1/11/73

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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

MOTION OF EPIC, INC. TO QUASH
OR MODIFY SUBPOENA DUCES TECUM
AND TO EXTEND TIME FOR RESPONSE

On 18 December, 1972, EPIC, Inc. (EPIC) was served with a subpoena duces tecum issued by the Atomic Safety and Licensing Board (Board) at the instance of Duke Power Company (Applicant), in connection with its application for licenses in these dockets. Pursuant to Section 2.720(f) of the Atomic Energy Commission's Rules of Practice (10 CFR §2.720(f)), EPIC hereby submits to the Board a Motion to Quash or Modify the subpoena, and moves as well for an extension of time in which to comply with such parts of the subpoena as are not objected to, or which this Board may require to be answered notwithstanding EPIC's objections. The subpoena is a lengthy one, consisting of 33 separate inquiries, many of them multifariously subdivided and others general in the extreme.[1/] Even a quick perusal of the questions makes clear the heavy burden of compliance, especially for an organization which has a staff of two and a decidedly modest budget. The requested extension of time would be appropriate even if none of the questions were subject to objections. As it is, the majority of

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1/ In one or two cases, the wording of the questions is so unclear or ambiguous that neither an adequate compliance nor a responsive objection is possible.

the demands are subject to objection on one or more grounds. We therefore believe it especially appropriate for the Board to extend the time for response, in order to avoid the potentially useless, and certainly costly and time-consuming task of preparing responses to questions which may be stricken as improper.

Section I of this motion develops a general objection to many of the questions contained in the subpoena. Section II deals, on a question-by-question basis, with the entire document, setting forth the objections to each and the reasons therefor.

I

A large number of the specific demands made in the subpoena are objectionable, on grounds of relevancy or otherwise, and EPIC hereby requests the Board to quash such items. Before reciting in detail the items to which we object and our reasons for doing so, we should discuss briefly the limits within which the existence and activities of EPIC can be considered relevant to this proceeding.

Applicant has stated (Application for Issuance of Subpoena Duces Tecum, pp. 1-2):

> * * * While it [i.e., EPIC] is not a party to this proceeding, its presence is clearly felt, and Applicant's activities in regard to EPIC have been placed squarely at issue. * * * almost every pleading filed in this proceeding, make[s] repeated reference to EPIC and to Applicant's attitudes and activities concerning EPIC. * * *.
>
> The intervenors have characterized EPIC as a potential competitor of Applicant. They also apparently claim that EPIC has been hindered in its development by Applicant. * * *.
>
> The documents requested will assist Applicant in developing a full record which will reflect the validity of the claims made by the Department of Justice and the intervenors. It will enable Applicant to demonstrate EPIC's

> history, plans, and present status. It will thereby enable this Board to appropriately assess the potential role of EPIC in supplying bulk power and the role which Applicant's activities have played in the existing or potential viability of EPIC.

The Board has the power to quash or modify a subpoena "if it is unreasonable or requires evidence not relevant to any matter in issue." 10 CFR §2.720(f). The rather generalized recital quoted above being Applicant's only effort to demonstrate the relevancy of the information demanded, it must be examined in light of the nature of this proceeding in order to determine relevancy.

EPIC is not a party to this proceeding. It seeks no relief from the Board. The parties who are seeking relief -- several North Carolina cities and the Department of Justice -- desire to establish that the granting of an unconditioned license to Applicant for the Oconee and McGuire developments would create or maintain a situation inconsistent with the antitrust laws. That inuqiry is taking place in the context of competition, or attempted competition, between Applicant and the intervening municipalities, which are its captive all-requirements wholesale customers. This competition takes place at the retail level. The EPIC system, if it is constructed, will introduce competition as well at the wholesale level, by providing an alternative bulk power source for the intervening municipalities and other publicly- or cooperatively-owned utilities similarly situated. That event, however, is not less than ten years in the future. The present inquiry cannot deal with competition between EPIC and Applicant directly, for there has been none; rather, insofar as EPIC is relevant at all, it must deal with Applicant's defensive

activities designed to prevent or retard the building of the EPIC system. These activities in turn bear on the presently existing competition between Applicant as a retailer of electricity and the various municipally-owned distribution systems, some of which are parties here. The cities have alleged that the monopoly presently enjoyed by Applicant in bulk power supply permits Applicant to increase its competitive advantage at the retail level. They therefore allege that Applicant not only seeks to retain its monopoly but to use it offensively against its municipal retail competitors. The allegations of activity directed against EPIC raise the question of a course of conduct or design to thwart competition, of which such activities would be probative evidence. Now the activities of a monopolist calculated to prevent the entry of a potential competitor are not less subject to proof and remedy under the antitrust laws if they are based on a counterfactual assessment of the competitive situation. If the anti-EPIC activities here took place as alleged, it does not matter whether they were based on an exact prediction of EPIC's competitive potential. It is the motivation that is important. By the same token, it does not matter whether the activities have succeeded in retarding the entry of the potential competitor into the market-place. If EPIC -- or for that matter the several municipal distributors -- were seeking money damages in this proceeding, such questions might be relevant. But since the relevance of EPIC and Applicant's alleged efforts to block it is simply to show a design and course of behavior on Applicant's part calculated to maintain its monopoly, no such question need

arise. The reaction of a monopolist to an imaginary threat may, in such a context, be quite as probative as its reaction to a real one of which it has formed an accurate assessment.

Placed thus in the real context of this case, Applicant's attempted showing of relevance largely vanishes. The "validity of the claims made by the Department of Justice and the intervenors" depends not on a detailed analysis of EPIC, but on a showing of Applicant's activities. Those claims do not rest on an allegation that, if constructed, the EPIC system will supply bulk power to particular customers on particular terms, but on the allegation that Applicant has perceived EPIC as a competitive threat and has acted to thwart it. Likewise, there is no need for this Board to "assess the potential role of EPIC in supplying bulk power". Applicant, it is alleged, has already done that; and what is in issue is the course of conduct to which that judgment has led Applicant.

II

We turn next to the specific demands contained in the subpoena to which objection is made. In dealing with these questions, we have made one assumption, which we believe to be correct: that where the subpoena speaks of "members" of EPIC, it means to refer to the various municipalities and cooperatives that are or will be signatories of EPIC power supply contracts. EPIC, which is a nonprofit corporation organized under the nonprofit corporation statutes of North Carolina, has no members in the strict sense.

We will also be referring in this section to the EPIC Feasibility Study and the Complaint in North Carolina Consumers Power, Inc. v. Duke Power Co., Superior Court of Cleveland County, No. 72 CvS 1734. These documents, which contain a great deal of the information requested herein, have been offered to Applicant in lieu of the responses called for in the subpoena, in an effort to find an expeditious compromise solution.[2/] Applicant has not accepted this offer, but EPIC would still be willing to attempt to reach a solution on this basis.

Item 1. Subsections (b) through (f) are objected to for the reasons detailed above.

Item 3. Subsection (a) is objected to not only because a complete documentary history of the financing of EPIC would be vastly disproportionate to the utility of such information in this proceeding, given the scope of inquiry discussed above, but also because of the unreasonableness of requiring a potential competitor to disclose to a present monopolist information of this kind on its future financing. Where a competitor such as Applicant has given the clearest possible public indications of its intention to exclude any rival, a potential rival should not be required to make the job easier by turning over data of this kind.

Subsection (b) calls for irrelevant information in that the individual signatories (cities and cooperatives) will not be borrowing in order to construct EPIC facilities. Besides,

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2/ Applicant is, of course, already in possession of at least one copy of the Complaint, since it has been served as a party defendant. We would supply further copies to Applicant's Washington counsel, who apparently do not now possess it.

Applicant has already requested and obtained the credit ratings of the cities which are parties to this case by way of its initial discovery request.

Subsection (c) again calls for irrelevant information; no REA or National Rural Utilities Cooperative Finance Corporation (CFC) money is intended to be used for construction of the EPIC system. Details on this subject can be found in the Feasibility Study and Complaint referred to above.

Subsection (d) again calls for information outside the proper scope of this inquiry, as well as being the subject, as to the cities intervening herein, of extensive discovery by Applicant.

Subsection (e) is subject to the same objection as (b) and (c).

Subsections (f) through (m) are, once again, demands for a great deal more factual detail than can be put to any use in this proceeding. Subsections (g) and (h) are further subject to the same objection raised in connection with subsection (a). A considerable amount of the information asked for here is conveniently available in the Feasibility Study and/or the Complaint, which have been offered to Applicant as described above.

Subsection (n) is irrelevant for another reason. The contractual exhibit to the Complaint referred to above contains the rate design on which EPIC relies to attract customers. It is on that rate structure that competition, if any, between EPIC and Applicant will take place. Accordingly, previous rate-design plans have no relevance whatever to the issues in this proceeding.

Item 4 deals, in the broadest possible sense, with the marketability of EPIC power. Several of the subsections deal with technical questions (load growth, peak demands, benefits of various kinds of power and energy exchanges, etc.). Subsections (a) through (d) fall into this category. Given the scope of the present proceeding, there is surely no need for a detailed production of data on these topics. They are in no way relevant to the factual questions (i) whether Applicant has improperly interferred with entry of EPIC into the bulk power market and (ii) its reasons for doing so.

Subsection (e) has perhaps some relevance, but is so broadly expressed as to sweep into its ambit topics that are not merely irrelevant but factually impossible. There can be no wholesale competition between "members" of EPIC, as none of them possesses bulk power facilities. Nor would such competition be relevant if it did exist. Competition between an EPIC participant or participants and Applicant is perhaps relevant here, but the question is not limited to that; it asks for data on competition between EPIC participants and any other utility whatsoever. We therefore urge that if subsection (e) is not stricken, it should be limited appropriately in the light of the subject matter of this proceeding.

Subsections (g) through (j) have only the most remote connection with the present issues. It may safely be taken for granted (as, to judge by the cities' allegations, Applicant itself has done) that EPIC will seek to develop loads in the area

it ultimately serves at wholesale. This is to say no more than that it intends to compete with Applicant, a judgment Applicant has apparently made already. The question here is what Applicant has done to defend its present dominant position, and why. Accordingly, these subsections should be stricken.

Subsection (k), as written, is so unclear as to be unanswerable; by the same token, we cannot presently tell whether it is objectionable. The question does not indicate by whom the electricity is to be obtained or whose energy requirements are intended. Until this question is clarified, we request leave to withhold comment upon it.

Subsection (l) cannot be relevant insofar as it seeks data on any analyses or comparisons of companies other than Applicant. There is no necessity, in this proceeding, to evaluate the competitive ability of EPIC participants other than those which are parties (or at the most, those that are served at wholesale by Applicant).

Insofar as it seeks to obtain the legal advice rendered by counsel to EPIC or any other entity, subsection (m) is objectionable on grounds of privilege.

Item 5. By far the greatest part of this item has no bearing whatsoever on the issues properly under scrutiny in this proceeding. The argument for that proposition, made at length above, will not be repeated here. Subsection (e), which has perhaps some bearing on the remedy appropriate in this proceeding, is not object to, insofar as it concerns the Oconee and/or McGuire plants. Otherwise,

item 5 is objectionable for reasons already explained. We may note parenthetically that the Feasibility Study referred to earlier would give this Board a more than adequate working knowledge of the matters covered in this item.

Item 6 does deal with matters that have a place in this proceeding, but there is no reason for the production of documents dealing with interconnection and coordination with entities other than Applicant or regional organizations such as CARVA or VACAR to which Applicant belongs. Item 6 should therefore be limited to production of data on that appropriately narrowed basis.

Item 7 has no visible relevance to the issues of Applicant's activities with regard to EPIC or to their motivation, and is objected to.

Item 8 not only has no such relevance, but is not even limited to surveys undertaken by or on behalf of EPIC. It is so unreasonably broad as to include questions to the public about such issues as the environmental impact of transmission lines or homeowners' preferences for electric over gas appliances. This item is objected to on both grounds.

Item 9, by referring to press releases "about" EPIC, would require the production of documents composed by and in the possession of an indefinite number of other entities, including Applicant itself. It should, at least, be limited to "press releases issued by or on behalf of EPIC".

Item 10 is subject to the same objection as item 9.

Item 11 is, if nothing else, unreasonably broad in view of the scope of this case. EPIC must deal with other electric utilities

besides Applicant, and documents dealing with such other entities have no relevance in assessing Applicant's conduct. There may be numerous documents which do not in any way bear on that conduct. This item should be limited to require only the production of documents which bear upon efforts by Applicant to interfere with the progress of EPIC.

Item 12. Once again, there is no visible connection between the studies referred to in this item and any course of conduct on Applicant's part designed to impede EPIC. In addition, the question calls for studies concerning utilities (whether EPIC participants or investor-owned entities) which are not parties and are in no way related to this proceeding.

Item 13. This Board has already stricken items from Applicant's discovery requests to intervenors dealing with these non-electric utility services. Tr. 261-271. There is no justification for this attempt to obtain the same data from another source. Moreover, these matters are even less relevant in the context of Applicant's alleged activities directed against EPIC than in the general context of competition between Applicant and the intervening municipalities, where the question arose previously.

Item 14. The documents requested here have no relevance to Applicant's alleged opposition to EPIC. There is no connection shown between municipal or cooperative ownership in general and any issue before this Board with respect to EPIC. We may also note that some, at least, of this information has already been sought from the intervening municipalities directly.

Item 17. This item evidently deals with the price-squeeze argument advanced by the municipal intervenors herein as part of their general allegation of anticompetitive conduct on the part of Applicant. Apart from the fact that the price relationships of municipal and cooperative systems which purchase their wholesale power from suppliers other than Applicant are not in issue here, there is no question before this Board respecting the price relationships of those wholesale customers of Applicant which are not parties. The inquiry is therefore unreasonably broad in its scope and calls for much irrelevant information. In addition, the present ability or inability of these municipalities to compete at retail with Applicant has no direct bearing on Applicant's alleged opposition to EPIC. The entire item is objected to for that reason.

Item 18. This item seeks information with respect to franchised utilities other than Applicant, and to that extent is overly broad for the purposes of this case.

Item 19 is subject to the same objection as item 18.

Item 20 is also subject to the same objection.

Item 21 has no relevance to the issues in this proceeding having to do with EPIC, insofar as it deals with cooperative efforts between EPIC participants or between EPIC and any participant. The first part of the question (dealing with "exchange of information") is so vague as to be unanswerable with any assurance of adequacy, as well as being of no visible relevance to the issues adverted to. EPIC objects to the entire item.

Item 22. Insofar as this item may be read to demand production of documents not in the "possession, custody, or control" of

EPIC, it is not only improperly addressed to EPIC, but is contradictory of Applicant's own definition of "documents" (Attachment to Subpoena Duces Tecum, p. 1). Insofar as it attempts to reach documents dealing with competition, interconnection, coordination, or pooling with utilities other than Applicant (or at the most, in connection with interconnection, coordination and pooling, with other entities than multi-utility groups of which Applicant is part), it is irrelevantly over-broad for purposes of this proceeding.

Item 23. Applicant has successfully sought discovery of the financial and operating reports and analyses of the municipalities intervening herein. The reports of cities or cooperatives which are not parties here but are participants in EPIC have no relevance to the issues before this Board. Item 23 is therefore objected to as irrelevant in part, and, so far as it may be relevant, unnecessary.

Item 24 is subject to the same objection as item 23, and in addition, to the extent it asks for documents in the files of EPIC's consultants, exceeds the proper scope of this subpoena (see comment on item 22, supra).

Item 25 is subject to the same objection as item 23.

Item 26 is not entirely clear as to the first sentence: if the "service area" referred to is that of EPIC itself, it should be pointed out that as yet EPIC has no service area. If the phrase refers to the respective retail service areas of EPIC participants, the relevance of such efforts to the questions involving EPIC in this proceeding is not apparent. The same comment applies to the second sentence (which also refers to "either of the purposes

specified in the first sentence," although but one purpose appears there).

Item 29 does not appear to have any relevance to the alleged activities of Applicant in opposition to EPIC. In addition, it may call for the production of privileged documents furnished by counsel; to the extent that it does, it is objected to also on that ground.

Item 30. The same objection regarding the proper scope of this subpoena which has been made as to item 22, applies here as well. In addition, since this case deals with competition between Applicant and the various municipal systems, data on loss or attachment of industrial or commercial customers by systems purchasing at wholesale from suppliers other than Applicant are irrelevant.

Item 31 appears to be a backstop to earlier questions requesting technical, financial, and operating information, and is subject to similar objections.

Item 32. This item could be relevant only in the event that decisions and efforts involving EPIC participation were in some way affected by those activities of Applicant here under scrutiny. The question should therefore be limited to occurrences where such involvement existed, or, at most, to occurrences involving wholesale customers of Applicant.

Item 33. The questions concerning technical and economic feasibility of EPIC have been discussed above, and our objections thereto explained. Since this question appears to seek documents ancillary to those mentioned above, it is subject to the same objection as to relevancy.

WHEREFORE, EPIC respectfully requests that this Board

(i) grant the motion to quash in accordance with the objections expressed herein; and

(ii) extend the time for responding to such questions as have not been objected to, and to any questions the objections to which may be overruled by this Board, to and including 1 March, 1973.

Respectfully submitted,

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Attorneys for EPIC, Inc.

Washington, D.C., this 11th day of January, 1973.

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached MOTION, dated 11 January 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 12th day of January, 1973.

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