

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of)

DUKE POWER COMPANY)

(Oconee Units 1, 2, and 3;)
McGuire Units 1 and 2))

Docket Nos. 50-269A

50-270A

50-287A

50-369A

50-370A

RESPONSE OF CITIES OF HIGH POINT, ET AL.,
TO ORDER REQUIRING FURTHER
SPECIFICATION OF ISSUES

Intervenors (Cities of High Point, et al.) hereby submit their response to that portion of the Atomic Safety and Licensing Board's (Board) Prehearing Conference Order 3 which requires preparation and service of a new list of subissues of fact. The text of Cities' suggested subissues is attached hereto, and explanation of some of the items contained therein is set forth in this Response.

The numbers in our list of new subissues correspond to those utilized in the list attached to the Board's order of 20 September 1972.

Cities propose that the Board make clear that a showing by Duke that Cities' lower (than Duke's) cost of distribution and/or tax advantages lessen the impact of a price squeeze is not relevant in defense against the charge that Duke has imposed price squeezes. Duke's conduct and Duke's pricing is here in question. If Cities cannot purchase electricity on Duke's wholesale rate, incur Duke's average cost of distribution (including return) attributable to a certain product market and sell at retail on Duke's industrial rate, then Duke is pricing wholesale electricity higher to external distributors than to its own distribution system. This is abuse of Duke's wholesale monopoly power to afford

Duke's own distribution system an advantage. We characterize this as a price squeeze.

Evidence that Cities have not competed successfully with Duke in the large industrial market helps prove the likely existence of a price squeeze and helps prove Duke's present domination in that product market.

We believe that Duke intends to prepare and introduce studies purporting to show the cost to each City of serving certain hypothetical industrial customers. Discovery, the burden of which continues to increase, seems pointed in that direction. We think no such studies could be relevant to the present determination, and introduction of them could cause this proceeding to become so protracted and the record so voluminous and confusing as to burden Cities unduly and delay for years any clear decision in this case.

If profitability of Cities is at all relevant to this proceeding (and we think it relevant only to the question of degree of damage suffered by Cities), Duke has financial reports from each City and a tendered stipulation that each City enjoys an excess of revenues over expenses. The growth rates of Cities' electric systems are a matter of record, and Duke's records show the continuing power and energy requirements of each City. Cities have answered an exhaustive interrogatory concerning the retail industrial customers served by each City.

The line must be drawn ahead of a cost analysis of the distribution system of each City. It seems to us decisive that no distribution advantage - resulting from natural, legal, geographical, or efficiency

advantage - can excuse anticompetition conduct toward that distribution. But an equally important objection is that permitting this Commission's antitrust review process to evolve into a detailed investigation of the operations of each competing retail distributor who dares question the wholesale pricing of the vertically integrated Applicant is to close this forum to small retail competitors. Duke's, not Shelby's, pricing is properly in issue here. But Shelby, and the other Cities, are beginning to face a burden equal to that of an applicant in a retail rate case.

For these reasons, we request that the following more limited list of subissues be adopted.

Respectfully submitted,

TALLY, TALLY & BOUKNIGHT

Attorneys for the Cities of
High Point, et al.

Washington, D.C., this
2nd day of February 1973.

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TEXT OF PROPOSED SUBISSUES

I. Is there a situation inconsistent with the antitrust laws in a major area of the Piedmont Carolinas? If so, is Applicant culpable for such situation?

1. Have Applicant's activities

(a) violated the antitrust laws as specified in Section 105(a) of the Atomic Energy Act of 1954?

(b) been "inconsistent with the antitrust laws" (including the "policies clearly underlying those laws") by reason of impairing the competitive opportunities or abilities of others -- regardless of whether violation of the antitrust laws is established?

2. What are the relevant product and geographic markets? Does Applicant have substantial monopoly power in, or has it monopolized, bulk power supply in the relevant market(s)? Retail electric service? What, in fact, is the market share of Applicant in respect to bulk power? Retail service?

3. Does Applicant own or control all or substantially all generation in the relevant market(s)? Has Applicant attempted, with the object of maintaining or increasing any form of monopoly power or of restraining competition, to prevent the establishment of other bulk power facilities or systems, including federal hydroelectric projects, or to cause the establishment of such facilities or systems to be on such conditions as to allow Applicant to control or influence the design or operation thereof?

4. (It is proposed that the first sentence be answered "yes" by stipulation.)

Is such control a source of its alleged monopoly power in or monopolization of bulk power supply? Is Applicant abusing its alleged control over transmission to retain and extend its alleged bulk power supply monopoly?

5. Can Applicant use its alleged bulk power supply monopoly to retain and extend its alleged monopoly in (or, as the case may be, to increase a submonopolistic market share of) the retail electric service market or any submarket thereof?

6. (No change.)

7. (No change.)

8. Have any other activities of Applicant, including litigation and attempting to influence governmental action, been such as to evidence:

- (a) the anticompetitive character of Applicant's conduct, or
- (b) Applicant's intent to restrain competition?

Have any of such activities formed part of a scheme or combination to monopolize? Are any of them prima facie protected from antitrust sanctions by the First Amendment? If so, are such prima facie protected activities or any of them in fact subject to the "sham" exception or otherwise not entitled to First Amendment protection?

9. (No change.)

10. Is a market structure requiring purchase by a small system (such as one of the intervenors) of bulk power from its vertically integrated retail competitor conducive to effective retail competition? Has the Federal Power Commission, in dealing with the wholesale rates of Applicant (see Duke Power Co., ___ FPC ___, Opinion No. 641, 18 December 1972), indicated that it will or will furnish protection against any anticompetitive conduct?

10A. Has Applicant imposed a price squeeze upon its wholesale customers-retail competitors? Does regulation of Applicant's rates and practices by the Federal Power Commission and state commissions place any restriction on this Commission's ability to inquire into or -- apart from the actual prescribing of rate levels, which is agreed to be the province of the FPC and the state commissions -- to remedy these matters?

11. Do Applicant's wholesale rate schedules provide adequate access to the benefits of large-scale generation and transmission, if any, for intervenors and other municipal wholesale customers? Will the answer to this question be different because of the putting into operation of the nuclear units here at issue? If the answer to the first question is or will be "no", are other alternatives offering comparable benefits available to such systems?

12. (No change.)

13. Has the alleged absence of access to coordination had any effect on the ability of small systems to compete effectively against Applicant

in any of the relevant product markets? Has Applicant's pricing policy affected competition in any market? Were those small systems that failed to survive, if any, able to secure bulk power supplies to retain their market share? to increase it? Has Applicant acquired, or sought to acquire, small distribution systems?

14. (Strike.)
15. (Strike.)
16. (Strike.)
17. (No change.)
18. (Strike.)

Under Roman-numeral II., no changes are proposed in the wording of any question. Intervenors propose that stipulations be reached on questions 2, 3, and 4:

2. Power from the Ocone and McGuire units will be marketed as part of the output of Applicant's bulk power system and not separately from other power generated by Applicant.

3. Yes.

4. Yes.

Under Roman-numeral III., Intervenors propose to strike questions 4 and 5 (which are identical with I.15-16).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the attached RESPONSE, dated 2 February 1973, in the above captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 2nd day of February 1973.

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