us  
18 this information, we are not going to be able to give you  
19 this information which will be very important to you in  
20 deciding this issue.

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1 CHAIRMAN BENNETT: All right. Now, let them  
2 answer. Give me the answer to that, Mr. Stover. It seems to  
3 me that if you are going to have a price squeeze, you have to  
4 show that it is a real squeeze and not an illusory squeeze,  
5 don't you?

6 MR. STOVER: Perhaps you don't --

7 CHAIRMAN BENNETT: If you have a real squeeze, you  
8 have to cut out all this extra services that the municipal  
9 utility provides for the municipality.

10 MR. STOVER: That is perhaps the point where I might  
11 take issue with you, your Honor.

12 CHAIRMAN BENNETT: Why? That is what I want to  
13 hear. Why?

14 MR. STOVER: We have heard about transfers of funds  
15 and free service; in principle, I see the point that Mr. Avery  
16 is trying to make. But the analogy between these transfers  
17 to other funds of the city, all of which, of course, are funds  
18 for public purposes, is not so much with profits of the  
19 municipal system, I think, as with -- or with the profits of,  
20 rather, a private corporation, as with the dividends paid out  
21 by a private corporation. This is something that helps the  
22 municipal electric system which is dependent on the -- for  
23 its existence on the municipality's voters in the last analysis,  
24 to justify its existence to those voters. This goes to  
25 what the municipal electric system does for you in the way

of providing cheap lighting for the schools, let's say, or for the streets, or surplus funds being put into other public service operations, public service funds for the city. I would --

CHAIRMAN BENNETT: Let me see if I get your argument. I hate to interrupt, but you say this is the cost of our doing business. It is like advertising or something else. We have to show this municipality that we are providing this service to remain in business at all and so it is a charge on doing business rather than a profit which we are giving to the municipality.

MR. STOVER: That is a little deeper than an analogy to advertising.

CHAIRMAN BENNETT: All right, a charge of doing business.

MR. STOVER: Yes, it is a cost of doing business, such as the dividends a corporation pays to its stockholders, which is a cost of doing business. If they stop paying dividends, it might for a while have a larger quantity of surplus funds retained in the corporation, but it would also quickly lose the ability to sell common equity.

CHAIRMAN BENNETT: I grant you that. On the other hand, if we are to measure the extent to which there has been a squeeze, we have to find out what the municipalities can economically sell this as an absolute matter for, rather than



taking a lot of charges into consideration which are made, but might not have to be made. In other words, it is a proper argument for them to say, it seems to me, that this isn't really a price squeeze because except for the fact that you give all these free services, you would be able to meet the prices quite easily and make a profit besides.

MR. STOVER: It probably is, your Honor, that that approach seems to me while it maybe -- as matter of bookkeeping it may be appealing, but it tends to assume that these payments to other city funds and the services of less than cost are in some way unnecessary or --

CHAIRMAN BENNETT: I know that is an argument. You have established they are unnecessary -- that they are necessary by putting somebody from your municipality on the stand and have him say they couldn't remain in business and establish that this was set up with this in mind as a charge, something of that nature.

But nevertheless, these people are entitled to the factual basis of what actually is the difference between the amount which you pay at wholesale and the amount which you can sell at retail.

MR. STOVER: Factoring in and factoring out the various parts.

CHAIRMAN BENNETT: Yes.

MR. STOVER: I would like to ask Mr. Avery if he has

had the opportunity to look at the city audit reports which we have delivered. I brought some over and gave them to Mrs. Golden on Tuesday, I believe. I wonder if it wouldn't be -- since we have said both orally and in writing, we are perfectly prepared to produce these city audit reports and are, in fact, doing so now. The annual audit reports -- that maybe the question could wait until Mr. Avery, if he has not already done so, has had a chance to consult his consultants and look at them himself and see whether they are adequate for the purpose for which your Honor has expressed.

CHAIRMAN BENNETT: I see Mr. Avery has consulted with Mrs. Golden, and ask whether he has an answer or whether she has said she can't tell yet.

MR. AVERY: That's right, Mr. Chairman, that is what she has said essentially. We have not had much chance to look at those.

CHAIRMAN BENNETT: We can reserve this.

MR. AVERY: I think it should be faced up to now, Mr. Chairman; if the answer is apparent on the face of those reports, they cannot make any burden claim. All they have to do is sit down and say it is a -- all they have to do is say page, "See page 14, line 4 of the report," and they have answered the question. They have told us that. They can't make any burden claim with just doing that. I think you ought to make up your mind whether we are entitled to this

information or not.

CHAIRMAN BENNETT: If he has the information in these papers, are they required to go ahead and make a lot of calculations on your behalf?

MR. AVERY: Yes, of course they are. That is what interrogatories are all about. Interrogatories -- you have to do work in answering interrogatories if it is germane information. Sure, there may be some burden about it. If the burden gets too great, then you start getting into the possibility of objections. But where the burden is as minimal as saying you can find the answer in such and such a place, that is perfectly proper discovery.

MR. TUBRIDY: You say you have had only two days. So you are not prepared for this particular item. If we postponed this and give you a little time, would that be helpful?

MR. AVERY: We have just gotten the reports. It will take a long time before we straighten it out. We should rule on it now and get it out of the way. The stuff they gave us is two or three of the cities -- three out of the nine or eleven. That is another question. We don't know whether there are the nine or eleven. It is three of nine or three of eleven, anyway. We don't know when we will get the rest. We will have to look at it; if it is not there, we will have to come back and file a motion, and they will file an answer. Someone may ask for an oral argument.

1 We may have to wait weeks or months. If you rule  
2 now and the answers are there, they can say, "You will find it  
3 on page so and so." You ought to face up to it now and  
4 rule on it.

5 MR. STOVER: We will waive oral argument on such  
6 a thing if it comes up.

7 MR. AVERY: We might not. I will not waive anything  
8 until I know what it is all about.

9 MR. STOVER: Your Honor, as Mr. Avery says, we have  
10 not yet been able to supply to him all of the audit reports,  
11 though we have furnished three sets for complete cities and  
12 we have in our office up here, at least one other city. We  
13 have not been able to inventory it yet, however. The real  
14 problem, it seems to me, is that if the isolation of all the  
15 information that is specifically asked for in these questions  
16 is simply a matter of going through the city audit reports  
17 and saying, "At line 9 on page 3 and line 11 on page 8 you will  
18 find what you are looking for" -- if that is what is involved  
19 neither side has a burden argument. I will put it that way.  
20 It seems if that is the case, it is no great imposition on the  
21 Applicant to ask it to take a good, hard look at the audit  
22 reports that it has and decide whether it can find this  
23 information on the face of the documents before asking the  
24 Board to order us to do more. If it --

25 CHAIRMAN BENNETT: I think they are entitled to

this type of information, because I don't see how you can make a squeeze argument without information of this character on the basis of your records. Now, I grant you that it is terribly burdensome to get this material out; maybe it is impossible to get it out of your records. That is a different matter. But I don't think that the Respondent has to be placed under the burden of digging it out from something when you should have it available from your own records.

MR. STOVER: All I am saying now, your Honor, is that the Respondent ought to, in our view, at least, make the effort to see whether the information it wants is reasonably visible on the face of the documents that we have supplied and are supplying before it asks the Board to compel us to go and try to back these various figures out, if they can be backed out, of the audit reports of 12 years in the past. In other words, I am speaking only of the question whether the Board should rule on this now or await the success or lack of success of the Applicant in deriving this kind of information from the audit reports furnished. It may be some of it may be obvious or not. We can narrow this, possibly.

MR. AVERY: It seems to me you could find yourself saving tremendous amounts of hearing time by requiring them to do it. If we have to look at those reports and guess at the answer or conclude that maybe this is it and put a man on the stand and he makes his computations, you may find hours

and hours and hours of cross-examination going on as to whether or not we have correctly computed this. If they give us the figure, that is the figure we can use at the trial. A little work now can save a tremendous amount of hearing time later. I think it is something we are clearly entitled to under discovery.

CHAIRMAN BENNETT: Oh, yes, you are entitled to this type of information. The question is whether they can get it for you without undue burden.

MR. AVERY: They have not claimed burden, your Honor.

CHAIRMAN BENNETT: I thought that was what they were doing.

MR. AVERY: I don't think so. They were claiming irrelevance on the ground they had stipulated that transfers were made or at least they said so. There was no burden argument I saw.

CHAIRMAN BENNETT: I seem to recall Mr. Tally arguing at great length that one of the things he couldn't abide was the possibility they were going to have to stop all work in the municipality and go to answering these requests for statistical information.

MR. AVERY: Mr. Chairman, they intervened in this proceeding; they have put the thing at issue. If work is involved, they have to do it. There is no claim of an impossible burden being made, and I don't think you should consider

the request in those terms.

CHAIRMAN BENNETT: I think the Intervenor should give the Applicant this type of information. Frankly, I don't see how you can keep from doing it.

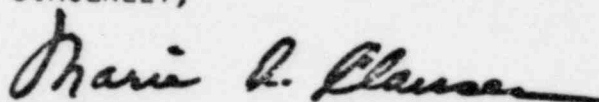
MR. STOVER: Your Honor, the --

NOVEMBER 24, 1972

289A

R SIR:  
PLEASE FORGIVE THE ERROR ON OUR PART, IN THE TRANSCRIPTION OF THE  
E POWER (269A, ET AL) HEARING OF NOVEMBER 17, 1972.  
ENCLOSED PAGES (PAGES 289-321) SHOULD REPLACE THE SAME PAGE  
NUMBERS IN YOUR PRESENT TRANSCRIPT. THE ORDER WAS INCORRECT IN  
THESE PAGES.

SINCERELY,



MARIE A. CLAUSEN

ACE-FEDERAL REPORTERS, INC.



1 CHAIRMAN BENNETT: One of my colleagues has a very  
2 excellent suggestion. That is, why can't you amend the  
3 stipulation to put the figures in that with respect to the  
4 extent that this transfer exists? It seems to me it is not  
5 going to be a matter of \$2.50, or \$3.81. It is going to be  
6 about an average of so-and-so over the period of the 10 years.

7 I don't know whether that is sufficient or not  
8 for you.

9 MR. AVERY: I don't know whether it is sufficient  
10 obviously until I saw what facts were being stipulated to.  
11 I really can't --

12 MR. FARMAKIDES: I think you have a copy of this,  
13 this is the objection of the Intervenors.

14 MR. AVERY: Yes.

15 MR. FARMAKIDES: He has the annex A stipulation,  
16 proposed stipulation. One of the channels that could be  
17 followed here is to amend what I consider to be a very  
18 sufficient stipulation, but to amend this to crank in the type  
19 of information which the Applicant is seeking here, and which  
20 the Board has indicated the Applicant should have.

1 MR. AVERY: Your Honor, it sounds then there is  
2 not much difference between the stipulation and the answer  
3 to the interrogatory. If you are saying give us the informa-  
4 tion in the form of the stipulation --

5 CHAIRMAN BENNETT: These interrogatories look to me

1 like the type of thing the income tax people put out.

2 MR. AVERY: I take that as a compliment.

3 CHAIRMAN BENNETT: I agree with you, it is  
4 tremendously detailed. But why do you need all that? It  
5 seems you are just going --

6 MR. AVERY: Mr. Chairman, I do think we need all  
7 that. It is going to be a complicated subject to present  
8 exactly the extent of these transfers or "profitability" is,  
9 what that is, and we have to have usable figures. We have  
10 to have figures that mean something. If you don't --

11 MR. FARMAKIDES: Isn't that the whole point, Mr.  
12 Avery, if you were to be given in a stipulation the magnitude  
13 of these transfers, would not that suffice?

14 MR. AVERY: Not if it is a ball-park figure. If  
15 we got the specific stipulation as to the specific amounts  
16 of the transfers for each of the cities for a representative  
17 period of years, and we have asked for the -- the ground rule  
18 has been established that the period is 1960 to the present  
19 that we are dealing with. I don't see why our information  
20 as to their profitability should be limited to any less  
21 period than that, when we are going through a fantastic amount  
22 of information for them, covering the same period.

23 This burden argument -- that burden argument,  
24 when we are spending thousands of hours for our client,  
25 doesn't set well with me. If we get specific figures for

1 the same periods of time from each of the cities, I would  
2 have no problem because I am getting what I asked for in the  
3 first place.

4 MR. STOVER: May I ask one question, your Honor?

5 CHAIRMAN BENNETT: You certainly may.

6 MR. STOVER: So I understand the proposal to have  
7 the stipulation plus specific figures, Judge Farmakides, how  
8 does this differ from the stipulation plus the audit reports  
9 in terms of --

10 MR. FARMAKIDES: I don't know what is in the audit  
11 reports, nor does the Applicant. Frankly, that was the ques-  
12 tion to you. You make that available to the Applicant.  
13 That is what he wants. You propose a stipulation here which  
14 possibly can be amended or supplemented to include the informa-  
15 tion that the Applicant is seeking. But in a general way you  
16 could do that, in a sense, each of these cities is transferring  
17 this amount or approximately this amount per year. I would  
18 think that would meet his needs and it would certainly reduce  
19 your burden.

20 MR. STOVER: We would be delighted to try doing it  
21 that way.

22 MR. FARMAKIDES: Well, it is up to you to --

23 CHAIRMAN BENNETT: Why don't we defer ruling on  
24 this to give them an opportunity to do that? I think you  
25 ought to do it. Mr. Avery's client is entitled to that

1 information. If the Justice Department and Intervenors  
2 are going to suggest there is a price squeeze, you have to  
3 establish what the squeeze is.

4 MR. BRAND: Your Honor, I wouldn't like my silence  
5 to be an acquiescence on the theory that a look at the  
6 profitability of a municipality at a point in time was  
7 careful that there was no price squeeze.

8 For example, a price squeeze can occur as to a  
9 particular market or markets. It may well be that the price  
10 squeeze is just as to large industrial customers and also as to  
11 certain markets such as the market for electric heating where  
12 you need particularly low rate in order to attract that  
13 customer.

14 The fact that on the static system you are making  
15 some profit doesn't mean --

16 CHAIRMAN BENNETT: You are agreeing with Mr.  
17 Avery that he needs all the detailed information which he has  
18 asked for.

19 MR. BRAND: Sir, frankly, I don't think it would be  
20 relevant. I have no objection to his getting it. I just  
21 wanted to make sure my silence wasn't interpreted to be that if  
22 the municipality has profitability that it is not subject to a  
23 price squeeze. I don't think that is the case.

24 CHAIRMAN BENNETT: I think you are perfectly right.  
25 That supports your argument, Mr. Avery, it seems to me, that

you have to have the details that he says he needs.

2 MR. AVERY: I want to thank Mr. Brand for his help  
3 on that, Mr. Chairman.

4 CHAIRMAN BENNETT: I think, Mr. Stover, they are  
5 entitled to this. If you are making a price-squeeze argument,  
6 as Justice certainly is, you have to supply them the informa-  
7 tion that shows just how that price squeeze affects the pricing  
8 that was being squeezed. You are not going to have a price  
9 squeeze unless somebody is feeling the brunt of it.

10 MR. STOVER: We will do our best.

11 CHAIRMAN BENNETT: I mixed my metaphor a little  
12 bit.

13 MR. STOVER: We will do our best to extract the  
14 information that Judge Farmakides --

15 MR. AVERY: Mr. Chairman, is that enough?

16 MR. TUBRIDY: If he supplies weak figures, he  
17 doesn't make out his case.

18 MR. AVERY: Mr. Chairman, excuse me for not  
19 standing -- I am willing to consider what they have. If you  
20 are saying you direct them to come forward with figures for  
21 us to look and see if we are willing to accept that by way  
22 of stipulation as a satisfactory response, we are willing to  
23 do that. We are willing to do that.

24 CHAIRMAN BENNETT: We are telling both of you  
25 that we feel if there is going to be a price-squeeze

argument, they have to establish it.

MR. TUBRIDY: They have to prove it.

CHAIRMAN BENNETT: And you are entitled to know how they will establish it.

MR. AVERY: I understand. But they will come forward with some vague figure that we transferred about a quarter million dollars a year now and then, or something, and they are going to say there it is. They will say we have met our burden.

CHAIRMAN BENNETT: All right, then they come down and bring out this price-squeeze argument and that is the establishment that they make -- we are not asleep up here.

MR. AVERY: You have already heard from Mr. Brand that he doesn't think this information -- he thinks an argument could be made even if we show a substantial amount of transfers, the price-squeeze argument may still be not established.

I think we have to have hard figures. If you are telling them to come forward with some figures and discuss with us whether they are sufficiently looking at what we have asked for, fine, I am willing to look at that and defer this, although frankly I still think a ruling that they have to give it to us is a preferable way to do it.

CHAIRMAN BENNETT: I think we have made it clear, Mr. Avery, and we made it clear to you, Mr. Stover, that if

you are going to proceed on the price-squeeze situation you are going to have to establish what the situation is with respect to the people that were being squeezed. Mr. Avery has said I want these figures. Now, you say you are reluctant to do any more than let him have audit reports. It seems to me you are going to have to establish this and he has a right to determine how he is going to defend against this.

In like manner, Mr. Brand is going to have to have these figures. He is going to have to know what they are to determine just how he will present his case. It may be that when he gets all through, he will say just as far as customers who are within a particular price range or particular capacity range or whatever it is, or particular area are going to be affected by this. But I think we still have to have these figures.

MR. STOVER: Not disputing that, your Honor. All I was saying was -- or all that I was objecting to was the possibility that the cities were going to be directed to make these elaborate accounting studies before Mr. Avery had even apparently looked at the audit reports to see whether further studies were necessary.

MR. AVERY: We are going around again. Mr. Chairman, I thought I had already said on that, that is not good enough as far as we are concerned.

CHAIRMAN BENNETT: Yes, he says that doesn't do it.

That doesn't give him the information.

MR. AVERY: They have to come forward with figures. I thought that you had ruled that was so. That the audit reports were not good enough.

CHAIRMAN BENNETT: I haven't seen the audit reports at all, so I can't rule on that, quite obviously, nor can this Board. We have not seen the audit report. You have, and your representation is you don't think it is enough. Now we have suggested that you have a stipulation here which you get these figures agreed to, to the extent that you can. They have to be based on the audit reports, I suppose.

MR. AVERY: There may be underlying figures. If we go this route, Mr. Chairman, of trying to reach a stipulation, could we have some directives from the Board as to the time schedule for that? I don't want it to drag on and on.

CHAIRMAN BENNETT: The Applicant has made some requests for delay here, I thought.

MR. AVERY: You are talking about the five-day rule. I don't know what you mean by delay. We want some time -- obviously we will need time in view of the volume of material. That isn't delay overall. My point is I don't think this -- this information on transfers is very important to the preparation of our case. I hope we won't walk out of here today with some vague understanding that we are supposed to reach a stipulation and then it could drag on for ages and ages.



1 CHAIRMAN BENNETT: I can't order you to reach a  
2 stipulation. I have indicated to --

3 MR. AVERY: Could you direct --

4 CHAIRMAN BENNETT: We have both indicated, I think,  
5 that -- the Board has indicated that this information has  
6 got to be supplied in some form or another; otherwise counsel  
7 will not be able to establish his case. Counsel for the  
8 Department of Justice said, oh, yes, we are, in particular  
9 areas, maybe this doesn't make any difference. But so far as  
10 we are concerned, we are going to have to look at what  
11 the situation is with respect to the municipalities.

12 MR. AVERY: Maybe I have been laboring under a  
13 misunderstanding. Are you saying the objections will be  
14 overruled by the Board and then you would like us to reach  
15 a stipulation?

16 CHAIRMAN BENNETT: I am asking for a practical  
17 solution of this. I don't think we have enough time. I  
18 don't think you have enough time. I don't think they have  
19 had enough time to arrive at a practical solution. So we are  
20 suggesting to you that you have 20 days. Will that give you  
21 sufficient time to get these things together?

22 MR. AVERY: The first step obviously is for  
23 the Intervenor to come forward with a set of figures. If  
24 you can give them a date to do that, we can react to that  
25 quickly, once we have it. But I think that a time limit

ought to be imposed on them as to when they come forward with those figures.

CHAIRMAN BENNETT: Can you do that in 10 days?

MR. STOVER: The questions that were here asked, I thought were otherwise intended to be answered by 13 December. I believe that was the date that had been fixed for the compliance with this discovery, was it not?

MR. AVERY: That was what was in the original request, yes, we did put a date in there, I think. Yes, that is the date.

CHAIRMAN BENNETT: All right. Now what you do is attempt to obviate an objection which has been made by a different proposal. I would think that we ought to get this thing going a little more rapidly than that. Can you do it?

MR. STOVER: Maybe we --

CHAIRMAN BENNETT: Can you get this by the 1st of December and let him tell you by the 13th whether it is adequate or not?

MR. STOVER: May I have a moment, your Honor?

CHAIRMAN BENNETT: Sure. Well, why don't we suggest you take two weeks to get this together?

MR. STOVER: We will try to do that.

CHAIRMAN BENNETT: Then he will react by the 13th of December.

MR. AVERY: Two weeks is what date now?

MR. STOVER: We will try our best.

CHAIRMAN BENNETT: That would be --

MR. STOVER: 1 December.

MR. AVERY: That would be December 1st, is that

right?

1 CHAIRMAN BENNETT: Well, how about 20 days, the 8th  
2 of December?

3 MR. STOVER: Fine.

4 CHAIRMAN BENNETT: Supply him with this information  
5 by the 8th and he will reply by the 13th. I see Mrs. Golden  
6 has concern here.

7 MR. AVERY: Yes. We have something of a problem  
8 because we had had an informal understanding that the audit  
9 reports themselves would be furnished by the 13th of November.  
0 They have been slow coming in. We are not objecting to that.  
1 We realize there are problems in furnishing information and we  
2 are encountering problems ourselves. We were just wondering  
3 whether putting this whole item off until 20 days later is going  
4 to mean that the flow of audit reports as they become ready  
5 will stop or whether that will continue.

6 MR. STOVER: The cities, Mr. Avery, are still  
7 proceeding on the assumption that they would have those  
8 reports in as part of their answers to the November 13  
9 questions which will be coming in and we agreed on them. I  
0 see no reason for a slow-up in that procedure.

1 MR. AVERY: Fine. You are saying, Mr. Chairman,  
2 the 7th of December?

3 CHAIRMAN BENNETT: 7th of December.

4 MR. AVERY: By that date, they will come to us with  
5 a set of figures.

CHAIRMAN BENNETT: That's right. Which will include the audit reports, I take it?

MR. AVERY: Well, certainly it should if they are going to rely on them.

CHAIRMAN BENNETT: Can you do it by that date? I don't want to ask anything that is impossible.

MR. STOVER: Our problem is that we have these nine clients, not all of whom have equal resources and not all of whom have equally complete records. I think -- I would like to put it this way, if your Honor please, that if the city has the figures with which to arrive at any answers, that it can be done by 7 December.

CHAIRMAN BENNETT: If they don't have the figures to arrive at any answer, I don't see how you are going to support any price squeeze.

MR. STOVER: Well, your Honor -- Mr. Brand has spoken to that and I won't repeat that argument. What I was saying just now was that there may be some cities that cannot supply it and in the detail you wanted. We have to contend with that.

MR. AVERY: I don't know where we are, Mr. Chairman.

CHAIRMAN BENNETT: Well, I do. By the 7th you are going to have those figures out. And you are going to tell him whether they are adequate by the 13th.

MR. AVERY: Six days?

1 CHAIRMAN BENNETT: Yes.

2 MR. AVERY: I hope we can do that. Two weeks would  
3 be better, I think. Let me consult with my expert, Mrs.  
4 Golden.

5 CHAIRMAN BENNETT: Let's not put it into Christmas.

6 MR. AVERY: My optimistic colleagues say we can  
7 do it in that time. So could we have it understood if it  
8 really gets tied up --

9 CHAIRMAN BENNETT: If anything comes up you can't  
0 do it, you let us know and we will extend, obviously.

1 MR. AVERY: Fine. We will try to meet the 13th.

2 CHAIRMAN BENNETT: We won't ask you to do something  
3 you can't do. Mr. Brand, do you have a problem?

4 MR. BRAND: I have a problem, too, your Honor. In  
5 our documentary request, which has now been substantially  
6 reduced by the Board, we asked for documents in two time  
7 periods. There were certain documents which were preceded  
8 by an asterisk in our request. We need these to start our  
9 engineering studies. We have not received the complete  
0 production of those asterisked documents, even though we  
asked for them as soon as possible, but in no event later than  
October 6. That date has long gone by. We asked for complete  
production by November 6, 1971. That has gone by. There has  
never been any objection to the time and the rules call for  
objections as to these within a certain time. There never has

1 been any objection with respect to time. We have to get the  
2 documents in order to proceed with our case. I would like to  
3 move now to compel the Applicant to complete his production  
4 within a reasonable time. We think a reasonable time would be  
5 seven days from today with respect to the asterisked item  
6 which we anticipated could be produced within 10 days of the  
7 date we gave them the request, which was at the date of the  
8 prehearing conference.

9 CHAIRMAN BENNETT: Let's answer the latter.

0 MR. BRAND: We think December 15 would be adequate.

1 MR. AVERY: I assumed this would come up, but I  
2 hate to have it come up because what I have to tell you is  
3 fairly depressing. Work has been going on this since we got  
4 this request in September. Work has been going forward both  
5 at the Duke offices and at our offices, with regard to these  
6 documents. Now I think -- I have had the feeling that you  
7 gentlemen looking at that knew what you were dealing with here.  
8 This is an enormous thing, but it is even more enormous  
9 than we had ever dreamed. We have in our office -- they have  
0 been delivered over the past few weeks, the product of several  
1 months and 200 manhours' work done since September. We have  
2 in our office right now 45,000 pages of documents that have  
3 been culled out, not gone over, but only to a limited extent  
4 by people at Duke, but they have to be reviewed by lawyers  
5 to see whether they are in fact in compliance. We had non-legal

1 people go through the files at Duke having a degree of training  
2 so they know what they were looking for and they made a broad  
3 search for documents and these documents now have to be  
4 reviewed to see whether they were called for. We have 45,000  
5 documents. We are told there may be 30,000 pages more which  
6 will be on their way up to us.

7 We have been presented by this request from the  
8 Justice Department which is absolutely a stunningly massive  
9 undertaking. We have added people to our office constantly.  
10 We have had people working on it at as fast a rate as we can.  
11 We have turned over to Mr. Brand already 2000 pages of the  
12 asterisked material. There are people back at the office right  
13 now -- there have been every day -- working on more and  
14 going over to see what is called for and what is not. Mr.  
15 Watson and I have to go to Charlotte next week to spend time  
16 with Duke down there to iron out the problems that are going  
17 on.

18 But the message I am giving you is that the breadth  
19 of this request has presented us and presents this Board with  
20 an absolutely massive file search and to talk about the fact  
21 that he wants it in seven days is absolutely ridiculous.

22 CHAIRMAN BENNETT: You can't do it, you say?

23 MR. AVERY: Seventy thousand pages?

24 CHAIRMAN BENNETT: When you make an agreement to do  
25 something by a particular date, it would seem to me you go to



1 the other side and say, "I can't do it." If he won't  
2 stipulate to a time, then you come to us and say, "Give us an  
3 extension."

4 MR. AVERY: I was a little taken back by Mr. Brand's  
5 characterization of this. We have been in constant touch with  
6 them. Counsel have known throughout that those dates had no  
7 meaning. We had been talking about when we would be furnishing  
8 this stuff. They have come up to our stuff -- I can remember  
9 one occasion -- three occasions -- to go over this material.  
10 As soon as we got enough material available for them to come  
11 and look at, they would come up. There has been no going back  
12 on any agreements. There has been full understanding between  
13 counsel as to what is going on. We have not gone back on  
14 any agreements. And I was quite upset to hear Mr. Brand  
15 suggest to this Board we have gone back on our agreements.  
16 We have been in constant communication. We are in the middle  
17 of a massive undertaking and we are putting a massive effort  
18 into it, but it cannot be done in seven days.

19 CHAIRMAN BENNETT: The Board's present schedule is  
20 to have the final prehearing on 16th of January and this  
21 starts in February.

22 MR. AVERY: I know that, Mr. Chairman, but I don't  
23 think that schedule can be met.

24 CHAIRMAN BENNETT: What do you suggest?

25 MR. AVERY: I don't know how many of that 70,000 will

11 1 end up in their hands. It will take us several months to go  
2 through that documentary material and finish producing it, nor  
3 the Justice Department and the Intervenors. We will be doing  
4 other things at the same time now. We are not suggesting that  
5 everything stop for that. We think everything -- the discovery  
6 should be going forward on several fronts simultaneously.  
7 But there is no way, in light of the breadth of the request  
8 made to us, that that schedule can be met.

9 CHAIRMAN BENNETT: I take it you have not got the  
10 documents all at your office yet?

11 MR. AVERY: That's right. I understand we have  
12 45,000 and they say -- the number I have heard is maybe there  
13 is another 30,000 pages that are going to be coming to us.  
14 They have to be reviewed by us. We have the right to have  
15 the lawyers go over those documents.

16 CHAIRMAN BENNETT: Certainly, you do.

17 MR. AVERY: This is a massive undertaking and we  
18 are doing it. I can assure you we are putting a considerable  
19 effort in on it. We have a large staff working on it.

20 CHAIRMAN BENNETT: What date can you have these  
21 materials all available?

22 MR. AVERY: Completion of documentary production?

23 CHAIRMAN BENNETT: Yes.

24 MR. AVERY: I think I have to ask for six months.  
25 1st of June. That doesn't mean they are all going to get them

8mil 1 in a chunk. That means between now and the 1st of June as  
2 the documents are processed, we will turn them over.

3 CHAIRMAN BENNETT: How many documents have the  
4 asterisk on them?

5 MR. AVERY: Let me ask Mr. Watson about that.

6 MR. TUBRIDY: What do these 30,000 documents consist  
7 of? What are they? You said you will have a total of about  
8 30,000?

9 MR. AVERY: No, a total of about 70,000 pages.  
10 I have been using documents interchangeably with pages, but  
11 it is pages.

12 MR. FARMAKIDES: This is the first screening.  
13 And you will screen them again?

14 MR. AVERY: Right.

15 MR. TUBRIDY: What do they consist of?

16 MR. AVERY: They consist of the material called for by  
17 the request; they are minutes, memoranda, letters, reports.

18 MR. TUBRIDY: Is there any particular group more  
19 bulky than the others?

20 MR. AVERY: The Carva pooling documents are the  
21 most bulky. That is the pool that did operate down there in  
22 Carolina.

23 MR. FARMAKIDES: What is the ratio of the documents  
24 you are getting on the first screening, compared with the actual  
25 number of documents you are giving to Justice?

1 MR. AVERY: We have worked mainly on the asterisked  
2 documents and I would say most of what we have gotten is  
3 turned over. There has been little we have culled out, but  
4 there is some material -- there is no question -- that in every  
5 category we have found material that is not called for. They  
6 have to be checked. Most of what we are getting is going over.

7 MR. FARMAKIDES: So they can expect 70,000 or roughly  
8 somewhere near 70,000?

9 MR. AVERY: Hopefully it will be less than that.  
0 I have no way of knowing. I am hesitant to give you a figure.

MR. FARMAKIDES: If you project the ratio, they can  
expect --

MR. AVERY: Somewhere between fifty and seventy  
thousand pages, which they will have to review as well. We  
know the Board is interested in moving this along and we are  
trying to comply with that and do it on a continuing basis.  
That is what we propose to do.

CHAIRMAN BENNETT: In light of the remarks by your  
distinguished partner at the previous meeting --

MR. AVERY: What did he say?

CHAIRMAN BENNETT: What do you say to that, Mr.

Brand?

MR. BLAND: It takes us five months from the time  
we get all the asterisked documents to do our engineering  
economic studies.

CHAIRMAN BENNETT: You say it is impossible for us to go ahead with any meaningful conference or any attempt to start this proceeding by the 1st of February?

MR. BRAND: Yes, your Honor. If all the asterisked documents were supplied today, our engineers tell me it would take until April to complete the studies.

MR. AVERY: Mr. Chairman, I meant to say -- you had asked a question which I neglected to answer about the asterisked documents -- Mr. Watson tells me we can have substantial compliance with the asterisked items within 30 days. That is we will have the whole great mass of it done, but as the general file search goes on, we may pick up some additional items which fall into that category. But we have focused a search on those asterisked items. It is going fairly rapidly and within 30 days we think we can finish substantial compliance on those items.

CHAIRMAN BENNETT: Then your answer is that we can't do anything about this for another six months. We can't expect to start this trial for six months?

MR. AVERY: Well, yes, we can't complete production to the Justice Department for six months, so that is clearly true.

MR. BRAND: In addition, I would like to point out that the Board in Consumers case indicated it wanted to go to hearings in it in latter April. If we get production at the

end of this month, or in 30 days, we would have our engineering studies ready in the middle of May. On the other hand, we would also want to be able to complete our review of the complete production before writing our trial brief, so those are the dates that are critical to us. In addition, I would like to point out that there were several requests that we had been going back and forth with the Duke people on and the ball is now in their court. It's been some time since we have heard any noise of a racket. These are listed on the bottom of page 2. Request numbers 5, 6, 8, 32, 38.

MR. AVERY: Page 2 of what?

MR. BRAND: Two of our answer. We think in fixing the dates, we think the Board should also fix a date by which Duke is required to respond further with respect to those items.

CHAIRMAN BENNETT: I take it you realize that your request of a week is entirely out of order?

Mr. BRAND: But we thought the engineering information would be readily available in 15 days from the time of the request. We are surprised here. It turns out apparently it is not so. In this case, whatever the Board orders, it should fix a time for based on solely the information. We are not in a position of the Intervenors.

We have not lived in North Carolina for a long time, dealt with the company, and are generally familiar with the situation. We have to make an analysis from the outside and go in here and enforce the law based wholly on material available from the Applicant in great measure as well as such other discovery that we are able to obtain.

So our ability to make our case is dependent in very large measure on discovery. We would hope that the Board in whatever ruling it makes on timing --

CHAIRMAN BENNETT: What about your second round? How are you going to get a second round of discovery until you get your original discovery? Then we are talking about 30-day second round. Are you going to need a second round?

MR. BRAND: That concerns me very greatly, your honor, because I know from previous experience with electric power utility cases that you can't learn about a utility at once. You first have to get some discovery and you have

succeeding discovery. Now, I thought I was going to have a reasonable opportunity to do that. I thought the complete documentary production could have been completed in 60 days. Apparently Duke represents this is not the case and I take it at face value.

So, in that case, we will need to allow a time for subsequent discovery if we are to make complete discovery. I would hope that after the first round of documentary production, 30 days for the complete second round would be adequate. What I would like to do is ask what I recently asked the Board in the Michigan case, that is to be able to split my interrogatories in two parts.

My first round interrogatories, one part would deal with Duke's contentions at trial. The other part which we didn't have to be submitted until after we start receiving some of the documents from the documentary production, we deal with specific conduct of Duke in regard to specific matters. I think that would help expedite the proceeding.

CHAIRMAN BENNETT: Now, you are suggesting that instead of one more round, we have two more rounds, is that it?

MR. BRAND: No, your Honor, all I am suggesting is that with respect to the first round of interrogatories that that be split into two parts so that we get part of it out of the way so that we can get it out of the way without waiting for the documentary production, that dealing with Duke's proposed



contentions at trial.

The second part dealing with conduct would be -- we would be allowed to see the documents first and ask the questions. If we get it done in that way, it seems to me it would help expedite the proceeding.

CHAIRMAN BENNETT: I would suppose that you are entitled to send interrogatories out at any time now with respect to the first group that you desired.

Now, on your second group of interrogatories that deals with specific conduct on the basis of the documents, when will that occur. We do have to make concessions due to shortness of life.

Two members of the Board here are retired individuals.

MR. TUBRIDY: We are just drawing pensions. There is a big difference.

MR. BRAND: We have to learn something about the activities of the facility before we are in a position to intelligently ask questions on interrogatories.

CHAIRMAN BENNETT: Let's get a schedule here then as to what we are going to do. You say you can't make a complete reproduction until June 1, is that correct?

MR. AVERY: That is correct.

CHAIRMAN BENNETT: In 30 days you can't get the documents necessary for the engineers report?

MR. AVERY: The asterisk items, we can complete that in

30 days.

CHAIRMAN BENNETT: All right. That is December 17,

right?

MR. AVERY: A Christmas present for Mr. Brand.

CHAIRMAN BENNETT: And the June 1 date seems to

be an awful long time away to me.

MR. AVERY: Mr. Chairman, if I could invite you to my

office --

CHAIRMAN BENNETT: Well, I --

MR. AVERY: -- you would believe it.

CHAIRMAN BENNETT: I would believe it.

MR. AVERY: It is just a massive undertaking.

CHAIRMAN BENNETT: I have seen a hundred thousand

documents on occasion. I remember another occasion on  
which we had 10 tons. You have to have a good imagination to  
see that.

MR. AVERY: We tried to make a good estimate about  
this. We knew this would come up and I just don't have any  
question about it. We tried to make as fair an estimate we  
could assuming we are putting on a really substantial effort  
on this.

I really do think, Mr. Chairman, it will take that  
long. I just don't see how it could be done in any less time.  
It is an incredible undertaking to read all those documents.

CHAIRMAN BENNETT: Now, let's assume that all this

production is in by June 1. You are going to have your engineering report by that time. What will you do then? Will you start your second round?

MR. BRAND: Yes, your Honor.

CHAIRMAN BENNETT: That is another 30 days.

MR. BRAND: Hopefully it could be done by then, your Honor, but if we don't have the complete documentary production until June 1, we won't even be able to start on the second half of our interrogatories by that. In other words, we won't be able to start on the interrogatories until June 1. At least, the part of the interrogatories dealing with their conduct.

CHAIRMAN BENNETT: Isn't that what your second round is intended to cover?

MR. BRAND: No, I intended that to be part of the first round. Then I intended the second round to be directed to very fine things that were still missing and we hope that that would take 30 days. So, it would seem to me we would need 30 days to be able to get the response to the interrogatories with respect to conduct. That would take until June 30. Then the second round of discovery thereafter would occur. That would take 30 days.

CHAIRMAN BENNETT: So you are now suggesting that this thing will not be ready for trial until sometime in September of next year, almost a year from now.

MR. BRAND: Your Honor, it just seems to me that we need a reasonable time after the provision of discovery. The Intervenors are ready to go forward fairly rapidly in getting all the documents they have to supply.

CHAIRMAN BENNETT: Except for the audit reports which don't seem to be in.

MR. BRAND: Apparently, they will be supplied in September, but we have waited since September of this year for a few engineering documents which are normally supplied in a negotiation over an innerconnection for pooling, and we are told that these take 60 to 90 days to come forward with. We are told it takes nine months to produce documents with respect to documentary requests. Based on our experience in CID investigations, they are supplied in a much shorter time. We don't object to these representations. All we say is we need a reasonable time after supplying of them so we can go forward.

MR. AVERY: Can I make two quick comments. One, it is not simply engineering. 4-G is one of them, the one I referred to earlier today where they want all documents relating to the intent or contemplated effect of any rate design that we have ever had.

That has been a massive job finding that stuff. So, it is not simply engineering documents. I can't agree with that characterization. The other representation I have to take

exception to is that the Intervenors have been going forward and supplying material -- the only thing we have gotten are audit reports from three cities. Thirteen, I am sorry. Thirteen out of 91 items for three cities. Thirteen out of 91 items for three of nine cities.

MR. STOVER: Your Honor, may I reply to that?

CHAIRMAN BENNETT: Just a moment. I understand your representation is then that you won't be ready to start your trial brief until September of 1973?

MR. BRAND: If the schedule of discovery that has been suggested -- as suggested by Duke is adhered to, yes, your Honor.

MR. FARMAKIDES: I don't understand that, Mr. Brand. Assuming your second round of discovery is completed in 30 days, that puts you into August. Once you receive your second round, once you receive your second round, how much more time will you require beyond that to prepare your case?

MR. BRAND: Thirty days after that.

MR. FARMAKIDES: That is September. How about your trial brief.

MR. BRAND: We would be prepared to submit trial brief 30 days after all discovery is completed, assuming that we don't get the entire batch of the first round discovery documents in on the very last day that is allowed. We would ask

1 substantial interim production.

2 CHAIRMAN BENNETT: Have you had substantial interim  
3 production to date?

4 MR. BRAND: I don't think so. We have gotten a few  
5 documents that have a great number of pages. For example,  
6 the pooling documents I may have 110 or 150 pages but we don't  
7 have very many documents. I would say we have no more than 20 or  
8 30 documents if I had to make a rough estimate at the moment.

9 CHAIRMAN BENNETT: How many thousands of pages?

0 MR. BRAND: 1500 to 2,000 pages.

1 MR. AVERY: Mr. Watson tells me it is 2027 pages.  
2 They have all been numbered.

3 CHAIRMAN BENNETT: 2027 pages out of a possible  
4 50,000 or 60,000.

5 MR. TUBRIDY: Have you started reading yet, Mr.  
6 Brand?

7 MR. BRAND: Your Honor, I have read through all of  
8 them.

9 MR. TUBRIDY: You better get him some more.

0 CHAIRMAN BENNETT: All right, gentlemen, this is your  
1 estimate. I don't know how the Board can do anything to require  
2 you to do something you can't physically do.

3 On the other hand, the Atomic Energy Commission  
4 is pressing us with respect to these cases, and we think it is  
5 a very extensive amount of time that the estimate is you are

1 calling for. I am just wondering whether maybe what we ought  
2 to do is to have another session in January of next year  
3 and see if we could cut down those issues because I thought  
4 and I think we indicated in our order that we thought, the issues  
5 were extremely broad. How soon we can do that, I don't know.  
6 Would it be of any help to start in January to try to  
7 cut that down?

8 MR. BRAND: Your Honor, we would be perfectly agree-  
9 able to that.

10 CHAIRMAN BENNETT: That is not my question. You would  
11 be perfectly agreeable to come in and talk again but my question  
12 is, are we going to get anywhere if we do?

13 MR. BRAND: We think one issue that should be cut  
14 out, your Honor, we feel the question of tax and financing advan-  
15 tage on the part of municipals and cooperatives is irrelevant.  
16 The question to us, it soon appears, would be whether or not  
17 Duke, Applicant, is responsible for a situation  
18 inconsistent with the anti-trust laws and whether or not this  
19 situation results in a restriction upon independent systems in  
20 the Piedmont Carolinas as who otherwise could be better off  
21 than they are now.

22 I think there are a number of cases that hold the  
23 fact that you are engaging in a restrictive practice against  
24 someone and you haven't managed to wipe him out and may be, in  
25 fact, flourishing is irrelevant as to the question as to whether

1 or not you should remove the restrictions. We would propose  
2 to try the case based on restrictions not on the question of  
3 whether or not there are other factors which would seem to indicate  
4 that the restrictions are not always successful in removing  
5 the competitors. So I think that if we remove the question of  
6 tax and financing that would save part of the work that we  
7 would have to do and it would save, enable us to remove a good  
8 bit of our discovery request.

9 MR. AVERY: Well, Mr. Chairman, the tax and  
10 subsidy question is absolutely central in this case. It is almost  
11 laughable to hear Mr. Brand. We should drop it. It is absolutely  
12 the heart of this case. The fact that these electric utilities,  
13 the private electric utilities face these other utilities  
14 operating who have these tax and subsidy advantages, it is a  
15 slick trick, it is almost ridiculous to hear him say that.

16 You would be cutting the heart out of this case if  
17 you drop that. The whole case is about whether or not these tax  
18 and subsidy advantages are such that certain attitudes  
19 about them on the part of the private utilities are justifiable  
20 or not justifiable and what would be the consequences of certain  
21 courses of action with regard to these public power entities  
22 if the kind of things they are asking for were given to them,  
23 given the fact they have these advantages.

24 I can't use any word other than ridiculous to  
25 suggest that, oh, let's cut out tax and subsidy and financing



1 advantages. That is what the case is all about.

2 CHAIRMAN BENNETT: Well, I am just asking whether  
3 you think there will be any advantage to attempting to meet in  
4 January to cut this thing down.

5 MR. AVERY: I think it is worth trying, Mr. Chairman.  
6 I can't make any promises. I don't know where we will stand  
7 then. I would hope it would --

8 CHAIRMAN BENNETT: We don't have any pieces of paper,  
9 if we don't have any papers circulated I don't think it will  
10 be helpful. On the other hand, I don't like  
11 to see us sitting around waiting for somebody to decide that  
12 they will produce documents. Because --

13 MR. AVERY: Maybe February would be a little better  
14 than January. I think it is a good idea for us to get together.

15 CHAIRMAN BENNETT: Can you get the bulk of these through  
16 by February.

17 MR. AVERY: The mass of documents?

18 CHAIRMAN BENNETT: Yes.

19 MR. AVERY: I don't know, I am not sure. Let me  
20 see if I can answer that.

21 CHAIRMAN BENNETT: How many people do you have  
22 working on that? I have to take a recess, gentlemen and  
23 change my reservations on the airplane. We will take a five  
24 minute recess.

25 (Recess.)

arl 1 MR. AVEZZO: Mr. Chairman, we were talking about the  
2 timing of another prehearing conference, et cetera. I have  
3 had an opportunity during the recess to discuss it with my  
4 colleagues. We think that essential, we should be able to  
5 start cranking out the documents at a fairly uniform rate.  
6 So I think it would be a fairly safe assumption that after  
7 three of the six months have gone by, we will have furnished  
8 about half the documents. I am certainly willing -- and I  
9 think it is a good idea -- to have a prehearing conference  
10 in mid-February. That is three months from now. Maybe  
11 we can get something constructive done with regard to dis-  
12 covery or cutting down the issues. I think it is a good idea.

13 CHAIRMAN BENNETT: Will the Intervenor have com-  
14 pleted most of their production by that time?

15 MR. BOUKNIGHT: Mr. Chairman, the Intervenor  
16 can now complete their production by December 13, certainly  
17 by the middle of January, with no difficulty. I would like,  
18 if this is the time, and if not, in a moment, to speak to our  
19 objection, our very strenuous objection to permitting a 1  
20 June date of production by this Applicant and the discussion  
21 seems to be proceeding under the assumption that that will be.

22 CHAIRMAN BENNETT: Mr. Bouknight, what am I --  
23 what is the Board expected to do? Go down there and look  
24 at the documents themselves?

25 MR. BOUKNIGHT: No, sir. I have some suggestions

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1 that --

2 CHAIRMAN BENNETT: If counsel can't do it, and I  
3 have no reason to believe that counsel is not telling me  
4 the truth, I have to take his word. I have been in anti-  
5 trust cases and I recognize the extent of difficulty. Here  
6 he is, he is not only examining these documents, but  
7 cataloging them. These gentlemen are not going to turn over  
8 30,000 or 50,000 pages of documents without knowing what they  
9 turned out, as one; and two, without indexing, so they will be  
10 able to find related documents. That takes time.

11 MR. BOUKNIGHT: Mr. Chairman, I understand that  
12 takes time. I don't understand that it takes this much time.  
13 I understand that Mr. Avery --

14 CHAIRMAN BENNETT: Have you ever been in an anti-  
15 trust case?

16 MR. BOUKNIGHT: I have never been in a case that  
17 produced the number of documents that the Applicant is talking  
18 about here today, no, sir. On the other hand, the prejudice  
19 to the Intervenors is real. These cities have been in this  
20 case now for some five years. They have small cities, there  
21 are nine of them, there is not one great corporate apparatus  
22 sitting here at this table. And the longer these proceedings  
23 drag on and on, or appear to them to drag on and on, the less  
24 the resolve of the group of people once every two years to  
continue to face the voters and to apparently have to explain

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1 the never-ending discovery period. It does hurt them.  
2 There were 11 Intervenors at one time, as Mr. Avery pointed  
3 out, and there are now nine. Time is really of the essence  
4 to these people. They have to go back and tell voters what  
5 they did the last two years in this litigation. When they  
6 say they waited 18 months for someone to produce documents,  
7 it is very difficult. I don't question Mr. Avery is telling  
8 us the truth and that his colleagues are working hard.

9 On the other hand, work can be speeded up if the  
10 number of people doing it can be increased. It is a matter  
11 of the resources this company is willing to put into producing  
12 these documents at an early date.

13 We would urge the Board to push them to putting  
14 a great number of resources into producing them early.

15 CHAIRMAN BENNETT: I would be glad to hear you.

16 MR. AVERY: Yes, Mr. Chairman. I would be glad  
17 to speak to that. If you have been involved in a major anti-  
18 trust action with vast amounts of documents as I have, and I  
19 know that two of you on the Board have, you know that you  
20 can't just say, oh, well, we will put 50 people on the case  
21 and get the work done. You know that doing the job right, and  
22 making the judgments as to what is to be produced and so on,  
23 that has to be done within a work force that is subject to  
24 uniformity and control.

We are acutely aware of that. We have put a work

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1 force on it, both at Duke and at our offices, that takes that  
2 into account, and it was the six-month estimate that I have  
3 given you, that was based on getting the job done with the  
4 maximum effort with the size staff that ought to be on it  
5 to do the job right, so first of all, the production will be  
6 done properly.

7 And secondly, the rights of the client will be  
8 properly protected.

9 Mr. Bouknight has never been through this so he  
10 perhaps doesn't realize the importance of that. But the six-  
11 month estimate is based on the size of staff, the maximum size  
12 of staff that this job can be done with, and still do the job  
13 right. It is not an answer to say if one woman can have a  
14 baby in nine months, nine can have one in a month. It just  
15 can't be done that way.

16 MR. BOUKNIGHT: The only thing I would add to that,  
17 Mr. Chairman, is that those who have been through this  
18 procedure before had been through this at the initial pre-  
19 hearing conference and the officials of that city heard Duke  
20 say that tens of thousands of documents would necessarily be  
21 produced. We recognized that that would be the case.

22 CHAIRMAN BENNETT: They are talking about 60,000  
23 now.

24 MR. TUBRIDY: This is before they got the demands.  
25 There are two different situations.

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1 MR. AVERY: That's correct. When we talked at  
2 that time, we didn't know what we were talking about.

3 MR. TUBRIDY: I appreciate that.

4 MR. AVERY: I knew you would be shocked. I have  
5 been shocked by what we have gotten into.

6 CHAIRMAN BENNETT: Mr. Bouknight, part of the  
7 difficulties, the extent of the demands here, the extent of the  
8 demands here have been astronomical.

9 MR. BOUKNIGHT: Both ways.

10 CHAIRMAN BENNETT: And the extent to which we  
11 proliferated the issues here, it seems to me, are tremendous.  
12 This is one of those situations where there was not a pinpoint-  
13 ing of the issues prior to the time this matter started out.

14 Now, I understand what the Justice Department was  
15 up against. They did the best they could. Presumably Mr.  
16 Avery's group has done the best they can. But the Board is  
17 required to do a particular job with respect to determining  
18 whether or not the situation will be inconsistent with the anti-  
19 trust laws. One of these installations goes onstream when?  
20 The first one?

21 MR. WATSON: Oconee has been delayed. It was  
22 supposed to go onstream last summer and they contemplated  
23 that it will go on some time after the first of the year. It  
24 is still uncertain.

25 CHAIRMAN BENNETT: One of them will be onstream,

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1 subject, of course, to the activities which we eventually  
2 undertake. It will be six months after that.

3 Now the second one is not scheduled for several  
4 years, as I understand it.

5 MR. AVERY: '74 or '76.

6 MR. BOUKNI: '76 is the McGuire.

7 MR. AVERY: '76 for McGuire.

8 CHAIRMAN BENNETT: The other should be ready this  
9 year.

10 MR. AVERY: Early next year.

11 CHAIRMAN BENNETT: But that being the case, we  
12 should make a decision as soon as we possibly can because the  
13 amount of reserve that Duke is going to have to plow back  
14 here to take care of the possible orders of the Board is going  
15 to be a problem for them, also.

16 MR. AVERY: I can assure you, your Honor, that we  
17 are moving along. There is no element of delay or foot-  
18 dragging on our part. We have tried to be helpful and realistic  
19 for the Board. Faced with the job we know we have to do.  
20 There is no intention to delay. We recognize both the  
21 Board's and the commission's interests in moving this along.  
22 That is what our objective is. We have tried to be helpful  
and realistic with the Board and tell you what the job is.

24 I want to go back to the point that Mr.

25 Bouknight got us off from, I think a mid-February conference

1 would be helpful.

2 CHAIRMAN BENNETT: Do you think there would be  
3 any further progress at that time?

4 MR. AVERY: There might be, Mr. Chairman, and if  
5 we have no conference, we know there will be no progress  
6 towards perhaps cutting the issues down and getting further  
7 progress with the Board in terms of shaping the case. If we  
8 don't have one, nothing will happen. I don't want to hold out  
9 any false promise -- I can't promise you we will make great  
10 accomplishments in February -- but I think your suggestion  
11 that we have one is a good one. I support it. I would say  
12 mid-February rather than January. I think January is a  
13 little soon.

14 MR. BRAND: Two things, your Honor: First, I  
15 would like to correct any representation, if I made one, which  
16 I don't believe I did, that Duke's counsel has not lived up  
17 to an agreement. There was no agreement. All I suggested  
18 earlier was that we had listed dates for compliance in our  
19 request, and we never heard any objection up until this date  
20 that it was impossible, and indeed that it would take nine  
21 months to comply with the request.

22 Secondly, I would like to state that the Department  
23 of Justice is also concerned with the expeditious resolution  
24 of this case. One of the primary reasons is that I am very  
25 much concerned that somebody will take the record of these



1 proceedings up to the Hill and say, well, you have  
2 scheduled an impossible kind of procedure here. You cannot  
3 have a reasonable trial on these issues and still put the  
4 power plants on the line. I believe it is possible to have  
5 a resolution of these cases. Particularly I would like to  
6 point out that where the pressure was on, instead of litigating  
7 these cases, they have been settled, settled on fair terms.

8 Here, in the case where they have been grandfathered,  
9 they can be strung out interminably. I am not suggesting  
10 intentional delay. I do take notice of the fact that this is  
11 a large corporation and they can afford to put substantial  
12 resources on the job. The fact that this license  
13 application has been grandfathered apparently removes any  
14 incentive they have to do so.

15 I just add that I would hope that the Board, whether  
16 it picks the dates requested by Applicant or picks other dates,  
17 but you fix dates particularly with respect to the asterisked  
18 items and as to the total, complete production of documents.  
19 You should fix guidelines as to interim production and a date  
20 as to further negotiations with respect to the particular  
21 items still under negotiation.

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RB #18  
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1 CHAIRMAN BENNETT: I think that is a good place  
2 to go from. It is my understanding that by December 17 the  
3 asterisked items will be supplied.

4 MR. AVERY: Substantial compliance. The only  
5 reservation I feel we have to make is that as other items  
6 turn up -- if anything turns up later, we will immediately  
7 deliver it to them.

8 CHAIRMAN BENNETT: You will attempt to make  
9 complete response by that time.

10 MR. AVERY: Exactly.

11 CHAIRMAN BENNETT: Will the Justice Department be  
12 able to make their first round of interrogatories?

13 MR. BRAND: As to contentions, your Honor?

14 CHAIRMAN BENNETT: As to contentions.

15 MR. BRAND: Yes, your Honor, we have just put  
16 in the mail yesterday a request for certain subpoenas. We  
17 would like an opportunity to see some of the responses with  
18 respect to these subpoenas duces tecum. But I believe that  
19 30 days from the time we get an indication as to the action  
20 on those I believe we will be able to put this first round  
21 of -- the first part of the first round of interrogatories  
22 into the mail.

23 CHAIRMAN BENNETT: When was the application for  
24 subpoenas made and why did you have to have an application  
25 for subpoenas when you had outstanding this extensive

ty 2

1 request for information?

2 MR. BRAND: Well, your Honor, we have a request  
3 for information from the Applicant. There are some information  
4 in possession of nonparties.

5 CHAIRMAN BENNETT: You are talking about subpoenas  
6 to nonparties.

7 MR. BRAND: Yes, sir.

8 CHAIRMAN BENNETT: I thought you were subpoenaing  
9 the Applicant and I was going to say I thought you had  
10 pretty well exhausted your resources of inquisitorial  
11 activity as far as the Applicant was concerned.

12 You say they are in the mail?

13 MR. BRAND: Yes, sir. When we are apprised of  
14 the responses to these we think we will be in a position  
15 to go forward with the interrogatories.

16 CHAIRMAN BENNETT: How extensive are those?

17 MR. BRAND: They are very narrow, your Honor.  
18 They are directed to what I call super power systems on the  
19 periphery of the Piedmont Carolinas and it simply inquires  
20 the nature and extent of their supply of power in the Piedmont  
21 Carolinas to measure the extent of the monopoly power of the  
22 Duke Power Company over the power supplies in that area.

23 CHAIRMAN BENNETT: Over the Piedmont area.

24 MR. BRAND: Yes, sir. It asks as to episodes,  
25 particular episodes with respect to requests or indications

ty 3

1 of interest which don't come up very often. For example,  
2 you may not have a request from this one area once in 10 or  
3 20 years. So it takes a particular amount of time to be able  
4 to get a sufficient number of episodes, at least one or two,  
5 to see what the policy is or pattern is with respect to  
6 the marketing of bulk supply in that area. These subpoenas  
7 are almost identical to the subpoenas issued by Judge Garfinke  
8 for the other day.

9 CHAIRMAN BENNETT: For a different area though.

10 MR. BRAND: For Michigan, yes, sir.

11 CHAIRMAN BENNETT: You can't give us a date by  
12 which you will send out your interrogatories.

13 MR. BRAND: All I can say is they will be well  
14 in advance of the date for compliance with the first round  
15 of documentary production by the Applicant so hat this  
16 first round -- this --

17 CHAIRMAN BENNETT: You are not talking about June 1.

18 MR. BRAND: Well, in advance of that so when the  
19 time comes for our interrogatories with respect to Applicant's  
20 conduct these will be long out of the way and they will not  
21 hold up responses with respect to Applicant's conduct.

22 CHAIRMAN BENNETT: How long will it take you to  
23 answer these interrogatories? Not having seen them. you  
24 can't give me any idea?

25 MR. BRAND: We will ask for a response in 30 days.

ty 4

1 Does Applicant contend it can be required by the  
2 FPC to establish interconnection for certain purposes?  
3 Does it contend it can be required by the Federal Power  
4 Commission to sell power at wholesale? Does it -- and does  
5 it intend to make these contentions at trial?

6 CHAIRMAN BENNETT: I am going to ask, gentlemen,  
7 that we have a prehearing conference February 15, 1973.  
8 I will expect at that time a report as to the progress,  
9 man-hours and what-not, which have been placed on this  
10 particular project to see if there can't be an expedition  
11 of this -- advancement of this date of June 1.

12 The card here is somewhat shocked at the time  
13 elements involved here. While we are certain that Mr. Avery  
14 is frank with us as to what he thinks is the most expeditious  
15 means of doing this I am just wondering whether if he  
16 studied it a little more it might not be possible to perhaps  
17 become a little bit more efficient particularly in the  
18 initial withdrawal of these materials from the Duke files.

19 MR. AVERY: Yes, Mr. Chairman, I can give you my  
20 assurance that we will do everything we can to expedite  
21 that. I hope we can give you a favorable report.

22 CHAIRMAN BENNETT: Then I will also by the  
23 February 15 deadline that we will be able to come up with  
24 some ideas with respect to reducing the number of issues  
25 here. Presumably by that time we should have enough documents

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1 so that you could see whether some of the theories which were  
2 originally advanced are really going to have any pay dirt or  
3 not. Particularly if counsel can specify whether he has  
4 completed discovery along particular avenues. Because I  
5 would hope that we could reduce the number of issues here  
6 so that we would have a manageable trial.

7 Right now I don't think it is manageable. I  
8 think we indicated that before.

9 MR. BRAND: I have an inquiry along these lines,  
10 your Honor, with respect to some antitrust trials, those  
11 which don't have a jury, it is the usual practice of counsel  
12 when they introduce documentary evidence to explain the  
13 significance of the document. Not only is this permitted  
14 in courts without juries but some have demanded it. We think  
15 this would be a real help in expediting not only the trial  
16 but the panel's understanding of the significance of the  
#18 17 various issues.

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1           CHAIRMAN BENNETT: On the other hand, I remember  
2 very vividly the ICI case which was tried by Judge Ryan whom  
3 I think is a very excellent judge and he received two volumes  
4 of documents at the beginning of the trial and he received  
5 briefs with respect to their meaning and the case was tried  
6 in three weeks. In contrast to the investment banking case  
7 which was tried by Judge Medina, which took something like over  
8 2.5 years during which each document was explained as it went  
9 in.

10           MR. BRAND: Well, your Honor --

11           CHAIRMAN BENNETT: I would hope we would not take  
12 2.5 years to try this because I don't think some of us will  
13 be alive then.

14           MR. BRAND: I don't anticipate taking a great deal of  
15 time with each document, your Honor. But it would help us  
16 to prepare our direct case now to know whether or not  
17 that practice was going to be followed or not and this would  
18 help us shape our presentation of the evidence.

19           CHAIRMAN BENNETT: I would think that counsel would  
20 make a recommendation as to how he was going to do it.  
21 Then the Board would be sympathetic to what counsel's proposal  
22 was.

23           On the other hand, we are not going to receive a bunch  
24 of documents for what they are worth. I think that we will all  
25 take that position, won't we? Documents for what they are

1       th --

2               MR. TUBRIDY: Are not worth much.

3               MR. BRAND: That is it, your Honor, my suggestion is  
4 that the Board does allow this comment. I think it is  
5 desirable if I know now that it will help prepare my preparation  
6 of my case.

7               CHAIRMAN BENNETT: I was going to suggest to you that al  
8 the documents are going to be marked.

9               MR. BRAND: Yes, your Honor.

10              CHAIRMAN BENNETT: With colors which show which  
11 person contends this document -- with what this document  
12 stands for. It will take time but you are not going to give  
13 me a document that doesn't have some marking on it. I am  
14 not going to be able to -- we are not going to be able to say to  
15 you, well what does this mean and you will have thought it out  
16 in advance.

17              MR. BRAND: We are delighted to have an opportunity  
18 to mark it. I wonder if we would have an opportunity to explain  
19 its significance.

20              CHAIRMAN BENNETT: It would seem to me you explain  
21 it in your brief or at the time you offer it. But I would  
22 hope that we are going to have some live witnesses here who can  
23 tell us what the situation is and will describe what the  
24 business is, and will tell us with references to particular  
25 documents which you have -- if you need them -- just what various



1 situations with that you think are important here.

2 MR. BRAND: Yes, your Honor, we do intend to have  
3 those witnesses.

4 CHAIRMAN BENNETT: Documents by themselves without  
5 the explanation of a particular individual who knows  
6 about it, they are not particularly helpful.

7 MR. BRAND: Yes, your Honor.

8 CHAIRMAN BENNETT: We tried the banking case on  
9 documents. It was one of the worst mistakes ever made.

10 MR. BRAND: Your Honor, we propose to have live  
11 witnesses. It was the practice prescribed in the Michigan  
12 case that documents would come in first in advance of the  
13 hearing of the live witnesses. I just want to be sure that with  
14 respect to those documents, some of which will not have live  
15 witnesses sponsor them, that we would have an opportunity to  
16 in addition to the underlying explanation, have an opportunity  
17 to comment on the significance of the document at the time  
18 they are offered.

19 CHAIRMAN BENNETT: You will at some time, as to whether  
20 you do it before we proceed with the live witnesses or not,  
21 we will have to consult with each other about that and see  
22 how it works out. I would suppose that at some  
23 time you will make a motion or an exchange with a notice of a  
24 motion or an exchange with a request that authenticity of a  
25 particular document or documents be indicated.

1 MR. BRAND: Your Honor, I would hope we would  
2 not have to do that with documents we receive from the Applicant.

3 CHAIRMAN BENNETT: It was my understanding that  
4 the Applicant indicated they would not require that  
5 they would be deemed authentic unless they specifically said  
6 to the contrary.

7 MR. BRAND: Very good.

8 CHAIRMAN BENNETT: We will not have problems about  
9 that. On the other hand, let's not just because there is no  
10 difficulty of proving authentication, shovel in a bunch of stuff.

11 MR. BRAND: No, sir, we don't propose to do that.  
12 However, it would be helpful if some of these documents, some  
13 of which we received, instead of having numbers on the  
14 back if he would stamp them on the front so when we  
15 reproduce them the numbers show up on them.

16 MR. AVERY: Your Honor, it is five to five at the  
17 end of a long day and we will have another hearing in  
18 February --

19 CHAIRMAN BENNETT: But would you please mark it on  
20 the front.

21 MR. AVERY: I don't think he should take the time of  
22 the Board. That is the first ever I have heard of it.

23 CHAIRMAN BENNETT: Sure, you can mark it on the front  
24 as well as on the back.

25 MR. AVERY: We are at the end of a long day and to get

1 into these trivia is must too much.

2 CHAIRMAN BENNETT: I think we have not settled  
3 as much as we can. We will undoubtedly prepare an order which  
4 we will send to you and if you have any questions about what  
5 our order means, we will be glad to have you move to resettle  
6 the order right away for any reason.

7 However, once the order is out and it hasn't  
8 been resettled, you will have to make a motion in writing  
9 to change it. Under Pacific molasses, which Judge Jones of this  
10 court decided some time ago, the prehearing order governs the futur  
11 of the proceedings.

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1 MR. AVERY: That is fine with us.

2 CHAIRMAN BENNETT: You have something to say, Mr.  
3 Bouknight? You are looking eager here.

4 MR. BOUKNIGHT: Thank you, your Honor. I am just  
5 eager to make one point, if I may. This morning on our dis-  
6 cussion of political activities and your Honor's ruling that  
7 our interrogatories or documents request addressed to that  
8 would be thrown out --

9 CHAIRMAN BENNETT: Yes, sir.

10 MR. BOUKNIGHT: -- you also indicated we might pursue  
11 other remedies to get more specific information. At lunch we  
12 discussed the possibility of sending to Applicant as soon as  
13 we are able to prepare them, certain interrogatories asking  
14 if certain specific activities occurred, with the idea in  
15 mind of following up affirmative interrogatories with either  
16 further documents request or with depositions of the  
17 witnesses. Do I understand directly, without at all asking the  
18 Board to rule on any interrogatories at this time, that we  
19 would be within the spirit of the ruling if we did so?

20 CHAIRMAN BENNETT: I would assume you would be  
21 if you followed the discussion which we had this morning  
22 and conform to it. But generally speaking, we think that  
23 political activity is so -- is regarded as such a --

24 MR. TUBRIDY: Sacred talent?

25 CHAIRMAN BENNETT: -- as a sacred right that you  
can't very well monkey around with it.

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MR. BOUKNIGHT: All right, sir.

CHAIRMAN BENNETT: On the other hand, you can propose anything you want. Remember, too, that this thing is still up before the Supreme Court and if there is a decision to the contrary to what we regard as the present law, obviously we are going to permit you to go into that.

MR. BOUKNIGHT: I just wanted to be certain that we were not going in the face of the Board order if we did something like that.

CHAIRMAN BENNETT: We did it without prejudice to your doing something.

MR. AVERY: Mr. Chairman, I have a matter relatively unimportant but I think it should be settled particularly because we have been trouble with it a little in our discovery. It has been alluded to a couple times today.

In petition to intervene there were 12 municipalities. One has formally withdrawn which leaves 11 and yet we have had repeated references to the fact that there are 9, in fact 9 municipal intervenors. There never has been a formal withdrawal by the Cities of Statesville and Cornelius. As far as the record of the case shows, they are parties, yet we keep hearing they are not. I would think it ought to be cleared up as to who are the parties to the case.

CHAIRMAN BENNETT: Counsel for those Intervenor

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1 or who were counsel for those ought to make a formal statement  
2 with respect to it and either withdraw --

3 MR. TUBRIDY: A formal withdrawal on the record.

4 CHAIRMAN BENNETT: Either a formal withdrawal or  
5 just dissuade anybody from thinking they have withdrawn.

6 MR. STOVER: May we do that, you Honor, in the  
7 form of a letter to the Board with copies to the parties?

8 CHAIRMAN BENNETT: Why don't you do it by a formal  
9 statement, in memorandum or whatever. Head it "Notice of  
10 Withdrawal" or notice of whatever.

11 MR. TUBRIDY: Did you put in a notice of appearance?

12 MR. AVERY: There was a notice of appearance  
13 but it had 9 on the notice.

14 MR. TUBRIDY: If you put in a notice of appearance  
15 you will have to have another notice to show that you have to  
16 plan to withdraw them.

17 MR. AVERY: The notice of appearance covered 9.  
18 The place where the 12 appeared was on the petition to  
19 intervene.

20 CHAIRMAN BENNETT: As long as there was a formal  
21 notice to intervene there should be a formal notice to  
22 withdraw.

23 MR. AVERY: We think the same.

24 CHAIRMAN BENNETT: Anything else?

25 MR. AVERY: Our motion about the 5 days.

1 CHAIRMAN BENNETT: I think 30 is too long; I  
2 think 10 is all right, don't you?

3 MR. AVERY: I really think -- I hope, first,  
4 there will not be any delay in light of the schedule by  
5 giving us 30 days. We have this three boxes of material. We  
6 have a bunch of other things going at the same time. I  
7 don't think you will delay anything by giving us 30 days,  
8 Mr. Chairman, and it will enable us to do the job a little  
9 more adequately. I really hope you will see your way  
10 clear to give us this.

11 CHAIRMAN BENNETT: I will dicker with you and  
12 give you 15 instead.

13 MR. AVERY: How about 20?

14 CHAIRMAN BENNETT: Do the other parties have  
15 objection? If the other parties agree to 30, all right.

16 MR. AVERY: I am sure they will.

17 MR. STOVER: I don't think it would hurt us any.

18 MR. FARMAKIDES: In the notice --

19 MR. BOUKNIGHT: Apparently we agree, your Honor.

20 MR. AVERY: Fine.

21 CHAIRMAN BENNETT: If you have no objection, then  
22 don't bother to bring a motion. Just make a stipulation and  
23 send us a stipulation. We have even taken your stipulation  
24 with respect to the issues, you know, even though we warned  
25 you we would make you cut it down later.

1 MR. BRAND: Your Honor, there is one other minor  
2 matter. I hesitate to bring it up to the Board at this late  
3 hour. For the sake of preserving my eyesight, I believe I  
4 must.

5 The quality of the reproductions that we have been  
6 getting are terrible. As we understand the practice of Duke  
7 is to make three copies, one of which is then loaned to us  
8 and we make another reproduction from it.

9 We have no objection to that practice. We would  
10 prefer, however, either to have the option on certain  
11 documents to go down to North Carolina and reproduce originals  
12 or we would like an opportunity, if the copy is not legible  
13 and can't reproduce -- a legible reproduction can't be made  
14 from it we think the Applicant under those circumstances  
15 should provide us free of charge a copy to replace the ones  
16 we attempted to make.

17 MR. AVERY: Again, Mr. Chairman, this is the  
18 first we have heard of it. We are perfectly willing to work  
19 with counsel and obviously they are entitled to legible  
20 copies.

21 CHAIRMAN BENNETT: I expect them to have copies  
22 they can read.

23 MR. AVERY: No question about it.

24 CHAIRMAN BENNETT: We should have in the business,  
25 prevention of blindness. I can assure you that I know that



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1 I know that with 40,000 or 50,000 documents it is pretty  
2 rough on the eyes of the individual.

3 MR. AVERY: We will certainly work with them to  
4 be sure they have legible copies.

5 CHAIRMAN BENNETT: May I express my appreciation  
6 for the patience which each of you exercised in allowing me  
7 to berate you each in turn because I think frankly a little  
8 taking of the position opposite the position being proposed  
9 by an individual is productive of a good, strong response.  
10 I got it and I appreciate it, thank you. But I just wanted  
11 everyone to know that I appreciated the way you all  
12 behaved here and took my rather strenuous objections to your  
13 proposals and also were willing to change your form of argu-  
14 ment from that which you had prepared to that which I asked  
15 you to respond to. I think I express the opinion of all  
16 the members of the Board.



17 MR. TUBRIDY: We are very grateful to you gentlemen.

18 MR. AVERY: We appreciate the obvious great amount  
19 of time you spent in getting ready for this. It was a very  
20 useful day, I think.

21 MR. STOVER: Yes, we do. Thank you.

22 (Whereupon, at 5:05 p.m., the prehearing was  
23 concluded.)

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