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ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

Department of Justice
Washington, D.C. 20530

AUG 2 - 1971

Bertram H. Schur, Esquire
Associate General Counsel
United States Atomic Energy Commission
Washington, D. C. 20545

Re: Duke Power Company
Oconee Units 1, 2 and 3
AEC Docket Nos. 50-269, 50-270 and 50-287
Department of Justice File 60-415-27

Dear Mr. Schur:

You have requested our advice pursuant to the provisions of Section 105 of the Atomic Energy Act of 1954, 68 Stat. 919, 42 U.S.C. 2011-2296 as recently amended by P.L. 91-560, 84 Stat. 1472 (December 19, 1970), in regard to the above cited application.

Applicant

Applicant is one of the major electric utilities in the eastern United States. I am advised that its electric system serves the Piedmont Carolinas, in an area about 100 miles wide and 260 miles long, extending from Virginia on the northeast to Georgia on the southwest, having a total area of about 20,000 square miles and serving a population of about 3,300,000. Its total assets as of December 31, 1970 exceeded $1 3/4 billion. Its electric operating revenues for 1970 were $386,138,000. Its total utility plant exceeded $2 billion before depreciation and its net utility plant was $1,628,677,000. In 1970 it had a total generating capacity of 6,743,789 kw consisting of about 5,650,000 kw of steam capacity, 860,000 kw of hydro-electric generating capacity and relatively smaller amounts of gas turbine capacity and internal combustion capacity. Its 1970 system peak demand was 6,284,000 kw. Of this, approximately 700,000 kw was supplied to 58 independent distribution systems serving at retail in the general area described above.

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in today's power economy. This is spelled out in some detail in our letter of June 28, 1971 regarding Consumers Power Co.

Anticompetitive Conduct

From almost its inception, Southern Power Company's and Duke's contracts contained market allocations which allocated larger customers to Duke Duke claims these allocations never resulted in preceding its purchasers in bulk from selling to any customer, and in November 1964, removed the provisions from all its rates schedules filed with the Federal Power Commission, see Docket No. E-7122, 30 FPC 524, 32 FPC 594 (1964) and 32 FPC 1253. Shortly thereafter, on January 1, 1965 Duke filed changed rate schedules modifying its rate design, with the possible effect of perpetuating the market allocation effected by the earlier provisions. Wholesale customers of Duke are now making substantially this claim to the Federal Power Commission, Before the Federal Power Commission Docket No. E-7557. Duke denies that its wholesale rate design has this effect or was instituted with this intent.

While its earlier rates schedules had other features which may have been anticompetitive, its present schedules contain a feature of ratcheted demand, which could serve effectively to discourage installation of thermal generating capacity by its wholesale customers. Lack of any provision for reserve sharing could also serve to discourage entry into self generation.

Duke claims it has never refused a proposal to coordinate. On the other hand, it takes the somewhat conflicting position that should it coordinate with any actual or potential competitor, its survival would be threatened because of the tax and financing advantages enjoyed by many of the smaller systems in its area which are municipally owned, or which are borrowers from the Rural Electrification Administration. At present it refuses to coordinate its nuclear generation expansion program with nine municipalities, proposed interveners herein, which wish to participate in that program by purchasing an interest in or power supply from the Oconee units. Such a purchase could serve to give them ownership and hence control over a portion of their bulk power supply costs.

A group entitled Electric Power In Carolinas (EPIC) which is proposed and under study by a number of municipals and cooperatives in the Carolinas also desires to coordinate

its power supply plans and operations with those of Duke. Duke spokesmen have reportedly stated publicly that they would oppose Duke's interconnecting its system with EPIC for the joint meeting of emergency load needs as it does with other electric systems. There were indications that Duke might utilize its substantial resources in a legislative campaign and before regulatory and judicial tribunals to frustrate EPIC's entry into the power business. Evidence available to us tends to indicate that on occasion Duke has bluntly warned North Carolina municipal electric systems that the efforts and funds that the latter could expend in seeking relief before regulatory agencies would be overwhelmed by Duke's resources and resistance.

An electric power system's refusals to deal and its dealing on discriminatory terms with its retail competitors is conduct that may well fall within the purview of Section 2 of the Sherman Act as discussed in greater detail in our recent letters to you on the applications of Virginia Electric and Power Company (AEC Docket Nos. 50-338A and 50-339A) and Southern California Edison Company (AEC Docket Nos. 50-361-A and 50-362-A). 1/

Conclusion

As a result of the foregoing, we concluded that the facts revealed by our preliminary study of the instant application indicate substantial questions regarding the applicant's activities and probable activities under the license which would need to be resolved by a hearing before your Commission. When we informed Duke that our advice to the Commission would be to this effect, Duke, although denying that its conduct had contravened antitrust principles,

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1/ Applicant's conduct of consistently opposing applications of other utilities for project licenses and its alleged threats to engage in extensive litigation to block such projects could with evidence of other conduct constitute proof of intent to unlawfully monopolize even if much of the former conduct is itself protected from prosecution by the First Amendment. United Mine Workers of America v. Pennington et al., 381 U.S. 657, 670 fn. 3 (1964). A pattern of vexatious litigation may form part of conduct proscribed by the antitrust laws. See Trucking Unlimited v. California Motor Transport Co., 432 F.2d 755 (CA 9, 1970) cert. granted June 7, 1971.

Duke's many generating stations are integrated into a single bulk power supply system by a high voltage transmission network which includes 1,535 circuit miles of 230 kv, 5,130 circuit miles of 100 kv, and 2,591 circuit miles of 44 kv. Its total high voltage transmission as of December 31, 1970 was 9,481 circuit miles. It is also vertically integrated, distributing electric power at retail throughout most of this area. It presently operates over 43,000 pole miles of distribution lines.

Duke's bulk power supply system is further interconnected and coordinated with other major systems on its periphery. These include high voltage ties to the American Electric Power System through Appalachian Power Company on its north, to Carolina Power and Light on the east, to South Carolina Electric and Gas on the south, and to the Southern System on the southwest through Georgia Power Company, and also ties with projects of the Southeastern Power Administration on the Savannah River. It is also interconnected with Yadkin, Inc., an industrial power supply.

History and Structure

Duke's early base was in the development of water powers on the Catawba and Wateree Rivers which are in the Santee Basin in the Carolinas. It soon added steam generation which it integrated with its hydro generation by high voltage transmission lines. Its evolution can be traced through a series of amalgamations and purchases which had the effect of providing it control over many of the water powers in the area. At about the same time a similar company called Southern Public Utilities Company was developing along parallel lines but operating extensive retail distribution properties, and the interests of these companies were first closely associated and then completely joined.

Duke now owns or controls substantially all the water powers in its area. Since Duke owns virtually all of the water power projects on economically attractive sites in its area, other electric entities seeking entry into bulk power supply cannot resort to hydro-electric production which can be economically developed as isolated projects not requiring interconnection with other generating sources.

Duke also owns and controls all high voltage transmission in the area, and owns or controls substantially all thermal generation in the same area. Hence, it has the market power to grant or deny access to coordination which is essential for a competitive thermal bulk power supply

represented to us that it will henceforth hold itself out to interconnect and coordinate with EPIC and any other entities where the possibilities for interconnection and coordination exist. However, this undertaking does not include all the kinds of coordination which Duke has heretofore carried out with other electric systems in the Southeast. It would exclude joint ownership of Oconee units and unit power sales from Oconee on terms under which unit power sales are normally made in the electric power industry, namely, at the cost of new power supply. While Duke has made power sales from new units at new unit costs in the past, it now advises that it has changed its policy in this regard. The fact that this change in policy comes at a time when small systems are pressing for coordination with Duke may itself have anticompetitive implications.

We therefore recommend that a hearing be held to determine whether the licensee's proposed activities under the license will create or maintain a situation inconsistent with the policies of the antitrust laws.

Sincerely yours,

RICHARD W. McLAREN
Assistant Attorney General
Antitrust Division