

UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

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

APPLICANT'S MOTION TO AMEND  
PARAGRAPH B(2)(b) OF PREHEARING ORDER NUMBER TWO

To the Atomic Safety and Licensing Board:

Duke Power Company ("Applicant") respectfully requests that paragraph B(2)(b) of Prehearing Order Number Two, issued November 27, 1972, be amended to include Joint Document Request item 6(f)(2).<sup>1/</sup>

In paragraph B(2)(b) of Prehearing Order Number Two, the Board sustained Applicant's objection to the production of documents relating to its constitutionally-protected right to petition legislative, executive, administrative and judicial officials and tribunals.<sup>2/</sup> The ruling specifically applied to Joint Document Request items 4(f), 4(h), 4(l), 6(f)(3), 6(i), 6(p), 16, 37 and 38. These requests originally had been itemized

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<sup>1/</sup> Applicant seeks this action pursuant to Sections 2.730(a) and (b) of the Commission's Rules of Practice, 10 C.F.R. Part 2, and to paragraph F(6) of Prehearing Order Number Two.

<sup>2/</sup> The ruling provides:

(b) "2. Applicant's Political Activity"  
Applicant's objection to joint requests number 4(f), 4(h) and 4(d); 6(f)(3), 6(i) and 6(p); 16, 37 and 38 are sustained without prejudice to a renewal thereof on the showing of prerequisites required by law.

by Applicant in footnote 6 on page 4 of its pleading entitled "Objections to Document Requests and Motion for Protective Orders," dated October 12, 1972.

As the document review for compliance with the Joint Request proceeded, Applicant discovered that item 6(f)(2) had not been included in the footnote just referred to nor, therefore, in the Board's ruling in paragraph B(2)(b) of Prehearing Order Number Two. This omission from the list of items objected to was entirely inadvertent. Applicant believes that it may have been a typographical error but cannot so establish at this late date.

Applicant believes that the fact of inadvertence is plain. First, the subject matter of item 6(f)(2) -- "communications to or about elected officials, councils, and boards" -- falls plainly within the political sphere covered by the Noerr-Pennington doctrine which formed the basis for Applicant's objection. It cannot reasonably be argued that Applicant did not intend to include this item in its Noerr-Pennington objection. Second, as evidence of inadvertency, Applicant has attached hereto as Appendix A an excerpt from a pleading filed in the AEC's Consumers Power Midland proceeding (AEC Dkt. Nos. 50-329A and 50-330A). In raising the Noerr-Pennington objection in that proceeding, Consumers Power included in its list an item precisely identical

to item 6(f)(2) herein.<sup>3/</sup> Consumers is represented by the same counsel as Applicant. Its pleading in the Consumers case was filed almost simultaneously with the objections in this proceeding.<sup>4/</sup> The inclusion of the item there and its omission here is a clear indication that the failure to include 6(f)(2) was unintended and inadvertent.

The Board's ruling on the other items objected to by Applicant on Noerr-Pennington grounds should clearly apply to item 6(f)(2).<sup>5/</sup> Communications to elected officials are perhaps the clearest example of the type of exercise of First Amendment rights which those cases hold immune from scrutiny under the antitrust laws. Moreover, there is no question that discovery of documents relating to Applicant's participation in the political process serves to deter and otherwise "chill" the exercise of its First Amendment Noerr-Pennington prerogatives. Recognizing the validity of these arguments, the Board indicated

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3/ The enumeration of items objectionable on Noerr-Pennington grounds is found in footnote 7 (page 5) of "Applicant's Objections to Document Requests and Motion for Protective Orders," Consumers Power Co. (Midland Units 1 and 2), AEC Dkt. Nos. 50-329A and 50-330A, Oct. 26, 1972. The objections there stated are equivalent to the items to which Duke Power Co. objected. Item 5(f)(2)(ii) of the Consumers request was renumbered as 6(f)(2) in the Joint Request served on Duke.

4/ The objections in this docket were filed on October 12, 1972. The objections in the Consumers case were filed on October 26, 1972.

5/ Applicant incorporates by reference its arguments on the scope of the Noerr-Pennington doctrine contained in "Applicant's Objections to Document Requests and Motion for Protective Orders," Oct. 12, 1972, at pp. 4-9 and "Applicant's Reply to Answer of the Department of Justice," Nov. 10, 1972, at pp. 5-13.

at the Prehearing Conference on discovery objections held on November 17, 1972, that it was sustaining all of Applicant's objections to requests for information concerning Applicant's political activity. (Tr. 177) Therefore, based on the rationale underlying that decision, constitutional considerations require the Board to amend paragraph B(2)(b) of Prehearing Order Number Two so as to include item 6(f)(2) among those to which Applicant's objection was sustained.

The instant motion is made because of the Board's statement that only those requests to which specific objection and reference has been made would be subject to the Board's Order. (Tr. 272) Because of this direction, when Applicant discovered its inadvertent failure to include item 6(f)(2) in the enumeration contained in footnote 6 of its objections, Applicant segregated the documents responsive to item 6(f)(2) and proceeded with production of other documents responsive to the Joint Request. Thus, production of documents has continued unimpeded. Applicant now asks the Board to take note of Applicant's omission of item 6(f)(2) from its list of objectionable items and apply its ruling in Prehearing Order Number Two thereto.

For the reasons set forth above, Applicant believes it has demonstrated good cause for the amendment of Prehearing Order Number Two, as required by paragraph F(b) of that Order.

WHEREFORE, Applicant moves the Board to amend paragraph B(2)(b) of Prehearing Order Number Two by adding 6(f)(2) to the enumeration of Joint Request items to which objections were sustained.<sup>6/</sup>

Respectfully submitted,

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George A. Avery

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Toni K. Golden

Wald, Harkrader & Ross  
Attorneys for Duke Power Company  
1320 Nineteenth Street, N.W.  
Washington, D. C. 20036

July 18, 1973

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<sup>6/</sup> In the event this motion is denied, Applicant requests that such order be without prejudice to Applicant's seeking further relief on the ground that some of the documents in question may be legally privileged or that some may come within the categories for which a protective order is being sought.



Excerpt from Consumers Power Co. (Midland Units 1 and 2), AEC Dkt. Nos. 50-329A et al, "Applicant's Objections to Document Requests and Motion for Protective Orders," Oct. 26, 1972.

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AEC staff during the last eighteen months; Applicant's replies were also made available to the Intervenor<sup>6/</sup>s. In addition, the other requests contained in the Joint Document Request are clearly so broad in scope as to sweep into their dragnet every document conceivably germane to any issue raised in the proceeding.

Given the ample opportunity of the Justice Department and the other parties to obtain information about the Applicant, there is no justification for permitting them to engage in an open-ended and undirected invasion of the privacy of Applicant's filing system. Since request 2, on its face, is an effort to "fish" for additional issues or evidence, it should be stricken from the Joint Document Request.

## 2. Applicant's Political Activity

Applicant objects to the production of documents relating to its constitutionally-protected right to petition

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<sup>6/</sup> The responses to the Justice Department inquiries were filed as Amendment No. 19 to the Midland Units Application on March 22, 1971. Additional information was provided in response to Justice Department inquiries in June and October, 1971. See letter from Brand to Youngdahl of June 4, 1971; letter from Graves to Saunders of June 23, 1971; letter from Brand to Watson of October 29, 1971; and letter from Watson to Brand of June 29, 1972. Extensive interrogatories by the staff were served on November 11, 1971 and answered by Applicant during the next several months.

legislative, executive, administrative and judicial officials and tribunals. At least seven of the document requests <sup>7/</sup> seek such documents on their face while many other requests will undoubtedly sweep such material into their broad ambit.

The very nature of Applicant's operations as a public utility in Michigan serves to thrust Applicant into the political process with great frequency. In the first place, Applicant is subject to pervasive federal and state executive, legislative and administrative regulation. Moreover, Applicant serves many local jurisdictions only at the sufferance of the elected officials and/or the voters of such jurisdictions. In the second place, its wholesale customers and several of other neighboring utility systems are publicly owned, operated and financed.

Thus, through its frequent interaction with various executive, legislative, administrative and judicial forums and officials, Applicant inevitably participates in a signi-

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<sup>7/</sup> See Requests 3(e) (legislation and constitutional revision); 5(f) (2) (ii) (communications with elected officials, etc.); 5(f) (2) (iii) (activities of citizen or taxpayer committees); 5(k) (activities to obtain "favorable action" from any governmental entity); 10(e) (communications with "persons in elective or appointive office"); 10(f) (documents concerning tax payer's committees and similar groups); 22 (issues regarding FPC or Michigan Public Service Commission jurisdiction).

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CERTIFICATE OF SERVICE

I hereby certify that copies of APPLICANT'S MOTION TO AMEND PARAGRAPH B(2)(b) OF PREHEARING ORDER NUMBER TWO, dated July 18, 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 18th day of July, 1973:

Walter W.K. Bennett, Esquire  
P. O. Box 185  
Pinehurst, North Carolina 28374

J.O. Tally, Jr., Esquire  
P.O. Drawer 1000  
Fayetteville, No. Carolina 28302

Joseph F. Tubridy, Esquire  
4100 Cathedral Avenue, N.W.  
Washington, D. C. 20016

Troy B. Connor, Esquire  
Connor & Knotts  
1747 Penna. Avenue, N.W.  
Washington, D. C. 20006

John B. Farmakides, Esquire  
Atomic Safety and  
Licensing Board Panel  
Atomic Energy Commission  
Washington, D. C. 20545

Joseph Rutberg, Esquire  
Benjamin H. Vogler, Esquire  
Antitrust Counsel for  
AEC Regulatory Staff  
Atomic Energy Commission  
Washington, D. C. 20545

Atomic Safety and  
Licensing Board Panel  
Atomic Energy Commission  
Washington, D. C. 20545

Mr. Frank W. Karas, Chief  
Public Proceedings Branch  
Office of the Secretary  
Of the Commission  
Atomic Energy Commission  
Washington, D. C. 20545

Abraham Braitman, Esquire  
Special Assistant for  
Antitrust Matters  
Office of Antitrust  
and Indemnity  
Atomic Energy Commission  
Washington, D. C. 20545

Joseph Saunders, Esquire  
Antitrust Division  
Department of Justice  
Washington, D. C. 20530



William T. Clabault, Esquire  
David A. Leckie, Esquire  
Antitrust Public Counsel Section  
Department of Justice  
P. O. Box 7513  
Washington, D. C. 20044

Wallace E. Brand, Esquire  
Antitrust Public Counsel Section  
Department of Justice  
P. O. Box 7513  
Washington, D. C. 20044

J.A. Bouknight, Jr., Esquire  
David F. Stover, Esquire  
Tally, Tally & Bouknight  
Suite 311  
429 N Street, S. W.  
Washington, D. C. 20024

Wald, Harkrader & Ross

By: \_\_\_\_\_

Attorneys for Duke Power Company

1320 Nineteenth Street, N. W.  
Washington, D. C. 20036