UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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

To the Atomic Safety and Licensing Board:

APPLICANT'S REPLY TO ANSWER
OF THE DEPARTMENT OF JUSTICE

Pursuant to Section 2.730(c) of the Commission's Rules of Practice, 10 C.F.R. Part 2, and to the attached motion for leave to file, Duke Power Company (hereinafter "Applicant") hereby submits its Reply to the "Answer of the Department of Justice[1/] to Applicant's Objections . . .", dated October 25, 1972 (hereinafter "Answer").

For the reasons set out herein, the Department's Answer is without merit and each of Applicant's objections should be sustained.

1. Fishing

As the Department's Answer observes, several of Applicant's objections rest on its view that document requests in question constitute "fishing", i.e., defining document designations so broadly as to sweep into their dragnet thousands of

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1/ The Department of Justice, the AEC regulatory staff and the Intervenors joined in submitting the Joint Document Request to Applicant. See covering letter from Brand to Ross dated September 5, 1972. Only the Department of Justice has submitted an answer to Applicant's objections.

irrelevant documents "in the hope that something will turn up". FTC v. American Tobacco Co., 264 U.S. 298, 306 (1924) (Holmes, J.)[2/]

The Answer admits that the Commission's Rules of Practice prohibit "fishing". However, the Department attempts to brush aside Applicant's contention that several of the Joint Document Requests are no more than fishing expeditions by suggesting that the Department is not subject to the Commission's Rules of Practice on discovery. The Department, it is claimed, may pursue its discovery "on suspicion" and without regard to the relevance of the documents that it seeks (Answer, p.5).

The Department's hypothesis is untenable. According to Section 2.700 of the Commission's Rules of Practice, the sections of the Rules which contain the discovery procedures (Sections 2.720, 2.740-742, and 2.744) govern procedure in all adjudications "initiated by the issuance of a . . . notice of hearing". This proceeding, of course, was initiated by a notice of hearing on June 28, 1972, and is, therefore, governed by those discovery procedures.

2/ The concept of "fishing" set forth in American Tobacco and many other cases is clearly broader than the definition proposed by the Department's Answer (p.6). See, e.g., Jones v. SEC, 298 U.S. 1, 26-28 (1936); United States v. Ling-Temco-Vought, Inc., 49 F.R.D. 150 (W.D. Pa. 1970); Flickinger v. Aetna Cas. & Sur. Co., 37 F.R.D. 533 (W.D. Pa. 1965). See also 8 Wright and Miller, Federal Practice and Procedure §2206 (1970 ed.) and cases cited in fn 99.

It is also clear that Congress intended the Department of Justice be governed by the same discovery rules as other participants in this proceeding since the 1970 amendment to Section 105(c)(5) of the Atomic Energy Act provides for the Department's participation "as a party" (emphasis supplied) in the antitrust hearings which its advice letters recommend.[3/] The Commission's procedures carefully delineate the discovery rights and responsibilities of parties to the proceeding; one such delineation explicitly proscribes "fishing" for evidence.

Another Atomic Energy Commission antitrust hearing board recently rejected similar Department contentions that the Commission's Rules of Practice pertaining to discovery are not applicable to the Justice Department. At a prehearing conference in the Consumers Power case,[4/] the Department argued that the Applicant should provide it with free copies of requested documents, even though the Rules of Practice clearly provide otherwise. The Department claimed that its role "shouldn't be regarded as simply that of an adversary where we are seeking some private advantages, but [as] simply

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3/ 84 Stat. 1473, 42 U.S.C. §2135(c)(5).

4/ AEC Docket Nos. 50-329A-330A (Application for Construction Permits for the Midland Units). The Prehearing Conference in question was held October 12, 1972.

carrying out the inquisitorial role of the Commission in this regard". (Tr. 171). The Board rejected the argument in a holding equally persuasive here:

> CHAIRMAN GARFINKEL: I appreciate your concern, Mr. Brand, but I think this Board is govnerned [sic] by rules of discovery now.
>
> What should have been done or what the practice should be prior to the actual notice of hearing is one thing, but the case, in dealing with discovery, does not require the furnishing of documents or copies free. So I am bound by that type of ruling. I can't be concerned, in this proceeding, with what the procedure should be prior to the initiation of a law suit (Emphasis supplied).

This Board should similarly affirm that the Commission's Rules apply to all parties to this proceeding.[5/] Each Department request should then be examined in light of the Rules' proscription of fishing.

2. Request 2: Applicant's Filing System

According to the Department's Answer, the request seeks a "detailed description of Applicant's filing system" in order to obtain a "clear picture of the sources of documents

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5/ The Department's reliance upon United States v. Morton Salt Co., 338 U.S. 632, 640-643 (1950) is entirely misplaced. In Morton Salt the Court was concerned with the general law enforcement powers of the Federal Trade Commission. Significantly, once that Commission's adjudicatory process begins, these broad powers are superseded by more restrictive discovery procedures which are applicable to all parties, including the Commission's staff. See All-State Industries of North Carolina, Inc., FTC Docket 8738, 3 CCH Trade Reg. Rep. ¶18,103 (Nov. 13, 1967).

provided in response to their request . . ." (Answer,p.7). In discussions with opposing counsel, the joint discoverers have made clear that they request the descriptive titles contained upon every file folder in the Company.

Contrary to the Department's assertions, this request for every descriptive title contained on every Company file folder is not "narrowly directed" (Answer, p.6). Indeed, Applicant suggests that the Department's rationale for the request is only a pretext for a fishing expedition, i.e., an effort to peruse file titles "in the hope that something will turn up". See Part I, supra. If the Department actually seeks no more than to ascertain the "source" of documents provided in response to the Joint Document Request, the method it proposes to utilize here will not only be unnecessarily time-consuming but also will fail to achieve its purported purpose. The file indexes will not indicate the files from which any given document came. If the Department wishes to obtain that information, it can proceed under Section 2.740b of the Rules of Practice.

3. Requests 4(f) et al: Applicant's Legal and Political Activity

The Department's effort to justify its request to obtain documents relating to Applicant's political and legal activities misstates the relevant facts and misconceives the applicable case law.

The Department addresses itself to two issues: relevance and privilege. Its argument on relevance simply begs the question. The Department discourses at great length on a point which Applicant readily concedes: Applicant is, by the nature of its business, thrust into the political and legal process at several levels. This being so, says the Department, Applicant's activities in these spheres must be relevant to the antitrust questions at issue in this proceeding.[6/] The Department thus neatly ignores the holdings of Pennington and Noerr that political and legal activities are not violative of the antitrust laws. This tack is particularly pertinent in light of the failure by either the Department or Intervenors to allege that any "sham" is here involved[7/] -- a position reaffirmed by the Department in its present pleading (Answer, p.12).

6/ In the course of this effort, the Answer (p.8) inaccurately characterizes Applicant's objection in this regard as "in all essential respects, identical" to that of the plaintiff in Gulf States Util. Co. v. McLaren, Civil Action No. 71-102 (M.D. La. 1972). The Court's minute entry, which is attached to the Department Answer as Appendix A, does not discuss the basis for its holding concerning documents related to political and legal activity. Moreover, plaintiff's memorandum in that case, which is attached hereto as Appendix A, reveals that, unlike Applicant here, Gulf States' objections were not founded upon Constitutional principles. Moreover, that case arose under the Antitrust Civil Process Act, 15 U.S.C. §§1311-1314, which, unlike the Commission's Rules, permits the discovery of irrelevant documents and condones "fishing" expeditions. Petition of Gold Bond Stamp Co., 221 F. Supp. 391, 397 (D. Minn. 1963). Thus the aforementioned case is not remotely in point to the issues raised in Applicant's Objections.

7/ See pp. 12-13, infra.

Once the Answer finally turns to the question of privilege raised by Applicant's Objections, its argument rests upon the erroneous assumptions that (1) Applicant enjoys fewer Constitutional protections than other persons and (2) that Applicant's First Amendments rights would not be "chilled" by the discovery sought by the Department.

The Department's Answer concedes that Supreme Court cases have protected certain entities from document production where such production would "chill" the exercise of First Amendment rights. But, it asserts, Applicant cannot "step into the shoes" of those to whom the Court has offered such Constitutional protections because it is a "mighty utility" with considerable assets and revenue (Answer, p.1). We would have hoped that the Department would be more sensitive to a fundamental principle of Constitutional law -- that protection of basic Constitutional rights is not a function of economic status. Gideon v. Wainwright, 372 U.S. 335 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). We recognize that this principle has usually found expression in cases where the rights of the economically disadvantaged were under attack. Id. However, the threat to basic freedoms which arises from erosion of this principle is also cause for concern when weight is given to the favorable economic status of the person claiming Constitutional rights. Moreover, it is clearly established that the Constitution equally protects the rights of corporations.

Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949); Grosjean v. American Press Co., 297 U.S. 233 (1936).

Significantly, in the Noerr case itself, the defendants included 24 railroads - an industry whose impressive political power and financial resources were, in part, responsible for the establishment of government regulation eighty years ago. Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). Yet, in Noerr, the Court held the railroads' participation in the political process to be beyond the scrutiny of the Sherman Act in words which are equally applicable here:

> "[W]e have restored what appears to be the true nature of the case -- a 'no-holds-barred fight' between two industries both of which are seeking control of a profitable source of income. Inherent in such fights, which are commonplace in the halls of legislative bodies, is the possibility, and in many instances even the probability, that one group or the other will get hurt by the arguments that are made. In this particular instance, each group appears to have utilized all the political powers it could muster in an attempt to bring about the passage of laws that would help it or injure the other. But the contest itself appears to have been conducted along lines normally accepted in our political system, except to the extent that each group has deliberately deceived the public and public officials. And that deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned. That Act was not violated by either the railroads or the truckers in their respective campaigns to influence legislation and law enforcement." (Footnotes omitted). 365 U.S. at 144-45.

The Department's Answer not only clouds the Applicant's right to the protection of the First Amendment, but it is also disingenuous in its analysis of how the exercise of those rights would be chilled by granting the Department's discovery request. The "chilling" impact upon Applicant's First Amendment rights has nothing to do with punishment for past political activity or with the outcome of this proceeding, as claimed by the Department (Answer, pp.15-16). Rather, whatever the outcome, permitting discovery of Applicant's internal files relating to political activity will put Applicant on notice that the privacy of these files is not inviolate. This knowledge, in turn, will inevitably inhibit Applicant's future exercise of its First Amendment rights. "[I]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government". Lamont v. Postmaster General, 381 U.S. 301, 309 (1965) (Brennan, J., concurring). See also Baird v. State Bar of Arizona, 401 U.S. 1 (1971); Baggett v. Bullitt, 377 U.S. 360 (1964).

In Lamont, supra, the Court held that the Post Office could not condition delivery of Communist "political propaganda" upon the addressee's written request for delivery. According to the Court, the condition was "almost certain to have a deterrent effect" on the exercise of the First Amendment rights since the addressees "might think" that public disclosure

of the request could result in adverse consequences. 381 U.S. at 307. Clearly, the inhibitory and chilling effect of the discovery which the Department seeks in this proceeding is no more "remote" (Answer, p.16) than governmental action proscribed by the Court in Lamont.

The Department's Answer also asserts that the "chilling" effect which would result from discovery of political activities must defer to the Government's "interest" in making such discovery (Answer, p.16). However, where, as here, the discovery would inhibit activity which is in the public interest, the discoverers must satisfy a standard of "exceptional necessity". Bredice v. Doctors Hospital, Inc., 50 F.R.D. 249, 250 (D.D.C. 1970). The Department has made no such showing.

In an effort to show the necessity for production of documents relating to political activity, the Department relies upon dicta contained in a footnote to the Pennington case, supra, 381 U.S. at 670, n.3. According to the footnote, it would be "within the province" of the trial judge to admit otherwise-privileged evidence of political ctivity where he found it (1) "probative", (2) "not unduly prejudicial" and (3) where the evidence "tends reasonably to show the purpose and character of the particular transactions under scrutiny".

Reliance upon such dicta here is misplaced since as one court has held, "not only is it illogical to infer from

evidence that [defendant] engaged in certain completely lawful [political] conduct that it also engaged in other conduct which was unlawful, but it would seem that to draw such an inference in this case would be an infringement upon defendant's First Amendment rights". United States v. Johns-Manville Corp., 259 F. Supp. 440, 453 (E.D. Pa. 1966). The Johns-Manville court also perceptively observed that none of the cases cited in the Pennington footnote "involved a situation in which predatory intent was inferred from participation in constitutionally protected activities". Id.

It is significant that the Department's Answer does not indicate for which "particular transaction under scrutiny" it seeks the requested documents. Having failed to identify any such transaction or to demonstrate the relationship between it and the documents requested, the Department has not justified the "chilling" impact on Applicant's First Amendment rights that would be the inevitable result of producing these documents.

Finally, the objections put forward by Applicant cannot be circumscribed by reliance upon the so-called "sham" exception to the Noerr-Pennington principle. In the Noerr case, supra, the Court noted that its holding did not encompass conduct which is a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor . . ." 365 U.S. at 144 (emphasis

supplied). Recently, while reaffirming the principles enunciated in Noerr and Pennington, the Supreme Court explained that, in the context of the judicial process, the sham exception includes efforts to deter competitors having "free and unlimited access" to agencies and the courts or to abuse the adjudicatory process by perjury, fraud or bribery. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 511 (1972).

The sham exception is of no relevance here. First, the requested documents here under challenge involve all of Applicant's political and legal activity. They are not restricted to documents related to Applicant's alleged efforts to deter competitors' "free and unlimited access" to agencies or the courts or to abuse the adjudicatory process by perjury, fraud or bribery. Second, neither the Justice Department nor the Intervenors have alleged that Applicant ever engaged in any political conduct which could be categorized as falling within the "sham" exception to the Noerr-Pennington doctrine.[8/] The Justice Department specifically states that it does not

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8/ The cryptic footnote contained in the Answer to the effect that Applicant "may have" engaged in threats to "ensnarl competitors in a web of regulatory and judicial proceedings" (p.12) is not only without foundation but also, even if proven, would not constitute a "sham", as the Court has defined such activity in California Motor. Such a reading of the sham exception would result in the anomaly that one could not threaten to engage in political activity but one could engage in such conduct, i.e., a "no-holds-barred" fight "seeking control of a profitable source of income." Noerr, supra, at 144.

know whether Applicant's activities fall within its alleged "sham" exception (Answer, p.12; Reply of Department of Justice to Applicant's Answer and Motion of July 24, 1972, filed August 3, 1972, p.16). The Intervenors simply claim that Applicant's activities "may" violate the Sherman Act. (Initial Prehearing Statement, filed August 9, 1972, p.13.) Moreover, the materials specifically relied on by Intervenors reveal that Applicant's opposition to various public power proposals has been open, vigorous, "on the merits", and essentially political in nature -- the very conduct most particularly protected by the First Amendment. (See Exhibits to Intervenor's Initial Prehearing Statement, filed August 9, 1972).[9/]

No tribunal should permit a chilling invasion of Applicant's Constitutionally-protected rights based upon the bald assertion that Applicant has frequently undertaken political or legal activities. Applicant's objections relating to political and legal activities should therefore be sustained.

9/ These exhibits show that Applicant did no more than come forward with facts and arguments for consideration by various governmental agencies: by the United States Congress in deciding whether to appropriate funds for Interior Department, Corps of Engineers and Public Works construction projects (Proposed Intervenors Ex. 1-7, 19-20, 23); by municipalities in the State of North Carolina (Ex. 11, 12), by the North Carolina Utilities Commission (Ex. 8, 14), by the Atomic Energy Commission (Ex. 9) and by the Federal Power Commission (Ex. 13) in deciding whether to authorize the EPIC project and other matters; and by other parties interested in Applicant's views on these and related public policy issues (Ex. 10 - shareholders, Ex. 15 - prospective bondholders, Ex. 18 - municipal officials).

4. Request 6(e): Allocation of Service Areas

The Department fails to refute Applicant's objections concerning the production of documents reflecting activity required by state law, i.e., directives from state utility commissions to Applicant to negotiate territorial allocations with neighboring utilities. Acceptance of the Department's conclusory arguments could lead this Board into a hopelessly complex examination of reasons why state action was undertaken, thereby emasculating the doctrine of Parker v. Brown.

The Department begins with the claim that any aspect of the business relationships between Applicant and smaller utilities is discoverable (Answer, pp.18-19). The Department would thus jettison any standard of relevance to antitrust concepts and open the door to discovery of all aspects of Applicant's business. This is not the approach permitted by discovery rules and practice.

Next, the Department cites three specific reasons for seeking discovery in this area, none of which is persuasive. First, it pleads that documents relating to wholesale territorial allocations are properly within the scope of its inquiry; however, Applicant has objected here only to the Department's request for documents concerning retail territorial allocations required by state law. Second, the Department claims that "it is not clear" whether the state utility commissions' directives to Applicant and other utilities to negotiate territorial

allocations were sanctioned by state law (Answer, p.19). However, the Department offers this claim without even attempting to analyze the applicable state law. In the absence of even an attempt to show that the applicable statute supports the Department's theory, the Board should give this argument short shrift.

Ultimately, the Department admits that it is not really concerned with these state-approved territorial assignments (Answer, p.20). Rather, it argues, it should be permitted to inquire into these negotiations, since inquiry "might" reveal anticompetitive conduct and "could be" significant (Answer, p.20) (emphasis supplied). Utilization of the verbs "might" and "could be" reveals that the request is no more than an effort to "fish" for evidence. See Part I, supra.

Thus, permitting inquiry into negotiations required by state authority not only flies in the face of Parker v. Brown but also constitutes an effort to open up a new area of inquiry in the hope that something will turn up. The Rules proscribe such a fishing expedition.

5. Request 16: Municipal and State Elections

The Department seeks to justify its request for all documents relating to all elections on the grounds that Applicant's objections foreclose "the possible discovery of relevant documents" (Answer, p.21) (emphasis supplied). Again, the

language of the Department's Answer demonstrates that its request is improper. The Rules require only the production of relevant documents and prohibit fishing; they do not permit requests leading to the "possible discovery" of relevant documents.

In its assiduous pursuit of documents reflecting Applicant's exercise of its First Amendment rights, the Department here abandons certain basic standards of fairness. We trust that the Board shares Applicant's dismay that the Department has sought to influence the Board's thinking as to Applicant's conduct by appending to its Answer a newspaper clipping about activities of an entirely unrelated utility operating in another state -- activities which themselves are more than ten years old. Equally reprehensible is the Department's reliance upon such generalized statements as "large electric utilities such as Applicant have traditionally possessed considerable political power" (Answer, p.21). The Department's lapse into emotional rhetoric makes it clear that, through Request 16, it is pressing no more than a fishing expedition into Applicant's activities.

6. Requests 13 and 17: Documents "Located In" Files

The Department's Answer on its face demonstrates the impropriety in permitting documents to be designated solely by their location in certain files. According to the Answer, the Department seeks to ascertain "the entire record" of "day to

day relationships" between Applicant and all of its wholesale customers in order to discover "the anticompetitive means and techniques employed by Applicant over the years . . ." (Answer, p.23).

This explanation constitutes a virtual admission that the Department seeks access to entire files in the hope of turning up documents which may relate to anticompetitive conduct. In other words, the Department here abandons any effort to designate documents, as the Rules of Practice require, and asserts a right to inspect files which, it concedes, are "voluminous" (p.23) and which, it also admits, may (or may not) contain relevant documents. The Department's offer to "sample and exclude" "repetitive, routine documents" found in these files (p.23) merely confirms that its request sweeps volumes of documents into its ambit which are not relevant to this proceeding.

7. Request 30: Documents Related to Regulatory Jurisdiction

The Department does not make a convincing case for obtaining all documents in which Applicant has asserted that its activities are subject to state or Federal regulation. It recognizes this fact by retreating substantially from its original request.

The Department claims that the requested documents would be relevant to the determination, in this proceeding, as to which activities of Applicant are subject to regulation and

by whom. That question is one of law which this Board may have to determine. We submit that the Board will make that determination on the basis of its own legal analysis, not on the basis of positions taken by Applicant in other proceedings. The Department's request would simply require the review and production of masses of material which would not be evidentiary at all. The only possible use which the Department might make of it would be as citation in legal argument.

In explicit recognition that it has gone too far, the Department states that production of all the documents it seeks would be "not particularly useful" (Answer, p.24). Hence, it suggests that Applicant produce a sample showing assertions as to regulatory jurisdiction over each "type of activity for which the fact or extent of regulation may be at issue." (Answer, p.24) This suggestion solves none of the problems raised by this Request. The documents produced would still be non-evidentiary and irrelevant. The search would be just as extensive. In addition, the standard is impossible to comprehend since Applicant does not know which activities are "at issue" with respect to regulatory jurisdiction.

If the Board does feel that past assertions as to jurisdiction are, in fact, germane, we suggest that the Department could more properly pursue the matter through

interrogatories under Rule 2.740b. The very process of framing interrogiatories would delineate the activities as to which regulatory jurisdiction is "at issue." In the meantime, this Request should be denied.

8. Request 31: Tax Returns

As the Department concedes, the issue raised by Applicant's objection to request 31 is whether or not data relevant to this proceeding and contained in its tax returns is "readily obtainable otherwise" (Answer, p.24).

Throughout negotiations with the Department concerning this request, counsel for the Department refused to identify precisely what data contained in the returns it seeks and needs. Having persisted in its failure to do so in its Answer, the Department is clearly not entitled to invade the privacy of these returns.

The Department's only elucidation of the grounds for its request is that it does not seek to find out how much tax Applicant pays, but rather wants to ascertain "how much tax was not paid" (Answer, p.28) (emphasis supplied). The latter question appears to be an exercise in metaphysics; in any event, contrary to the Department's assertions, the amount of taxes not paid has never been put in issue by Applicant (Answer, p.27).

Applicant has raised the issue of comparative tax burdens, i.e., the amount of taxes it pays compared to the

amount of taxes paid by other neighboring utilities. This inquiry is, of course, vital since many of these utilities pay no taxes and borrow capital at reduced rates, and are thus afforded competitive advantages of direct relevance to this proceeding. The Department fails to explain why a study of comparative tax burden requires any more than a record of taxes paid, capitalization, revenues received, and expenses incurred. Such data, as the Department concedes, is contained in Applicant's Form 1's filed with the Federal Power Commission. (Answer,p.28).

Thus, since the data relevant to the tax issues raised in this proceeding are "readily obtainable otherwise", request 31 should be denied.

9. Request 6(p) and 37: Pending FPC Proceedings

The Department's response to Applicant's objections to production of documents reflecting pending proceedings before the Federal Power Commission demonstrates that requests 6(p) and 37 merely seek to re-litigate matters currently before the FPC.

The Department is clearly hard-pressed to find issues in this proceeding to which the documents sought are remotely related. Its Answer alleges that the documents sought will demonstrate Applicant's "thwarting in various ways potential competing water power projects". Only request 6(p), which

calls for all documents relating to EPIC's Green River application before the FPC, is remotely in point. Although Applicant opposed that application, the Commission has granted EPIC a preliminary permit which gives the right of priority of application for license over other non-federal entities, while the permittee undertakes studies to determine the feasibility of the proposed project in accordance with FPC regulations.[10/] Since the Green River project has not therefore been "thwarted" by Applicant, it is difficult to discern how any documents with regard to the application relate to alleged "thwarting" of competing facilities.

The Answer also contends that the documents requested are relevant to the issue whether "Applicant has imposed a price squeeze upon its wholesale customers/retail competitors" (Answer, p.30). The reference here must be to request 37 which calls for documents relating to the Applicant's current fuel adjustment clause proceedings before the FPC. Such an alleged squeeze relates to the effect of existing rates and conditions, not to proposed changes to those rates and conditions. Thus, the documents requested are not related in any way with the issues upon which the Department bases its request.

10/ In fact, in its order issuing the permit, the Federal Power Commission ruled that the matters raised by the Intervenor (the Applicant here) were appropriate for consideration in a proceeding for an application for a license and not in a proceeding for a preliminary permit.

CONCLUSION

Wherefore, Applicant urges the Board to sustain its objections to the aforementioned items of the Joint Document Request.

Respectfully submitted,

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November 10, 1972

ATTACHMENT A

NOTE: Only those pages of the Memorandum dealing with the Noerr-Pennington argument have been included in this Attachment.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

GULF STATES UTILITIES COMPANY,	:	
	:	
PETITIONER	:	CIVIL ACTION NO. 71-102
	:	
VS.	:	
	:	
THOMAS E. KAUPER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, UNITED STATES DEPARTMENT OF JUSTICE,	:	MEMORANDUM RESPONSE TO MOTION FOR ENFORCEMENT
	:	
RESPONDENT	:	

Upon the terse assertion that the Antitrust Division, Department of Justice, was conducting an inquiry for the purpose of ascertaining whether or not there existed a violation of Title 15, USCA, sections 1 and 2, by conduct of "agreements in reasonable restraint of trade between your company and neighboring bulk power supply systems, monopolization and attempted monopolization of bulk power supply and monopolization and attempted monopolization of the retail distribution of electric power", and without notice or previous request for information, the Antitrust Division invoked the Antitrust Civil Process Act (15 USCA, 1311-1314) and served Gulf States Utilities Company with a motion to produce documents covering a significant portion of the corporation's activities over an eleven-year period.

After deliberation Gulf States responded by filing a petition for order to set aside or modify the civil investigative demand pursuant to 15 USCA 1314 (b), in which a number of objections to the production of documents were raised. However, with the knowledge that the discovery procedure invoked was only investigatory in nature and that partial compliance could not be construed as an acknowledgment that there constituted a reasonable basis for issuance of the motion in the first place, Gulf States made a good-faith effort to produce the documents demanded in the subpoena,

and, in fact, has forwarded approximately _____ thousand documents to the Antitrust Division. Arrangements were reached between counsel limiting the scope of the motion in order to minimize the burden of Gulf States in selecting, sorting and reproducing documents thus curing an area of objection.

However, Gulf States, as a matter of principal, adhered to its initial objection to providing two categories of documents included in the production provided for in the civil investigative demand, viz: (a) documents involving company activities to influence government action - legislative, judicial, executive or administrative[1] which were withheld by Gulf States for the reasons stated in paragraphs 5 (b) and (c) of its petition; and (b) communications between Gulf States and its attorneys and attorneys and parties similarly aligned with Gulf States in litigation on which the attorney-client privilege has been urged. This proceeding involves those documents.

There are two questions of law to be resolved by the court in this proceeding, and they are:

(1) Relevance of documents relating to the company's activities to influence "government action" to a civil antitrust investigation in the light of the NOERR-PENNINGTON doctrine (EASTERN RR CONFERENCE VS. NOERR MOTOR FREIGHT, 365 US 127 (1961); UNITED MINE WORKERS VS. PENNINGTON, 381 US 657 (1965); and

(2) Whether the Department of Justice has made a prima facie case that the otherwise privileged communications between Gulf States and its attorneys and attorneys commonly aligned in litigation, constitute communications in furtherance of illegal activity and, therefore, not entitled to a privileged status.

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(1) Because of the volume of documents reviewed and returned, Gulf States did not rigidly adhere to this objection in its sorting of documents and, accordingly, many documents covered by this category have already been furnished the Department of Justice.

Gulf States interposes no objection to the government's request for an in-camera inspection of the privileged documents by the court, and such documents will be produced at the hearing on this matter.

1. RELEVANCE TO A CIVIL ANTITRUST INQUIRY OF DOCUMENTS INVOLVING ACTIVITIES TO INFLUENCE GOVERNMENT ACTION UNDER NOERR-PENNINGTON DOCTRINE

Gulf States urges as a matter of law that the NOERR-PENNINGTON rule as further defined by the Supreme Court in CALIFORNIA MOTOR TRANSPORT COMPANY VS. TRUCKING UNLIMITED, 404 US 508, 40 US Law Week 4153 (1972), precludes documents reflecting activities to influence government action from being relevant or reasonable to a civil antitrust inquiry. The Antitrust Civil Process Act extends to documentary material "relevant"to a civil antitrust investigation (15 USCA 1312 (a)), provided such demand does not require the production of any document which would be held to be "unreasonable" if contained in a subpoena duces tecum issued in aid of a federal grand jury investigation (15 USCA 1312 (c)). Documents reflecting activities involving attempts to influence government action are not relevant to civil antitrust inquiry, and their production would be considered as unreasonable if viewed in the light of grand jury subpoenas.

The NOERR-PENNINGTON doctrine, as amplified by the recent TRUCKING UNLIMITED decision, involves a conflict between the reach of the Sherman Act in matters of economics and the basic constitutional rights of persons to freedom of speech and right of petition guaranteed by the First Amendment. In the NOERR case the Supreme Court was concerned with an injunctive action brought by an association of motor carriers seeking to restrain a railroad association from conspiring to restrain trade and monopolize the long-distance freight business through a publicity campaign and lobbying efforts allegedly calculated to destroy the motor transport freight business. Justice Black, speaking for a unanimous court, recognized the fundamental constitutional issues raised in any action seeking

to deny or eliminate a person's freedom of speech and right of petition to the government, stating:.

> In the first place, such a holding would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly unjustified in this case in view of all the countervailing considerations enumerated above. For these reasons, we think it is clear that the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws. *** 365 US at pages 137-8.
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> * * * * *
>
> In rejecting each of the grounds relied upon by the courts below to justify application of the Sherman Act to the campaign of the railroads, we have rejected the very grounds upon which those courts relied to distinguish the campaign conducted by the truckers. In doing so, we have restored what appears to be the true nature of the case - a "no-holds-barred fight" between two industries both of which are seeking control of a profitable source of income. Inherent in such fights, which are commonplace in the halls of legislative bodies, is the possibility, and in many instances even the probability, that one group or the other will get hurt by the arguments that are made. In this particular instance, each group appears to have utilized all the political powers it could muster in an attempt to bring about the passage of laws that would help it or injure the other. But the contest itself appears to have been conducted along lines normally accepted in our political system, except to the extent that each group has deliberately deceived the public and public officials. And that deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned. That Act was not

> violated by either the railroads or the truckers in their respective campaigns to influence legislation and law enforcement. *** 365 US at pages 144-5.

In UNITED MINE WORKERS VS. PENNINGTON, SUPRA, the court was concerned with an alleged conspiracy in violation of the antitrust laws between a labor union and large coal companies to impose upon the coal industry a wage and productivity agreement through efforts to influence TVA to refrain from purchasing coal from the companies not subject to the agreement and effectively eliminate such small coal operators from business. In a decision which can be argued as broadening the rule of the NOERR case, the court concluded that:

> Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.
>
> * * * * *
>
> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as a part of a broader scheme itself violative of the Sherman Act. 381 U.S. at page 670.

In the TRUCKING UNLIMITED decision the Supreme Court reaffirmed the NOERR-PENNINGTON doctrine and added that the NOERR-PENNINGTON ruling, which pertained principally to activities to obtain legislative action, also encompassed legal actions calculated to obtain judicial decisions favorable to the economic interest of the moving party. Justice Douglas said:

> We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the anti-trust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors. 40 U.S. LAW WEEK at page 4154.

On the basis of these decisions Gulf States Utilities Company denies relevancy of the documents.

With all candor it is admitted that the Antitrust Division has been quite successful in having the courts conclude that information it sought to produce was "relevant and reasonable". There are exceptions, however.

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2. Counsel for Justice Department argues that language in a footnote to this quotation establishes the relevancy of the documents in question. This is discussed at page 7 infra.

In UNITED STATES VS. UNION OIL COMPANY OF CALIFORNIA, 343 F. 2d 29 (9th Cir., 1965), the production sought by the government was denied because it pertained to activity which was alleged to lead to a possible future violation and not restricted to the literal interpretation of the definition of "antitrust investigation" contained in 15 USCA, section 1311, which encompassed only activity constituting a present or past violation. It is true that the documentary information objected to here must be considered in a different context from the documentary information involved in the UNION OIL COMPANY case; however, the case does establish that "relevance" is a meaningful prerequisite to production. Gulf States submits that the documents covered by paragraph 5 (b) and (c) of the civil investigative demand to which objection has been made could not constitute evidence of a violation of sections 1 and 2 of the Sherman Act under the NOERR-PENNINGTON - TRUCKING UNLIMITED doctrine, and consequently are not a relevant subject of inquiry, if "relevancy" is to be given any meaning.

Counsel for the Justice Department contends that the information requested in paragraph 5 (b) and (c) "can constitute evidence of a violation of sections 1 and 2 of the Sherman Act under the "sham" exception enunciated in the NOERR decision as explained by the "denial of access to the courts and agencies" language in TRUCKING UNLIMITED. Alternatively, Justice contends that the documentsare relevant to this inquiry because they might tend to be admissible in evidence to show purpose and character of other conduct which allegedly forms the basis of violation, citing a footnote in PENNINGTON[3], and the Fifth Circuit opinion in HOUSEHOLD GOODS CARRIER'S BUREAU VS. TERRELL, 452 F. 2d 152 (5th Cir., 1971).

With respect to the first contention, Gulf States simply denies that its activities to influence government action (legislative, judicial, executive and administrative) within the meaning of the NOERR-PENNINGTON rule denied any party access to courts and agencies as contemplated in

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3. See page 7 infra.

TRUCKING UNLIMITED. Therefore, they cannot constitute a violation of the Sherman Act and would not be relevant to the inquiry.

Our reasons for support of this conclusion will be developed and discussed in following portions of this brief dealing with the issue of whether or not Justice has made a prima facie case that otherwise privileged documents are discoverable because they reflect activity violating sections 1 and 2 of the Sherman Act.

As to the second and alternative contention, Gulf States suggests that such doctrine as may evolve from the PENNINGTON footnote and developed in the CARRIER'S BUREAU case is not apposite here. This ruling presupposes that there is other conduct separate and apart from the activities to influence government action which could form the basis of a Sherman Act violation. We have carefully reviewed the affidavits filed by Justice and it is reasonable to conclude that the only activities which Justice documents in its claim of an alleged violation of the antitrust laws are lobbying to influence legislative and administrative action, lawsuits to obtain a favorable judicial result and publicity efforts in connection therewith[4] directed against rural electric cooperatives.

The government argues in a circle - the alleged illegal activity consisted of action to influence government action; but if not relevant to establish a violation of the Sherman Act, is is relevant to establish a purpose for other activities which might establish a violation. The circle is not complete. No other activities are cited and documented.

2. THE PRIVILEGE WITH RESPECT TO COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT

The government contends that communications between Gulf

4. In the affidavit there are conclusionary assertions of denial of access of Gulf States' transmission lines to others, offering some municipalities reserve-sharing contracts to the prejudice of LEC, and offering contract proposals which if accepted would allegedly restrict LEC, Lafayette, Plaquemine and Dow Chemical Corporation from use of Gulf States transmission lines for their best interest. No factual data is offered to corroborate such conclusion.

ATOMIC ENERGY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the MOTION FOR LEAVE TO FILE APPLICANT'S REPLY TO THE ANSWER OF THE DEPARTMENT OF JUSTICE AND SAID REPLY, dated November 10, 1972, in the above-captioned matter have been served on the following by deposit in the United States Mail, first class or air mail, this 10th day of November, 1972:

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