UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

In the Matter of Duke Power Company (Oconee Nuclear Station Units 1, 2 and 3 and McGuire Nuclear Station Units 1 and 2)	)	Docket Nos. 50-269A, 50-270A, 50-287A, 50-369A, and 50-370A

ANSWER TO NOTICE OF HEARING AND OPPOSITION TO, AND MOTION TO RECONSIDER, DELEGATION OF REVIEW AUTHORITY

Pursuant to the provisions of 10 C.F.R. section 2.705 of the Commission's Rules of Practice, Duke Power Company (hereinafter "Applicant") files this Answer to the Notice of Antitrust Hearing on Applications for Construction Permits and Operating Licenses published in the Federal Register (37 Fed. Reg. 13202, July 4, 1972) (hereinafter "Notice").

Applicant's Position

It is Applicant's position that the activities under the permits in question would not create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105(a) of the Atomic Energy Act, as amended, 42 U.S.C. §2135(a). Subsection 105(c) of the Atomic Energy Act, as amended, 42 U.S.C. §2135(c), requires the Commission, whenever antitrust issues have been properly raised in a licensing proceeding, to

"make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws***." An "affirmative" antitrust finding does not preclude unconditional issuance of a license, however, since the Commission is further directed by this section to "also consider*** such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest."

The legislative history of the Act demonstrates that Congress intended the Commission to consider the implications, from the standpoint of antitrust laws and policies, of the construction and operation of the proposed facilities only, and not to assume the responsibilities of the Department of Justice and the courts for the enforcement of the antitrust laws with respect to an applicant's overall activities as a utility. Rather, the statute commands that the Commission scrutinize the possible effects of the "activities under the license", and only those activities, in an antitrust context. The licenses applied for in this proceeding would permit Applicant to operate the Oconee units and to construct and ultimately to operate the McGuire units, but no more. The licenses are not concerned with the operation of Applicant's system in a broader context, including other generation or transmission facilities, sales contracts, coordination arrangements and the like. Thus issues relating to

coordination, market allocation, pooling, rates, and proposed, existing or former interconnection agreements, as set forth by the Justice Department, in its advice letter dated August 2, 1971, and by those filing a joint petition to intervene, are irrelevant to the inquiry which the statute contemplates, and should not be considered in this proceeding. A fuller statement of Applicant's views on this matter is attached as Appendix A to this Answer.

Subject to -- and without waiving -- the foregoing position, it is Applicant's further position that it has not monopolized any relevant market within the meaning of section 2 of the Sherman Act, 15 U.S.C. §2. Nor has Applicant engaged in any other conduct or activity which is inconsistent with any of the federal antitrust laws, to the extent that those laws are applicable to an industry characterized by pervasive government regulation and natural monopoly economies. In addition to other alternatives available to Applicant's neighboring utilities, such utilities presently enjoy the option of nondiscriminatory and wholly adequate access to the benefits of large scale generation and transmission through purchases under Applicant's wholesale rate schedules approved by the Federal Power Commissior. Applicant's neighboring utilities, including those obtaining all or part of their requirements under Applicant's wholesale schedules, are financially viable and, to the extent con-

templated by federal and state law, competitively viable as well.

In those areas where competitive impediments have been raised, such restrictions have been imposed by the state, not by Applicant, and, indeed, Applicant is equally subject to these strictures. First, a pervasive scheme of state regulation in both North Carolina and South Carolina strictly controls and limits the activities of public utilities. For example, the ability of Applicant and other suppliers of electric energy to compete within those states has been seriously curtailed by operation of law.*/ In addition, the rates and practices of the Applicant are subject to regulation by the North Carolina Utilities Commission and the South Carolina Public Service Commission, respectively; and within the ambit of such regulation, those with an interest in the rates and practices of the Applicant have an opportunity to be heard. Thus, the states' intimate involvement with the activities of the Applicant, and the meaningful regulation and supervision to which it is subject, immunizes Applicant's rates and practices under challenge here from scrutiny under the antitrust laws.

Furthermore, it is Applicant's position that requiring Applicant to grant some of its customers a preferential form of access to its generation and transmission system would be unfair and discriminatory to Applicant's customers

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*/ See Gen. of North Carolina, §62-110.2 (Supp. 1971); Code of Laws of South Carolina of 1962, §24-13 through §24-18 (Supp. 1971).

who are not afforded such access and would therefore violate the Federal Power Act and the laws of the states of North Carolina and South Carolina. Additionally, to afford such access to municipal or other small systems, which enjoy tax and other advantages, would place such entities in a position to compete unfairly with Applicant for wholesale and industrial --and in some areas, residential -- load, and would be inconsistent with the antitrust laws and the public interest.

Finally, it is Applicant's position that its activities in regard to the proposed Electric Power in Carolinas (EPIC) project to which the Justice Department refers in its advice letter are fully protected by the Constitution of the United States. These efforts before legislative and other governmental bodies constitute a legitimate exercise of Applicant's Constitutional rights under the First Amendment. They in no way represent an abuse of the processes through which Applicant may direct its views, do not evidence an intent to unlawfully monopolize, and therefore cannot be introduced as evidence in this proceeding.

Specification of Issues and Facts

Applicant denies that the activities under the permits in question would create or maintain a situation inconsistent with the antitrust laws as specified in subsection

105(a) of the Atomic Energy Act as amended [42 U.S.C. 2135(a)].

Applicant also takes issue with the fact that the petition of the town of Newton to intervene in this proceeding (Notice, p. 2) in regard to the Oconee units is now before the Board. By letter to the Commission dated October 11, 1971, counsel for the petitioning intervenors made a formal request to delete Newton as a party.

Appearance

Applicant proposes to appear and present evidence in this proceeding.

Opposition to Delegation of Review Authority

Applicant respectfully opposes, and moves the Commission to reconsider, that portion of the Notice which delegates, pursuant to 10 C.F.R. section 2.785, to the Atomic Safety and Licensing Appeals Board (hereinafter "Appeals Board"), the final authority, including the review function, which would otherwise be exercised and performed by the Commission.

Applicant submits that the issues to be considered in the above-captioned proceeding are so fundamental, and may be so novel to this Commission, that they require a full review by the Commission itself. The hearing will be held to determine whether the activities which Applicant proposes under the construction and operating permits in question would

create or maintain a situation inconsistent with the antitrust laws, pursuant to amendments to the Atomic Energy Act enacted in December, 1970. See 42 U.S.C. §2131 et seq. Until the 1970 amendments, the Commission's antitrust review under the 1954 Atomic Energy Act remained inoperative because all reactors were licensed under section 104 of the Atomic Energy Act, as amended, to which the antitrust review provisions did not apply. The 1970 amendments changed the law so that almost all reactor licensing proceedings now require antitrust review. See Bertram Schur, Background Discussion of Nuclear Power Licensing, ALI-ABA Course on Atomic Energy Licensing and Regulations, Washington, D. C., (November 12, 1971), pp. 1-3.

The instant proceeding is the second to be noticed for hearing on antitrust issues pursuant to the 1970 amendments. While the first of these, Consumers Power Company (Midland Plants Units 1 and 2), Dockets Nos. 50-329A and 50-330A, has progressed through an initial prehearing conference, it cannot now be determined which matter will be completed first. In any event, it is likely that many additional antitrust hearings will follow. In the words of one Justice Department official, "many of the applications involve issues just as complex and difficult as those which we encounter in a major antitrust investigation under the

Sherman Act." Milton J. Grossman, Antitrust -- Aspects of Nuclear Power Licensing -- The Role and Philosophy of the Antitrust Decision, ALI-ABA Course of Study on Atomic Energy Licensing and Regulations, Washington, D.C., (November 12, 1971), p. 3.

In addition to the complex questions of fact and law arising under the Sherman Act, this proceeding (and those which will follow it) raises difficult questions about the Commission's role in enforcing the antitrust laws, serious issues of comity with the Federal Power Commission and other federal and state governmental agencies, and vital questions concerning the nature and scope of hearings required by the 1970 amendments. The issues are further compounded because of the consolidation of the Oconee and McGuire applications. The Commission has never before had to address itself to these or other fundamental issues of antitrust law and public policy. The published amendments to the Commission's Rules which implement the 1970 amendment [see 35 Fed. Reg. 19655 (1970)] are of little guidance in this regard since, "generally, these rules simply crank into our regulatory system the statutory amendment." Schur, supra, at 9.

Given the lack of Commission precedent and the fundamental nature of the issues raised, Applicant submits that the delegation of final review to the Appeals Board would be particularly unwise and impractical. An appellate review board's role is to apply agency policy to given factual

circumstances, not to formulate policy. See Freedman, Review Boards in the Administrative Process, 117 U. Penn. L. Rev. 546 (1969). Significantly, in the Federal Communications Commission and the Interstate Commerce Commission, where Congress has explicitly provided for the establishment of appellate review boards, 47 U.S.C. §155(d)(1) and 49 U.S.C. §17(5), such boards are not utilized as final authority where important policy questions are concerned. See Note, Intermediate Appellate Review Boards for Administrative Agencies, 81 Harv. L. Rev. 1325, 1329-30 (1968). Similarly, the Administrative Conference's proposed amendment to section 8(b)(1) of the APA, 5 U.S.C. §557, calls for Commission-level review of cases where a party makes a "reasonable showing" that the case involves "a decision of law or policy which is important". See Freedman, supra, at 577.

Here, there is no extant Commission policy for the Appeals Board to apply, and the Commission's on-going regulatory process will suffer from a lack of Commission guidance in policy areas. Unlike the ICC and FCC, the Commission's Rules of Practice, 10 C.F.R. section 2.786(b), do not permit parties to petition the Commission to review Appeals Board decisions. This provision emphasizes that the Appeals Board mechanism was established to review ordinary cases, not to formulate Commission policy or otherwise resolve important questions of law and public policy. Thus, here, where the issues are novel, complex, and fundamental, and

where their disposition will have a far reaching effect on a vital segment of our economy, the parties are entitled to have the issues heard and reviewed by the Commission itself, the agency charged by Congress with paramount oversight responsibility for nuclear energy.

Conclusion

For the foregoing reasons, Applicant prays that the Commission reconsider that portion of its Notice delegating final review authority to the Appeals Board.

Respectfully submitted,

Wm. Warfield Ross

Keith S. Watson

Toni K. Golden

Attorneys for Duke Power Company

WALD, HARKRADER & ROSS
1320 Nineteenth Street, N. W.
Washington, D. C. 20036

(202) 296-2121

Of Counsel:

William H. Grigg
Duke Power Company
422 South Church Street
Charlotte, North Carolina 28201

July 24, 1972

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In the Matter of	)	
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Duke Power Company	)	Docket Nos. 50-269A, 50-270A,
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2 and 3 and McGuire Nuclear	)	and 50-370A
Station Units 1 and 2)	)	

Appendix A to
Answer to Notice of Hearing and
Opposition to, and Motion to Reconsider
Delegation of Review Authority

It is the position of Duke Power Company (hereinafter "Applicant") that the scope of the antitrust scrutiny is limited by Section 105(c) of the Atomic Energy Act, as amended, 42 U.S.C. 2135(c), to activities under the licensed units. Any holding to the contrary would ignore the statutory standard set forth in Section 105(c) which governs this proceeding and misread the legislative history underlying this section.

A. The Applicable Statute Itself Limits the Scope of the Commission's Antitrust Review

The Atomic Energy Commission has no authority to conduct antitrust enforcement proceedings as such, i.e., proceedings directly to compel compliance with the antitrust laws. That power is reserved principally to the Department of Justice as prosecutor in civil or criminal court actions; to injured private parties suing in court for damages or injunctions; and to the Federal Trade Commission. Some federal administrative

agencies are also authorized by Section 11(a) of the Clayton Act, 15 U.S.C. 521(a), to conduct enforcement proceedings with respect to the industries they regulate, but the Atomic Energy Commission is not one of those so authorized.

Most administrative agencies with licensing responsibilities are required by statute or judicial decision to take account of antitrust policy. Such licensing responsibilities, however, do not require, or permit, the agency to conduct an overall review of the license applicant's conduct in light of the antitrust laws. Rather, there must be "a reasonable nexus between the matters subject to its surveillance and those under attack on anti-competitive grounds". City of Lafayette v. SEC, Slip Op. 27 (D.C. Cir. Nos. 24,764 and 24,963, 1971), cert. granted sub nom. Gulf States Utilities v. FPC, et al., 40 USLW 3565 (1972).[1/]

In the Lafayette case, supra, the Court found an insufficient "nexus" between the SEC's approval of security issues under the Holding Company Act and the operation of the facilities for which the financing was required, because "the agency, here

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1/ The Court granted certiorari only in the companion case to Lafayette, supra, of Lafayette v. FPC (D.C. Cir. No. 71-1041), which held that the Federal Power Commission must consider antitrust issues relating to the issuance of securities by a public utility.

the SEC, has not been given any regulatory jurisdiction over the operations of the company". Slip Op. at 27. The same restrictions limit the Atomic Energy Commission's antitrust review. As the Court of Appeals said in Cities of Statesville v. AEC, 441 F.2d 962, 975 (D.C. Cir. 1969) (en banc),

> [w]hat is unique about the instant situation, is the extreme narrowness of the Commission's jurisdiction in making licensing determinations. Unlike the Federal Power Commission, the Federal Communications Commission, and the many other regulatory agencies, the Atomic Energy Commission is dealing with a subject matter that is not, as yet, open to vast commercial exploitation. These atomic power plants are not like radio stations of proven technical and commercial feasibility which are coveted prizes of the elite; instead, nuclear reactors are extremely speculative investments because of the many technical and financial imponderables. Unlike the other regulatory agencies, the Atomic Energy Commission concerns itself not with economic feasibility but with practical development and application of this wondrous source of energy. While the regulatory agencies in most of the other fields concern themselves with establishing an efficient national allocation of resources in the area which they are administering, and base this goal on a "public interest" concept of free enterprise, the Atomic Energy Commission concerns itself with promoting technical innovation in a highly experimental field and implementing "public interest" concepts through protection of the health, safety, and security of the nation.

Section 105(c) of the Atomic Energy Act, as amended, 42 U.S.C. 2135(c), requires the Atomic Energy Commission to consider the antitrust laws in its licensing process. But it does not provide the Commission with general antitrust enforcement authority, or subject every facet of the license applicant's activities to antitrust review by the Commission. On the contrary, whenever antitrust issues have properly been raised in a licensing proceeding, the section only mandates the Commission to "make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws" (emphasis supplied).

An attempt to subject all of Applicant's activities as an electric utility to an unlimited antitrust review in this proceeding would require this Board to construe Section 105(c) as if the words "activities under the license" (emphasis supplied) had been deleted from the statute. Significantly, these words limiting the Commission's antitrust review authority were added by the 1970 amendments to the Act. By contrast, the previous version of Section 105(c) required only that the Attorney General advise the Commission as to the anticompetitive impact of the proposed license. The statute was silent as to what antitrust principles or parameters should guide the Commission in its consideration of license applications. See 68 Stat. 938. At the hearings which considered the 1970 amendments, the Justice Department proposed a revision of Section

105(c) which again failed to set forth the parameters or principles of the Commission's antitrust review functions. Thus, the acting Assistant Attorney General testified that under his proposal the Commission would not "have to make an express conclusory finding that the license or the transaction upon which the license was based" might be inconsistent with the antitrust laws, but could condition the license -- in the light of the Attorney General's advice -- without limitations as to the area of antitrust scrutiny. Prelicensing Antitrust Review of Nuclear Powerplants, Hearings before the Joint Committee on Atomic Energy, 91st Cong., 1st Sess. (November, 1969 and April, 1970) 125. [Hereinafter cited as "Hearings"].

The Justice Department's proposal was not adopted by Congress; instead, Congress rejected an unlimited and open-ended scope of review and inserted the phrase "activities under the license" in place of the pre-1970 standard in order to establish the principles and parameters of the review proceedings. This conclusively demonstrates that, not only did Congress focus its attention on the question of the scope of the Commission's inquiry in antitrust proceedings, it explicitly restricted the inquiry to an applicant's activities under the license.

B. Legislative History Confirms Congressional Intent to Limit Commission's Antitrust Review

1. Prior Antitrust Review Standards

The legislative history of the antitrust provisions of the Atomic Energy Act confirms the clear meaning of Section 105(c), i.e., that the Commission's antitrust inquiry must be confined to activities under the license. See Power Reactor Development Co. v. International Union of Electrical Workers, 367 U.S. 396, 408-411 (1961).

The original Atomic Energy Act of 1946 provided:

> Where activities under any license might serve to maintain or to foster the growth of monopoly, restraint of trade, unlawful competition, or other trade position inimical to the entry of new, freely competitive enterprises in the field, the Commission is authorized and directed to refuse to issue such license or to establish such conditions to prevent these results as the Commission, in consultation with the Attorney General, may determine. §7(c), 60 Stat. 724.

The Commission was thus required by this section not only to condition every license so as to prevent anticompetitive consequences, but also to deny a license altogether if it determined that conditioning would not be effective. The practical operation of such a requirement was never experienced, however, because no licensing proceedings under the 1946 Act ever arose.

A substantially different regime was established by the Atomic Energy Act of 1954. The statutory revision first

proposed in that year by the Joint Committee on Atomic Energy (JCAE) would have eliminated entirely the obligation of the Commission to consider or apply antitrust policy in licensing proceedings.[2/] Upon the protest of several JCAE members and the Department of Justice, an alternative proposal was advanced under which antitrust considerations would have continued to be controlling, but with the power to make the requisite antitrust determinations removed from the AEC and given to the Federal Trade Commission.[3/] The version initially passed by the Senate was similar but would have made the Attorney General the final antitrust arbiter.

The common thread in all these proposals was extinguishment of this Commission's authority to decide antitrust issues. But, as finally enacted, the 1954 statute nevertheless preserved an antitrust role for the Commission. While eliminating the prior provision which made antitrust considerations dispositive, the new statute required the Commission in commercial-licensing cases to obtain the views of the Attorney General as to "whether, insofar as he can determine, the proposed license would tend to create or maintain a situation inconsistent with the antitrust laws. . . ." 68 Stat. 938. However, as previously observed, the 1954

2/ H.R. 8862, 83d Cong.; S. 3323, 83d Cong.

3/ H.R. 9757, 83d Cong.; S. 3690, 83d Cong.

legislation established no principles or parameters to guide the Commission in its antitrust review.

Like the original 1946 statute establishing an antitrust rule for licensing proceedings, however, the 1954 antitrust provision never came to be applied. All applications filed under the 1954 Act were for research and development licenses rather than for commercial licenses, and, as the Court of Appeals held in the Statesville case, the Commission was neither obligated nor permitted to consider antitrust issues when only a research license was sought. Cities of Statesville v. AEC, 441 F.2d 962 (D.C. Cir. 1969) (en banc).

2. The 1970 Amendments

Following the Statesville case, supra, increasing dissatisfaction with the research-commercial dichotomy, and with the lack of any role for antitrust in research licensing, eventually resulted in the 1970 amendments to Section 105(c).

These amendments were enacted only after numerous Committee hearings and conferences in which interested parties, including the Antitrust Division of the Justice Department, participated extensively. The legislative process began in late 1969, when the JCAE Committee initiated hearings to consider three bills which proposed changes in the Atomic Energy Commission's antitrust review procedures: S. 212 (the Anderson-

Aiken bill); H.R. 8289 (the Holifield-Price bill); and the Atomic Energy Commission's bill, H.R. 9647 (also introduced in the Senate as S. 1883).

Each of these bills proposed changes to the language of Section 105(c) concerning the scope of the antitrust review by the Attorney General and the Commission in nuclear facility licensing proceedings.[4/] But, H.R. 9647 failed to set forth principles or parameters to guide the Commission in its antitrust review functions. Despite, or perhaps because of, such lack of guidance, the Antitrust Division of the Justice Department endorsed H.R. 9647, since the bill "would assure the applicability of the antitrust standard to all significant nuclear utilization and production facilities", including supply arrangements for the proposed licensed units. Hearings, pp. 119, 121. (Testimony of acting Assistant Attorney General).

The lack of guidance to the Commission in the proposed legislation troubled the Committee. One member of the Committee staff warned:

4/ S. 212 and H.R. 8289 authorized the Attorney General to advise and the Commission to consider whether "activities under any license would tend to create a situation inconsistent with the antitrust laws." H.R. 9647, the Commission's bill, provided that the Attorney General would advise the Commission whether "issuance of such license or activities for which the license is sought would tend to create or maintain a situation inconsistent with the antitrust laws. . . ."

> "[T]here apparently are no other statutes, and no court decisions based thereon, to which the AEC could look for guidance in implementing and interpreting Section 105(c). The only analogous statute as far as I am aware, is the one you [the acting Assistant Attorney General] mentioned, the Federal Property and Administrative Services Act. For the reasons indicated earlier, it probably would not afford much guidance." Hearings, p. 125.

The Association of the Bar of the City of New York expressed a similar concern. Commenting upon the proposed bills, the Association warned that:

> "Unless Congress establishes some perimeters *** presumably the Commission will feel obligated to pursue at least the following questions as to the following activities of each license applicant:
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> * * *
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> "Activities of applicant in disposing of electrical energy from the facility. Is the facility part of a pool which is inconsistent with the antitrust laws? Are there improper agreements between the applicant and others as to the parties to whom and the areas in which the applicant will sell the electricity? Is there a joint venture from which other parties have been improperly excluded? Even if there is no joint venture or joint understanding, does the applicant occupy such a position of dominance that he is akin to a monopolist? If so, is his refusal to sell to some parties inconsistent with the antitrust laws? Does the applicant charge discriminatory prices, utilize deceptive advertising, or engage in unfair sales practices which are inconsistent with the antitrust laws?" Hearings, pp. 595, 612, 613.

One of the "perimeters" recommended by the Bar Association was that the supply industry be entirely excluded from consideration. It also proposed that "[t]he [antitrust] review should also be limited to the activities of the applicant directly associated with activities under the proposed license in order to preclude the possibility of Commission investigations into unrelated matters . . . ." Id. at 625. This concern was also reflected in the testimony of Donald G. Allen, President of the Yankee Atomic Electric Co., who concluded that:

> ". . . the AEC will need guidance in determining what antitrust issues can appropriately be resolved in licensing proceedings, and should be given express authority to exclude issues which are not directly related to the proposed project, which it cannot dispose of because all necessary parties are not before it, or which for other reasons can more appropriately be resolved in another forum." Hearings, p. 532.

The hearings on the bills concluded in April 1970, but discussions continued in other forums, including informal conferences between interested parties and the Committee members and staff. In June 1970, the question of the scope of antitrust review in the proposed legislation arose during hearings before the Senate Antitrust & Monopoly Subcommittee. There, the acting Assistant Attorney General testified that while

> ". . . antitrust review would consider the contractual arrangements and other factors governing how the proposed plant would be owned and

> its output used . . . [, n]o broader scope of review is contemplated . . . .
>
> We do not consider such a licensing proceeding as an appropriate forum for wide-ranging scrutiny of general industry affairs essentially unconnected with the plant under review." Hearings, p. 366.

This testimony was put into the JCAE hearing record by the American Public Power Association, as part of its written response to questions propounded by the JCAE. Hearings, p. 366. It is of value not merely as evidence of what the JCAE was led to believe the Justice Department's interpretation of the Act should be, but also as a contemporaneous opinion of a principal participant in the development of the legislation.

The bill, H.R. 18679, which finally emerged from the Committee and was enacted as PL 91-560 in December 1970, clearly took account of the concerns of certain Committee members and other parties, such as the Bar Association of the City of New York, that the scope of the Commission's antitrust review as proposed was too vague and open-ended. The final Committee report which accompanied PL 91-560 emphasized that the new antitrust standard to be applied by the Commission did not encompass industries supplying the construction and operation of the proposed unit "unless the license applicant is culpably involved in activities of others that fall within the ambit of the standard." House Report 91-1470, Joint Committee on Atomic Energy to Accompany

H.R. 18679, p. 31. In addition, the new Act itself explicitly restricted the Commission's inquiry to "activities under the license" -- a much more defined and limited standard than originally found in the proposed legislation of the Atomic Energy Commission and the Justice Department. Even Senator Aiken, an advocate of broad review authority, conceded that the effort "to cut back on the scope of the AEC consideration of antitrust issues . . . is reflected to some extent in this bill" (emphasis in the original). (Dissenting views on H.R. 18679.)

The clearest indication of the Congressional decision to define and limit the Commission's antitrust authority is contained in the Committee Report, supra, at 14, which states:

> "The committee is recommending the enactment of prelicensing review provisions which -- as in the proposed Atomic Energy Act of 1954 that the Joint Committee originally reported out, and as is in the version of subsection 105c, that the Senate passed on July 27, 1954 -- do not stop at the point of the Attorney General's advice, but go on to describe the role of the Commission with respect to potential antitrust situations.
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> * * *
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> ". . . It is intended that, in effect, the Commission will conclude whether, in its judgment, it is reasonably probable that the activities under the license would, when the license is issued or thereafter, be inconsistent with any of the antitrust laws or the policies clearly underlying these laws." (Emphasis added.)

Although several industry spokesmen preferrei a more narrow standard, while others sought a broader scope of review, such views merely confirm that the legislation ultimately enacted was a compromise. As Senator Pastore, the floor manager of the bill in the Senate, told his colleagues:

> "The committee and its staff spent many, many hours on this [antitrust] aspect of the bill, and I can assure the Senate that we consider [sic] very carefully the considerable testimony, comments and opinions we received from interested agencies, associations, companies and individuals, including representatives from the Antitrust Division of the Justice Department, from privately owned utilities, and from public and cooperative power interests. The end product, as delineated in H.R. 18679, is a carefully perfected compromise by the committee itself; I want to emphasize that it does not represent the position, the preference or the input of any of the special pleaders inside or outside of the Government. In the committee's judgment, revised subsection 105(c), which the committee carefully put together to the satisfaction of all of its members, constitutes a balanced, moderate framework for a reasonable licensing review procedure." Congressional Record, S. 19253 (December 2, 1970).

The "balanced, moderate" approach is reflected in the bill and in the Committee report which adopted it. For example, the Committee report, supra, stated:

> "Of course, the committee is intensely aware that around the subject of prelicensing review and the provisions of subsection 105c, hover opinions and emotions ranging from one extreme to the other pole. At one extremity is the view that no prelicensing antitrust review is either necessary or advisable and that the first two subsections of section 105

> concerned with violation of the antitrust laws and the information which the Commission is obliged to report to the Attorney General are wholly adequate to deal with antitrust considerations. Additionally, there are those who point out that it is unreasonable and unwise to inflict on the construction or operation of nuclear powerplants and the AEC licensing process any antitrust review mechanism that is not required in connection with other types of generating facilities. At the opposite pole is the view that the licensing process should be used not only to nip in the bud any incipient antitrust situation but also to further such competitive postures, outside of the ambit of the provisions and established policies of the antitrust laws, as the Commission might consider beneficial to the free enterprise system. The Joint Committee does not favor, and the bill does not satisfy, either extreme view." Committee Report, supra, p. 14.

It is well settled that where the language of an act in its final form represents a compromise, the views of those who sought different wording, "cannot control interpretation of the compromise version." Hardin v. Kentucky Utilities Co., 390 U.S. 1, 11 (1968). Similarly, the "legislative history of a bill that was not adopted cannot be resorted to to construe a bill that was." Interstate Natural Gas Co. v. FPC, 156 F.2d 949, 952 (5th Cir. 1946), aff'd, 331 U.S. 682 (1947). Thus, Senator Aiken's threatened dissent and the failure of Congress to enact the abortive Aiken-Kennedy bill (S. 2564 and H.R. 13828) contribute nothing to the interpretation of the 1970 amendments of the Atomic Energy Act.

What emerges from the foregoing review of the legislative history of the 1970 amendments is the desire of Congress to give the Atomic Energy Commission some power of antitrust review, but to limit the scope of that review. Congress made clear that the Act does not foreclose Justice Department enforcement of the antitrust laws in federal court. See Section 105(a) and Remarks of Representative Price, Congressional Record, H. 9449 (September 30, 1970). Thus, the narrow scope of the Commission's antitrust review does not leave the public unprotected against allegedly unlawful conduct since enforcement of antitrust violations unrelated to an applicant's proposed activities under the license is left to the traditional forums.

During consideration of the legislation, spokesmen for the public power interests, the Atomic Energy Commission, and the Justice Department recognized that the Commission's antitrust review should be limited and that general antitrust enforcement should be left to the courts. A representative for the American Public Power Association wrote the JCAE and quoted with approval the testimony of the Atomic Energy Commission's General Counsel that "the antitrust authority of [sic] Commission will be an appropriate complement to the authority of the Attorney General, and, it would seem, should not be used by the Commission to duplicate authority already held by the Attorney

General." Hearings, pp. 365-366. Finally, a restrictive interpretation of the scope of the Commission's review comports with the Justice Department's testimony that the fortuity of a nuclear license application should not be used to initiate a "wide-ranging scrutiny of general industry affairs essentially unconnected with the plant under review." Hearings, p. 366.

C. Issues Raised by Justice and Petitioners are Beyond the Scope of Review Provided in the Act

Applicant's view of the Act is entirely consistent with the standard applied by the Justice Department in reviewing the disposal of property under Section 207 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. §488, whose applicable statutory language was adopted by the 1970 amendments. The analysis under the Property Act is whether an anticompetitive "situation" could be created or maintained as a result of the contemplated disposal of government property. By analogy, therefore, the test here should be whether an anticompetitive situation would be created or maintained as a result of Applicant's construction or operation of the Oconee and/or McGuire units.

Limiting this proceeding to issues proximately related to the construction and operation of the Oconee and McGuire units in this instance precludes inquiry into the nature and use of Applicant's transmission system, interconnection arrangements, and other areas of Applicant's conduct which relate to

its system-wide operations as an electric utility. Any other conclusion would turn the applicable standard on its head: the test is not whether the overall system has an impact on the Oconee or McGuire units, but rather whether an anticompetitive impact will result from the variation in the method of supplying a part of Applicant's bulk power supply. Hence, the "activity" of generating power in the Oconee or McGuire station could not rationally be said to "maintain" a situation inconsistent with the antitrust laws, and hence is not the sort of event calling for antitrust scrutiny by this Commission as a precondition to a license.

Such an interpretation of Section 105(c) in no way precludes Commission review of the kind of activities under a power reactor license which did concern the JCAE Committee and the Department of Justice. Commenting upon "issues which are of particular concern to the electric utility industry at this time," the acting Assistant Attorney General testified:

> "Specifically, the industry is now going through a considerable controversy over the extent to which, and the means by which, small systems should have access to large new generation and transmission facilities. As to this, I think antitrust law provides some general guidance. Companies acting together to create or control a unique facility may be required by application of the rule of reason, to grant access on equal and nondiscriminatory terms to others who lack a practical alternative." Hearings, pp. 127-128.

Similarly, when the Justice Department was asked to comment on the bill which was enacted, the Assistant Attorney General endorsed the bill and observed that it would enable the Commission to condition a license for a "joint venture" nuclear power plant -- that is, one owned by two or more companies. 5/ Congressional Record, S. 19254 (December 2, 1970).

Thus, it is clear that the 1970 amendments sought principally to deal with the exclusion of small utilities from joint ventures owning and operating nuclear power reactors. The ownership and operation of such reactors would raise questions directly and immediately under Section 1 of the Sherman Act without need for appraisal of an entire utility system operation, and thus are appropriate for AEC review under the statutory standard. There is no suggestion in the legislative history that where, as here, the proposed units will be owned by a single utility, Section 105(c) was intended to trigger an antitrust review of an applicant's general activities as an electric utility.

5/ The acting Assistant Attorney General made clear in his JCAE testimony that if the licensed unit were owned by a single utility which was a member of a pool, such membership per se would not cause the unit to be considered a joint venture. Hearings, p. 134.

Finally, even assuming arguendo that there could be shown a sufficient nexus between the Commission activity in licensing the Oconee and McGuire units according to health and safety standards and the competitive "situation" in Applicant's service area, that nexus could not extend to the wide range of demands and issues raised by the Antitrust Division and the Petitioners. While questions regarding Petitioners' participation in the licensed facilities might be considered arguendo within the statutory ambit, issues as to monopoly, joint ventures, interconnection, wheeling and pooling arrangements (all posed on a system-wide basis), are plainly too remote to the operation of the Oconee and McGuire plants to require scrutiny in this licensing proceeding. Rather, if the overall competitive condition of Applicant's system is to be examined, it can only be done in antitrust enforcement proceedings, the availability of which is carefully preserved by the 1970 amendments to the Atomic Energy Act.

It is significant that following passage of the final version of the 1970 amendments in the House, the Antitrust Division of the Justice Department wrote several letters offering an expansive interpretation of the antitrust provisions of the bill. After these letters were introduced into the Congressional Record during the Senate debate by Senator

Aiken and other proponents of a broader scope of antitrust review than enacted, Representative Hosmer, co-author of the bill, rose on the House floor to set the record straight. He noted that the language of the legislation was a compromise and warned: "Thus, the views and opinions expressed in the letters from the Antitrust Division of the Department of Justice are not necessarily authoritative, and may or may not accurately represent the intent" of the bill. Congressional Record, H. 11087 (December 3, 1970).

In this proceeding, the Justice Department and the Petitioners basically seek to achieve what Congress refused to sanction, i.e., an unlimited antitrust review of every facet of Applicant's activities as an electric utility. Section 105(c) does not permit such review. Accordingly, Applicant urges the Board to find that Applicant's activities which are unrelated to the Oconee and McGuire units are beyond the scope of this proceeding.

UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

In the Matter of	)	Docket Nos. 50-269A,
	)	50-270A,
Duke Power Company	)	50-287A,
(Oconee Nuclear Station Units 1,	)	50-369A
2 and 3 and McGuire Nuclear	)	and 50-370A
Station Units 1 and 2	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Answer to Notice of Hearing and Opposition to, and Motion to Reconsider Delegation of Review Authority" in the captioned matter have been served upon the following by deposit in the United States mail, first class or air mail, this 24th day of July, 1972:

Walter K. Bennett, Esq.
Atomic Safety and Licensing Board
Atomic Energy Commission
Washington, D. C. 20545

Joseph F. Tubridy, Esq.
Atomic Safety and Licensing Board
Atomic Energy Commission
Washington, D. C. 20545

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

Mr. Stanley T. Robinson, Jr.
Chief, Public Proceedings Branch
Office of the Secretary
of the Commission
U.S. Atomic Energy Commission
Washington, D. C. 20545

J.O. Tally, Jr., Esquire
P.O. Drawer 1660
Fayetteville, North Carolina

Mr. Dayne H. Brown, Director
State Radiation Protection Program
North Carolina State Board of Health
Raleigh, North Carolina 27602

Honorable Reese A. Hubbard
County Supervisor of Oconee Coun
Walhalla, South Carolina 29621

Mr. Joseph Knotts, Jr.
Counsel for AEC Regulatory Staff
U.S. Atomic Energy Commission
Washington, D. C. 20545

Joseph Rutberg, Esq.
Antitrust Counsel for AEC
Regulatory Staff
U.S. Atomic Energy Commission
Washington, D. C. 20545

Benjamin H. Vogler, Esq.
Antitrust Counsel for AEC
Regulatory Staff
U.S. Atomic Energy Commission
Washington, D. C. 20545

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

Jack R. Harris, Esquire
Suite 207
Stimpson Wagner Building
Statesville, North Carolina 286[illegible]

Dr. W.C. Bell
State Planning Task Force
P.O. Box 1351
Raleigh, North Carolina 27602

Mr. J. Bonner Manly, Director
State Development Board
Hampton Office Building
Columbia, South Carolina 29202

Algie A. Wells, Esquire, Chairman
Atomic Safety and Licensing Board Panel
U.S. Atomic Energy Commission
Washington, D. C. 20545

Toni K. Golden
Wald, Harkrader & Ross
Attorneys for Applicant