UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

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

ANSWER OF THE DEPARTMENT OF JUSTICE
TO APPLICANT'S OBJECTIONS TO DOCUMENT
REQUESTS AND MOTION FOR PROTECTIVE ORDERS

The Department of Justice hereby answers Applicant Duke Power Company's Objections to Document Requests and Motion for Protective Orders filed in this proceeding on September 12, 1972. The Department urges denial of Applicant's motion for the reasons specified below with regard to each document request and asks the Atomic Safety and Licensing Board to order Applicant to provide discovery as sought, pursuant to the Board's authority under Section 2.740(c) of the Commission's Rules of Practice, 10 C.F.R. Part 2, as amended, 37 F.R. 15127, 15133.

The Department further requests that the Board deny Applicant's motion for oral argument. Sections 2.730(c) and (d) of the Rules express the policy that a motion and an answer should ordinarily be sufficient to permit disposition of a question without further reply or oral argument.

There is no need to depart from that policy here. All parties have had ample opportunity to set forth their positions, and postponing decision until oral argument can be scheduled and heard would only delay discovery that the Board has directed be accomplished with dispatch.

Counsel for the parties have held three meetings--on September 19, September 25, and October 10--concerning Applicant's objections to and purported difficulties in complying with the first joint request for documents. As a result the joint discoverers agreed to curtail or modify many of the specific requests so as to substantially reduce the Applicant's burden, and Applicant agreed to comply accordingly. With regard to certain other requests, although similar agreement has not yet been reached, there appears to be a good possibility of doing so.* The joint discoverers therefore agreed to await Applicant's responses to their latest proposals for modifying these requests prior to seeking a decision and relief from the Board.

The remaining requests are those on which agreement was not reached and further discussion was deemed unlikely

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*These requests are Nos. 5, 6(a), 32, 38, and, with regard to outside directors, Definition No. 2.

to produce any agreement. They are the subject of Applicant's present Motion for Protective Orders and will be discussed under numbered headings below.

The Department is troubled by Applicant's disclaimer of waiver in footnote 2 to its Objections and Motion. We believe that any claim that a specific document or category of documents requested is irrelevant or privileged should be made at this time (except for the requests still under discussion listed above) and the Board's decision thereon must control future production of that document or category of documents. We would certainly oppose relitigating the relevancy or privilege of documents within the categories which Applicant has agreed to provide or the Board orders to be provided, should Applicant's file search disclose particular documents it would prefer, for whatever reason, not to produce. The joint request does not seek any documents protected by the attorney-client privilege, and no objection would be necessary to prevent their discovery.

A recurring contention in Applicant's Objections and Motion is opposition to discovery on grounds that a request improperly "constitutes no more than a fishing expedition," citing Section IV(a) of the Commission's Statement of Policy, as amended. 37 F.R. 15139 (1972).

To properly dispose of Applicant's "fishing expedition" accusation, we must consider it, and the Commission's Policy Statement in the context of this proceeding. Applicant has come before the Commission seeking licenses--and, more particularly, seeking a finding that the activities under the projected licenses would not create or maintain a situation inconsistent with the antitrust laws so as to require the imposition of appropriate corrective license conditions. In this role as proponent of an unconditioned license, Applicant clearly bears the ultimate burden of proof.* The Department of Justice recognizes that a certain amount of difficulty inheres in establishing a proposition stated in the negative and, in cooperation with the Commission's Staff, therefore assumed, as its role in the antitrust review, the preliminary burden of making out a prima facie case of antitrust inconsistency. See Attorney General's letters of advice to AEC, 36 C.F.R. 17883, 36 C.F.R. 20256 (1971). The role of the Department is thus substantially inquisitorial in nature--and analogous to that of a grand jury, rather than

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*Administrative Procedure Act, 5 U.S.C.A. §556(d); Atomic Energy Act, §181, 42 U.S.C.A. §2231; Section 2.732 of the Commission's Rules of Practice, 10 C.F.R. Part 2; Sections V(c)(1), V(d)(1) of the Commission's Statement of Policy, as amended, 37 F.R. 15140; Joint Committee on Atomic Energy, Hearings on Prelicensing Antitrust Review, Part 1, p. 81 (Statement of AEC General Counsel).

that of litigant in an adversary judicial proceeding. This distinction was explained in United States v. Morton Salt Co., 338 U.S. 632, 640-643 (1950), dealing with powers of the Federal Trade Commission:

> The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. 338 U.S. 642-643.

The ultimate burden remains on Applicant and it necessarily includes providing the information required by the Department (and the AEC Staff) in carrying out their duty of inquiry. Under these circumstances, a certain amount of latitude in the conduct of discovery, exceeding even that which might be allowed in a purely judicial context, is necessary and appropriate.

We trust Applicant is not seriously contending that the Department must have in its possession all evidence necessary to establish a prima facie case of antitrust inconsistency prior to rendering its advice to the Commission. A requirement that the Department's inquiry

be complete at that point in time would place the burden of full prehearing discovery on all license applicants, rather than merely those for which a hearing is deemed necessary. The Commission's Rules plainly envision that detailed discovery on particular matters in controversy will follow an initial, special prehearing conference. Sections 2.740(b)(1), 2.751a.

1. Request for Description of Applicant's Filing System

Applicant objects to Request No. 2 as a "fishing expedition" to obtain additional issues or evidence. The ordinary sense of the term is that of an attempt to discover original grounds for a proceeding, or to broaden its scope, by indiscriminately searching an opponent. Request No. 2 is nothing of the sort. It seeks no new issues beyond those accepted by the Board for purposes of determining the relevancy of discovery in its order of September 20, nor does it even call for any production of evidentiary documents, assuming arguendo that this could somehow be improper. The request is narrowly directed to obtain discovery of information "relevant to the subject matter involved in the proceeding, . . . including the existence, . . . custody, . . . and location of any . . . documents . . . and the identity and location of persons having knowledge of any discoverable matter," as permitted by Section 2.740(b)(1) of the Rules.

The joint discoverers desire a detailed description of Applicant's filing system in order to obtain a clear picture of the sources of documents provided in response to their requests--and with it an ability to focus subsequent discovery with the specificity the Board has indicated it will require. The information sought is patently "reasonably calculated to lead to the discovery of admissible evidence." Section 2.740(b)(1).

We expressed willingness to accommodate Applicant in reducing any burden of complying with the request as originally written (such as suggesting that the minimum number of documents giving a complete description of the filing system would suffice, or that a response might be specially prepared in the form of an answer to an interrogatory). Applicant, however, was and is adamant in denying the relevance of the request in whatever form.

2. Request for Documents Relating to Applicant's Efforts to Influence Legislative, Executive, Administrative and Judicial Action

Applicant objects to producing any documents which it characterizes as "relating to its constitutionally protected right to petition legislative, executive, administrative and judicial officials and tribunals." It thus apparently opposes any compliance whatsoever with "[a]t least ten of the document requests" because they "seek such documents on their face," and would undertake to comply only insofar as Applicant deems fit with the "many other requests [which] will undoubtedly sweep such material into their broad ambit."

Applicant's objection on this point is, in all essential respects, identical to that recently made in the United States District Court, Middle District of Louisiana, by another electric utility, Gulf States Utilities Company, in opposing discovery by the Department of Justice of government-influencing documents sought by under the civil investigative demand procedure. Antitrust Civil Process Act, 15 U.S.C.A. §§1311-1314. The District Court, following submission of briefs and oral argument, rejected Gulf States' contentions and ordered it to comply with the Department's demand. A copy of the court's opinion is attached as Appendix A. This is the only case directly in point of which we are aware.

As with Gulf States, there is simply no merit to Applicant's present objection. The Commission's Rules permit "discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding. . . ." Section 2.740(b)(1). The Rules certainly do not condition discovery on a prior showing that the requested documents will themselves prove something (for example, that they will on their face demonstrate inconsistency with the antitrust laws). In fact, Section 2.740(b)(1) makes it a point to emphasize that discovery is not objectionable "[even if] the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." (Emphasis added)

All that is required, then, is that the matter sought to be discovered be relevant and not privileged. Both criteria are satisfied here.

Applicant itself has made a compelling case for relevancy. By previously raising substantial issues concerning the degree of pervasiveness of Federal and state regulation of its business activities, the appropriateness of rate schedules presently filed with regulatory bodies in providing its competitors access to the benefits of nuclear generation and high-voltage

transmission, the degree to which regulation restricts its wholesale and retail competition, and the relevancy to the Board's decision of any advantages Government may have conferred upon its competitors -- to mention just a few -- it has brought its own dealings and relationships with Government irrevocably into the forefront of this proceeding.

Furthermore, in its present objection on this subject, Applicant carefully points out that "[t]he very nature of Applicant's operations as a public utility in North and South Carolina serves to thrust Applicant into the political process with great frequency" and goes on to assert that "through its frequent interaction with various executive, legislative, administrative and judicial forums and officials, Applicant inevitably participates in a significant way in the political and legal arena." It is this very fact of constant, intimate involvement with government in Applicant's day to day conduct of business that makes it essential to discover and consider its government-influencing activities in this proceeding. They are an inextricable part -- just as threads woven into a fabric -- of the total context of Applicant's business conduct which the Board must consider in making its antitrust finding. The failure to obtain particular desired action from a legislature,

executive official, court or administrative agency could be an important part of the background explaining a decision to subsequently employ other, unlawful means of building a monopoly. Or attempts to influence government may shed new light on the purpose and character of prior and contemporaneous conduct -- and perhaps even give form to an overall plan of monopolization. See, e.g., American Medical Association v. United States, 130 F.2d 233, 250-252 (D.C. Cir. 1942). Documents concerning Applicant's government-petitioning activities may, in the Board's discretion, be introduced as evidence of the antitrust inconsistency of other conduct, even though the political activities themselves could not be found illegal. United Mine Workers v. Pennington, 381 U.S. 657, 670n.3 (1965).* Finally, of course, activities ostensibly directed toward influencing governmental action, but in reality a mere sham to interfere with competitors' business relationships may be held to violate the antitrust laws -- or be found inconsistent with those laws.

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* It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under the "established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny."

Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). We cite this last possibility not as an allegation that Applicant's political activities were only a sham, * but rather to highlight the absurdity of Applicant's claim that consideration of its political, administrative or adjudicatory activities is irrelevant to the Board's decision and that discovery thereof should not be permitted.

There remains the question of possible privilege from discovery, and we understand Applicant to contend that a privilege, or something akin thereto, operates in support of its objection here. The argument goes this way: (1) the Noerr and Pennington cases served to wholly immunize Applicant's political, administrative and legal activities from antitrust scrutiny; (2) given this immunity, to permit discovery of such activities -- and particularly access to its internal discussions -- would "chill" Applicant's exercise of First Amendment rights; (3) lacking any compelling interest for discovery,

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* Some may have been, e.g., threats to ensnare competitors in a web of regulatory and judicial proceedings should they attempt to enter the bulk power supply business.

the Department cannot require disclosure of Applicant's internal records or any other documents relating to its political, administrative, or litigating activities, in the face of this chilling effect.

On examination, Applicant's argument dissolves completely.

First, as our discussion of relevancy has already indicated, to read Noerr and Pennington as unqualifiedly immunizing all of Applicant's government-related conduct from antitrust scrutiny at the command of the First Amendment is a gross overstatement. Noerr simply decided that no violation of the antitrust laws can be found in mere attempts to influence the passage or enforcement of laws and reversed a judgment enjoining such conduct. The Court stated as one basis for its holding that a contrary construction of the Sherman Act would raise important questions concerning invasion of the First Amendment right of petition. Pennington added the rule that such political conduct would not be illegal even as part of a broader scheme of violation. Neither case even suggested that First Amendment values might restrict or prohibit the mere discovery of political conduct as sought here; the Pennington footnote cited earlier saw no problem in admitting evidence of such conduct.

Lacking the necessary support in Noerr and Pennington, Applicant reaches for the cases that have denied requests for disclosure of information on finding that First Amendment associational rights would be "chilled" by requiring the disclosure. It boldly steps into the shoes of the individual members of the National Association for the Advancement of Colored People who demonstrated that compelled disclosure of their identity as members would likely bring them irreparable injury in the form of economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility -- and that real fear of such injury effectively impaired their exercise of the First Amendment right of association for advocacy. See, e.g., NAACP v. Alabama, 357 U.S. 449 (1958). The analogy is bizarre, to say the least. Applicant -- a mighty electric utility, with over $2 billion in assets and annual operating revenues in excess of $450 million; member of an industry long feared for its exercise of political power* and subjected

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*See 70th Congress, 1st Sess., Summary Report of the Federal Trade Commission to the Senate of the United States Pursuant to Senate Resolution No. 83, Part 71(a). Efforts by Associations and Agencies of Electric and Gas Utilities to Influence Public Opinion and Report on Publicity and Propaganda Activities by Utilities Groups and Companies (Part 81(a)), pp. 229-230. See also the results of the earlier Federal Trade Commission investigation reported in Federal Trade Commission, Electrical Equipment and Competive Conditions, Senate Doc. 46, 70th Cong. 1st Sess. (1928), xviii-xix. And see Lobbying and Lobbyists, Senate Report 43, 71st Cong. 2nd Sess. Part 7.

to some regulation of that power as a result;* and with, by its own admission, a record of frequent, significant participation in the political arena--now asserts that it will suddenly be seized with fear to exercise its First Amendment rights if its files on political activity are opened to discovery of relevant matter in this proceeding.

How this could come to pass is not apparent to us. Mere discovery would neither punish, nor enjoin (as was sought in Noerr), nor indirectly restrain Applicant's free exercise of First Amendment rights. If discovery is granted, and political material produced is later sought to be introduced into evidence, Applicant would then have the opportunity to argue its inadmissibility as not probative or unduly prejudicial. If the material is admitted as evidence, Applicant would have yet another opportunity to argue its lack of probative value when the Board prepares to make its antitrust finding. Any real punishment or other sanction flowing from the discovery could come only after a Board determination (and probably one or more appeals) that what purported to be political activity was

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*Section 12(h) of the Public Utility Holding Company Act of 1935, 15 U.S.C. §79l(h); see also Southwestern Electric Power Co. v. F. P. C., 304 F.2d 29 (5th Cir 1962), cert denied, 371 U.S. 924 (1962).

in fact an unprotected sham, or perhaps that the political activity tended to prove the antitrust-inconsistent purpose and character of other unprotected conduct. The only possible chilling effect is thus very remote--and would necessarily be the direct result of applicant's having engaged in unprotected, antitrust-inconsistent activities.

Applicant simply has not made a reasonable showing that his exercise of First Amendment rights would truly be chilled by its being called upon to make discovery here. All it really claims is the possible embarrassment of having its political activities made known. There is no immediate, irreparable injury of the sort found crucial in the NAACP cases to justify preventing disclosure.

Even if Applicant's vague protestation of fear and possible embarrassment should its manner of exercise of First Amendment rights be revealed could somehow be deemed a chilling effect, that would not suffice to resolve this issue in its favor. Discovery may be compelled even in the face of a chilling effect if the Government has a legitimate, justifiable interest in making the discovery, and the incidental effect of inhibiting of First Amendment rights is minor in relation to the need for discovery. See Younger v. Harris, 401 U.S. 37, 51 (1971). In this

proceeding, the chilling effect on Applicant is negligible or nonexistent. On the other hand, the requested discovery has been shown above to be both relevant and necessary for accomplishment of the goals of this proceeding under the Atomic Energy Act. The Board should deny Applicant's objection and order it to comply with these discovery requests.

3. Request for Documents Relating to Understandings or Arrangements as to Allocation of Service Areas

In a limited objection to Request No. 6(e), Applicant contends that documents concerning "territorial assignments which were undertaken following the enactment of specific legislation by the legislatures of North and South Carolina" are products of state action, cannot be violative of the antitrust laws, and therefore "are so clearly irrelevant to any appropriate antitrust inquiry that the Board can properly dispose of the issues raised in the context of objections to discovery." We do not agree.

Even assuming that the territorial assignments themselves were valid state action so as to preclude a finding that they violated the antitrust laws, that is no reason to exclude them from discovery here. They are demonstrably "relevant to the subject matter involved in the proceeding"--the test of Section 2.740(b)(1).

Most important, the Board must determine whether Applicant is responsible for a situation inconsistent with the antitrust laws that may exist in its area. To properly do this, the Board should consider the total context of competitive relationships between Applicant and the smaller electric utilities in its area during the period under scrutiny. Territorial assignments are an

integral part of this total context and may therefore properly be considered in evidence by the Board. Whether they are lawful or unlawful in themselves, then, they are discoverable in this proceeding.

Beyond this plainly sufficient general relevancy, three specific points will serve to emphasize our interest in discovery concerning these territorial assignments.

First, should either the state laws or the territorial assignments ostensibly made pursuant thereto purport to cover wholesale sales, they would not be immune from antitrust sanction.* Any such state regulation would be constitutionally invalid under the decisions in Public Utilities Commission v. Attleboro Steam & Electric Co., 376 U.S. 205 (1964), and there could be no "state action" justification for wholesale territorial assignments.

Second, it is not entirely clear whether the relevant statutes authorized the state commissions to permit private bargaining by the utilities concerned as a first step in making the assignments directed by the legislatures. If a state commission's direction to bargain privately

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*A proviso of N.C.Gen. Stats., C. 287, Art. 41, §62.110.2(10) seems clearly to exclude wholesale sales from that law's ambit.

were unauthorized, the "state action" would not be valid. See Georgia v. Pennsylvania R. Co., 324 U.S. 439, 456-463 (1945).

Third, the Department's principal concern is not so much with state-approved territorial assignments themselves, or with their routine implementation, but rather with the circumstances of private negotiation on the arrangements prior to seeking their approval. Examination of the bargaining process documents might well reveal evidence of Applicant's misuse of its bulk supply or high-voltage transmission monopoly power as a lever to obtain favorable territorial agreements for presentation to the state commissions. Similarly, applicant's post-approval private use of monopoly power to secure favorable interpretations of the agreements could also be significant.

As with other requests here objected to, we were and are willing to modify this request in any way practical so as to reduce Applicant's burden of producing the "many file drawers" of documents it claims would be involved in complying.

4. Request for Documents Concerning Participation in Municipal and State Elections

While relying primarily on its basic objection to producing "political activity" documents, Applicant also opposes Request No. 16 on the ground that it seeks

production of documents that would be irrelevant to this proceeding even if Applicant's other objection were to be denied. Applicant would have the Board limit production to documents which on their face reflect efforts to obtain a competitive advantage vis-a-vis other electric utilities. Clearly, our request is very much concerned with documents that may evidence such efforts. Not all anticompetitively motivated election activities are overt, however.* Support for friendly candidates may well be given under the guise of taking a position on "issues of more general concern." We therefore believe that granting Applicant's objection would inappropriately foreclose the possible discovery of relevant documents. Further, given the unquestioned fact that large electric utilities such as Applicant have traditionally possessed considerable political power--so much that Congress has imposed regulation in attempting to control its exercise--it ill behooves Applicant to attempt to characterize this request as yet another "fishing expedition." Finally, we would once again be pleased to cooperate with Applicant in minimizing its feared burden, but not to all-inclusive extent it has proposed here.

5. Request for Documents Located in Files Designated as Pertaining to Wholesale Customers of Applicant

Applicant has objected to producing documents sought by Request Nos. 13 and 17, claiming a failure to adequately

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* See, e.g., the newspaper report attached as Appendix B.

designate, describe, or particularize the documents requested. The requests, as modified during discussion by the parties, ask for "designated documents" as required by Section 2.741(a) of the Rules, and "set forth the documents to be inspected . . . by category, and describe each . . . category with reasonable particularity," as permitted by Section 2.741(c). They call for particular categories of documents: "[All] documents located in the Company's individual files pertaining to each wholesale electric customer of the Company . . ." and "[All] documents located in the Company's individual files pertaining to Electricities of North Carolina (or its predecessor, North Carolina Municipally Owned Electric Systems Association); EPIC, Inc.; and Piedmont Electricial Cities Association . . . ." This is not a "fishing expedition" attempting to search indiscriminately and without foundation all of Applicant's files, as implied by Applicant's citation of Schwimmer v. United States, in which an "all files"subpoena was quashed.

The designation of documents by their location in the specific individual files maintained on each of Applicant's wholesale customers and potential competitors is most appropriate in this proceeding. The main thrust of the inquiry concerns the various means and techniques by which Applicant is believed to have retained and expanded

its monopoly of bulk power supply and to have abused that monopoly power in retail competition, at the expense of these very wholesale customers and potential competitors. Some of these means and techniques are known to the Department prior to discovery; others may not be and we are not at all certain that our other requests will bring them all to light. We believe that the surest path to fully discovering the anticompetitive means and techniques employed by Applicant over the years in dealing with this one, very limited, class of customers is to obtain the entire record of their day to day relationships, as maintained in the designated individual files.

We recognize that these files could possibly be voluminous; how voluminous, we have not been advised. Routine billing data were originally excluded from Request No. 13 (and are not included in Request No. 17), and we would be quite willing to sample and exclude other repetitive, routine documents should their existence be made known to us. Finally, it must be pointed out that all that these requests seek is production of documents for inspection. Applicant certainly need not make copies for us, and, in fact, may permit the desired inspection without even removing the files from their present location.

6. Request for Documents Asserting or Denying Regulatory Jurisdiction

Applicant has objected to portions of Request No. 30 asking for documents in which it has asserted that Applicant's activities are subject to Federal or state regulatory jurisdiction and pre-1965 documents reflecting its position on Federal jurisdiction.

This request was intended to obtain information with which to flesh out and prepare to respond to Applicant's contentions that pervasive Federal and state regulation of its coordination and pricing policies precludes or limits the Board's consideration of those matters. These contentions make it incumbent upon Applicant to show in this proceeding exactly which of its activities are subject to regulation and by whom. Documents reflecting the positions Applicant has previously taken on these points, asserting as well as disclaiming jurisdiction, are thus relevant and discoverable.

We agree that production of every document routinely asserting jurisdiction would be quite voluminous and not particularly useful. It is important, however, that we correctly ascertain Applicant's position with regard to each separate type of activity for which the fact or extent of regulation may be at issue. We therefore

request that Applicant be ordered to produce a sample of each differently worded statement it has filed asserting Federal or state jurisdiction, indicating to what specific activities each form of statement pertains.

We also recognize that Applicant may have changed its position on the basic issue of Federal jurisdiction over interstate wholesales of electric energy as a result of the Supreme Court's decision of March 2, 1964, in Federal Power Commission v. Southern California Edison Co., 376 U.S. 205 (City of Colton). Colton, however, merely resolved that fundamental issue. It did not purport to settle all questions concerning the applicability of Federal regulation to all activities and practices of Applicant which may be relevant here. That being the case, any pre-Colton statements Applicant may have made opposing Federal regulation of particular activities were not necessarily mooted by the decision and could be relevant evidence in this proceeding. Accordingly, we ask that such documents be ordered to be produced in compliance with Request No. 30.

7. Request for Duplicate Tax Returns

Applicant has contended in this proceeding that Government subsidies and tax and financing advantages enjoyed by municipal and cooperative electric systems are relevant in determining whether Applicant is responsible for a situation inconsistent with the antitrust laws. See issue I-15 of the Joint Recital. Although we believe such matters are wholly irrelevant to a determination of antitrust violation or inconsistency, we nevertheless recognize that Applicant may persuade the Board to consider them in this proceeding. If so, fair consideration would require the Board to ascertain what similar benefits--including tax advantages--Applicant itself may enjoy,* and to compare them with those of the municipals and cooperatives. Request No. 31, to which Applicant now objects, seeks information to enable the Department to respond to this issue Applicant has raised.

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*Congressional awareness of and concern with these advantages is evident in the legislative history of the 1970 Amendments to the Atomic Energy Act, as well as that of the 1954 Act itself. e.g., Joint Committee on Atomic Energy, Hearings on Participation by Small Electrical Utilities in Nuclear Power, pp. 1219-1225 (1968) (Remarks by Rep. Holifield); 100 C.R. 11828-11828 (Remarks of Sen. Morse). (1954).

We were and are willing to limit this request substantially so as reduce any burden on Applicant. Federal and state income tax returns are still desired for all years since 1960. For all other returns, we would request that only a list thereof be initially provided, with the opportunity to obtain particular returns or a sampling of returns subsequently. Applicant, however, has chosen to object to any production of tax returns whatsoever.

As Applicant admits, despite some judicial reservations, there is no privilege against discovery of retained copies of tax returns. St. Regis Paper Co. v. United States, 368 U.S. 208, 218-219 (1961); 4 Moore, Federal Practice ¶26.61 [5.---2] (1971). This is an appropriate case for their production. Applicant itself has tendered the issue of tax advantages, and courts have often seized upon that circumstance to justify ordering the production of returns, Kingsley v. Delaware L. & W. Ry. Co., 20 F.R.D. 156, 158 (S.D.N.Y. 1957); its absence was noted in the Wiesenberger and Richland cases cited by Applicant. The tax returns themselves are the best evidence of exactly what tax benefits Applicant may enjoy. They show not only what taxes were paid, but also why other taxes were not paid: by specifying the exclusions, exemptions or

deductions Applicant has claimed. This evidence is "not readily obtainable otherwise"--the test Applicant would apply, citing Richland. Form No. 1's filed with the Federal Power Commission merely state the taxes actually paid; and, unlike the tax returns themselves, do not reveal how much tax was not paid. Regulatory accounting under the Federal Power Act and tax accounting as reflected in the returns are two different animals, and our requirements deal with the latter. Some regulatory accounts do reconcile differences between the two systems, e.g., Uniform System of Accounts Nos. 281-283, but they do not purport to show all of them and, particularly, the vital underlying details of how they arose.

Applicant suggests that Section 2.740(b) of the Rules provides other means of obtaining the desired data. Section 2.740(b) says only that we may have discovery of any relevant matter. Perhaps Applicant meant to refer us to Section 2.740b, which deals with interrogatories to parties. Interrogatories, however, are not nearly as satisfactory for our purpose as the requested tax returns. The returns necessarily speak for themselves, while answers to interrogatories would merely be Applicant's conclusions as to tax benefits enjoyed. We wish to argue the tax benefits question from the objective

evidence itself, rather than relying on Applicant's reading of that evidence.

We therefore ask the Board to order compliance with Request No. 31, modified as suggested above to reduce the burden of production.

8. Request for Documents Relating to Federal Power Commission Proceedings

Applicant objects to Request Nos. 6(p) and 37, which ask for documents relating to particular Federal Power Commission proceedings, as attempts "to import into this proceeding the issues and facts which are subject of pending litigation before a sister Federal agency." It professes concern that the documents are sought to "relitigate" or "simultaneously litigate" the FPC proceedings before this Board.

We submit that nothing of the kind is contemplated. This Board is simply not sitting to decide upon EPIC's hydroelectric facility application, nor will it approve or disapprove Applicant's filing with respect to the wholesale fuel adjustment clause, and we are not aware that any party is here seeking to litigate those matters.

The Board does, however, have the jurisdiction and duty to find "whether the activities under the license[s] [sought by Applicant] would create or maintain a situation inconsistent with the antitrust laws." One issue pertinent to the Board's decision is whether Applicant has preserved and misused its monopoly power over hydroelectric

production by thwarting in various ways potential competing water power projects. Applicant's activities in connection with EPIC's FPC Green River application would be relevant evidence on this issue. They might even prove to fall within the "sham" exception of Noerr and California Motor Transport.

Another pertinent issue for the Board's consideration is whether Applicant has imposed a price squeeze upon its wholesale customers/retail competitors; and if so, is that inconsistent with the antitrust laws notwithstanding FPC jurisdiction to determine whether Applicant's filed wholesale rates are "just and reasonable." Applicant's rate design studies and documents relating to the decision to file and FPC filing on the wholesale fuel adjustment clause are relevant evidence on that issue. They could show, for example, that an anticompetitive purpose and character underlie Applicant's wholesale-retail rate design.

Hydroelectric generation and purchase of power at wholesale are two of the avenues normally open to electric utilities seeking respectively to compete in the business of bulk power supply and the retail distribution business. Applicant's efforts in FPC proceedings to deny or unreasonably restrict their availability to competitors

or potential competitors are clearly relevant in this proceeding because applicant's fence around the wholesale market would not be complete if hydroelectric power were an available alternative for potential bulk power suppliers; and its fence around the retail market would be incomplete if the wholesale purchase of power on terms permitting retail competition were an available alternative. The Board should order production of documents called for by Request Nos. 6(p) and 37.

Respectfully submitted,

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Department of Justice

Dated: October 25, 1972

APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
September 1, 1972
WEST, J.

GULF STATES UTILITIES COMPANY

versus

CIVIL ACTION

RICHARD W. McLAREN, ASSISTANT ATTORNEY GENERAL, ANTI-TRUST DIVISION, UNITED STATES DEPARTMENT OF JUSTICE

NO. 71-102

This cause came on for hearing this day on the Government's petition for enforcement of Civil Investigative Demand No. 1299 of the Department of Justice, motion for production of documents in camera, and motion for costs.

PRESENT: Tom F. Phillips, Esq.
Attorney for plaintiff

Wallace E. Brand, Esq.
David A. Leckie, Esq.
Douglas M. Gonzales, Esq.

Hearing was had on the motion of Thomas E. Kauper, Assistant Attorney General, Antitrust Division, United States Department of Justice, to order enforcement of Civil Investigative Demand No. 1299 with respect to two categories of documents, the production of which was objected to by Gulf States Utilities Company in its Petition for Order to Set Aside or Modify said Civil Investigative Demand, and the Court, after hearing argument and considering the briefs of counsel, orders the production by Gulf States Utilities Company within 45 days of all documents withheld by it pursuant to the objections recited in paragraphs 5 (b) and (c) in its Petition for Order to Set Aside or Modify said demand; further, the Court accepts for in-camera examination certain documents furnished by Gulf States Utilities Company, the production of which was withheld upon the claim of the attorney-client privilege and the Court's determination of whether or not the privilege asserted by Gulf States Utilities Company should be maintained, or whether a prima facie case for the exclusion of the privilege as contended by the Government has been established will be deferred until the in-camera review of documents furnished by counsel for Gulf States Utilities

Company will be given an opportunity to submit additional argument with respect to the privileged nature of any of the documents which the Court, after review, may consider not protected by the attorney-client privilege or subject to an exception to the privilege as claimed by the United States.

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Note:

Paragraphs 5(b) and (c) of Gulf States' Petition, to which the Court makes reference, read as follows:

5.

Alternatively, the Demand, each part and paragraph thereof, and the pertinent portions of each part and paragraph should be modified and limited to exclude therefrom the following:

* * *

(b) Documents involving activities of and negotiations and dealings with governmental authorities and instrumentalities, which activities are exempt from the application of the antitrust laws and therefore are not proper matters for investigation to support the demand; and

(c) Matters relating to litigation, legislative and regulatory agency activities of Petitioner, and actions of Petitioner to influence governmental action, which are activities not violative of the antitrust laws and which are protected under the First Amendment to the United States Constitution and are therefore not proper matters for investigation to support the demand.

Papers Reveal Florida Power Scheme

By PAUL SCHNITT and LAURENCE JOLIDON II

Of The Times Staff

Florida Power Corp. of St. Petersburg, according to documents from its own files of a decade ago, waged a grandly orchestrated and successful campaign in the early 1960s to retain an exclusive franchise in a small Florida city.

The papers, released Tuesday by State Sen. Gerald Lewis, a Democratic candidate for the state Public Service Commission, who did not reveal his source for the documents, outline a plan under which:

✔ Florida Power would work to defeat a proposed city charter in Winter Garden, west of Orlando, that would permit the community to operate its own electric system rather than buy power from the utility;

✔ Following the approval of the charter by a narrow margin, Florida Power then would campaign for the defeat of those city officials opposed to the private utility maintaining a franchise.

✔ The news in the Winter Garden area media would be carefully managed to coincide with an elaborate advertising pitch showing the Florida Power franchise proposal in the best light.

✔ A so-called "Citizens Committee" would be set up, at least one member of which would be a secret utility representative who would feed the committee information from the company but act as though it were his own.

✔ Prominent citizens in Winter Garden would unwittingly be won over to act as unofficial backers of the utility and, in some cases, "groomed" specifically to run for office so as to more efficiently carry out public policy that would favor Florida Power.

The plans were conceived by the New York public relations firm of Bozell & Jacobs, hired by Florida Power to find ways of defeating the charter and blunting the community forces in Winter Garden opposed to their franchise.

THE CHARTER was narrowly approved, but the officials who opposed Florida Power's franchise were removed, and the St. Petersburg-based utility signed a 30-year franchise.

Florida Power's franchise in Winter Garden had expired in 1950, and late that year the voters of the community had decided to have Winter Garden establish its own electric facility.

Florida Power spokesman William Johnson, asserting that Lewis has made no effort to advise the utility of his charges in person, said that even if such a proposal had been made by the Bozell and Jacobs firm, Florida Power's executives would not necessarily have followed the plans to the letter.

IN FACT, Johnson said, "I've been in public relations for five years and I have yet to see a situation in which a client did exactly as his consultants suggested."

He said none of the executives now in control at Florida Power was in a position to have handled any such matters at the time of the Winter Garden episode.

Internal Florida Power documents, however, indicate that executives of the utility at the time were at the least working very closely with Bozell and Jacobs recommendations. Notes of a meeting held in the office of J. Shirley Gracy, then Florida Power's senior vice president, included the following passages:

"IT WAS definitely agreed to obtain the help of Bozell and Jacobs in the formation of the Citizens Committee as referred to in their Recommendation No. 11. Mr. Gracy and Mr. Benson are to contact Bozell & Jacobs for their assistance in a plan for forming the Citizens Committee to first oppose the proposed new charter at the coming charter election, second, to work for the election of favorable candidates in the October election, third, to work for a possible franchise election and a franchise ratification.

J. Shirley Gracy, who was then Florida Power's senior vice president and is now retired in St. Petersburg, could not be reached for comment.

Further in the notes of the meeting, which was held May 5, 1961, just prior to Bozell & Jacobs' "Confidential Plan of Action" dated May 22, 1961, appears the passage:

"4. (An All Out effort should be made to prevent the re-election of Mayor Clements and City Commissioners Partee and Petris in the October 1961 election and to replace them with candidates favorable to the Company — but replace them regardless.)

"Mr. Roberts has been working on this recommendation constantly and will continue to do so. Favorable candidates now in view include Mr. Judson Moore, manager of the Pounds Goodyear store. Mr. Moore beat Mr. Roper for mayor in 1946. Last year Mr. Moore lost in his race for commissioner by only four (4) votes. Another possibility is Mr. Lester Arnold, a citrus grower. Still another is Mr. B. T. Hannon — who operates the Camera Shop in Winter Garden. It was decided to have Bozell & Jacobs draft a campaign for the coming October city election."

IN A May 16, 1961 memorandum described as notes of a telephone conversation between John O. Gunn of Bozell and Jacobs and W. W. Snow of Florida Power on the same date:

"They (Bozell & Jacobs) think that there are three main objectives for the Company in regard to the June 13 election, namely:

"1. TO SPLIT the community to the disadvantage of the City Commission.

"2. TO SET UP or to begin establishing a base from which candidates for the October City election can emerge.

"3. COMMIT certain people in town, community leaders, against the incumbent City Commission (people like Mr. Moyle Pounds for example who may be so bitterly opposed to the charter as to be outspoken about it and about the City Commission that the result would be an open break with a public commitment against the incumbent City Commission.)

"If we decide to proceed on this premise then Curtis Roberts should draw back and remain in the background from this point on, that is to say the organization of the Citizens Committee should be handled by someone other than a Company representative.

"They feel that the June 13 election is not critical because if the City should be taken to court on a contest of the validity of the revenue certificates based on the present charter, the court would decide in favor of the validation anyway. They feel that the only thing to be gained by such court action would be time, which of course may be necessary."

LATER in the May 16 telephone memo:

"They (Bozell & Jacobs) feel that it is only necessary to have one man on the Citizens Committee with whom we could deal in complete confidence. This man could be furnished publicity material and other assistance if need be, which he in turn would pass on to the Citizens Committee without their actual knowledge of its source. This particular man, or men, could be groomed for candidacy in the October election and his name or names brought before the public as outstanding members of the Citizens Committee, civic leaders, etc."

In perhaps the most direct link between Florida Power officials then interested in salvaging the Winter Garden franchise and their consultants in how to do it, J. Shirley Gracy, then senior vice president of Florida Power, wrote Donald D. Hoover, president of Bozell & Jacobs, on May 5, 1961:

"In your recommendation No. 4, you stated that you would be glad to draft a detailed plan for a campaign to elect favorable public officials (in Winter Garden). We feel that you should proceed promptly with the preparation of this plan."

In a previous letter dated April 18, 1961, Gunn, Bozell & Jacobs' representative for the Winter Garden campaign, wrote Gracy that:

"I judge from your letter that John Partee's resignation and replacement by Lew Warden on what is apparently an interim basis means that the Mayor plus three of the five Commissioners all will be elected this year. If that is so, the company has a once-in-a-lifetime opportunity to reverse the city's official attitude in a single day — to change the present lineup of six unanimously hostile officials to a 4-3 majority favorably disposed toward Florida Power."

THE HIGH-POWERED New York public relations firm hired by Florida Power to draw up the Winter Garden battle strategy called it "A Confidential Plan of Action: Phase Two."

The campaign would involve, according to the secret documents:

- "A preparatory stage highlighted by a newspaper advertising series intended to influence the general public and by intensive personal-contact work among city officials and opinion leaders of the community;
- "Securing the defeat of the new city charter proposed for Winter Garden;"
- "Replacing the incumbent mayor and two of the present five city commissioners with newly-elected public officials favorably disposed toward Florida Power;
- "Replacing the remaining three incumbent commissioners with new men who have privately shown a conciliatory attitude toward the company;
- "Winning a franchise-renewal election which will provide Florida Power with a 30-year franchise in Winter Garden and end the threat of a city-owned electric system."

ALTHOUGH JOHNSON said no current Florida Power executives were involved in the Winter Garden situation, records of a meeting held in Gracy's office June 12, 1961 show that S. A. Bardelmore was

present. Brandimore was a member of Florida Power's legal department at that time and currently is its chief legal officer.

A key part of the secret battle plan, the papers show, would be a "citizens committee," making it appear as though there was a popular uprising against the charter proposal. In fact the committee was to be used as a tool of Florida Power, whose officials would later refer to it as the "puppet citizens committee."

The task of the "citizens committee, according to the May 22, 1961, "Confidential Plan of Action," would be to defeat a new city charter that would have helped the city's plans to establish its own electric system. The charter was basically a vehicle of reform for an antiquated local government system.

BOZELL & Jacobs, Inc., the Park Avenue public relations firm, suggested the "citizens committee" as a front for Florida Power for two reasons, according to the papers:

✔ "That it would be unseemly and probably of doubtful legality for Florida Power to intervene openly in the June 13 charter election;

✔ "That the violation of the Company interests which would result from adoption of the proposed charter is not sufficiently major to justify the Company's mounting a public effort despite the risks of opinion alienation and legal challenge inherent in such action;"

The charter defeat was what "Phase Two" was all about, but as the confidential report explained, it was to be treated "fundamentally as a means to an end (i.e. accomplishment of Phases Three and Four), rather than as a sufficient end in itself."

PHASES THREE and Four, according to the plan, involved ousting those Winter Garden elected officials not favorably disposed to Florida Power.

It was a grand plan. And Bozell & Jacobs expressed hope it would "attain the following subobjectives" in the charter campaign:

✔ "To use the charter proposal to discredit the present city officials, thus making incumbent Mayor L. C. Clements and incumbent City Commissioners W. E. Petris and Lew C. Warden easier to defeat on October 4, 1961;

✔ "To use the charter campaign to build popular strength for the three men who will run against the Mayor and the two Commissioners in October;

✔ To use the charter campaign to develop lasting animosities between the six present city officials and prominent local opinion leaders who previously have been arrayed with the city administration against the Company;

✔ "To make the charter's defeat appear privately as a significant reflection of popular sentiment that Florida Power's Winter Garden franchise should be renewed, and as an important indication that the Company's behind-the-scenes political backing is a valuable asset, thus encouraging potential candidates for public office not only to welcome private assurances of Company support but also to follow the Company's strategic recommendations through their campaigns.

✔ To use the charter campaign to give Florida Power's Winter Garden District employes some preliminary experience with basic political tools prior to the October 4 municipal campaign, and to test the political interest, reliability and acumen of the Company's Winter Garden employes, again prior to the critical aspects of Phase Three."

Bozell and Jacobs, which specializes in the well-being of private electric companies, mentioned one maneuver prior to setting up the citizens group to defeat the charter. And it had already been accomplished:

"QUIET withdrawal of company representatives from their initial position of semi-public participation in the charter campaign. (If the charter bond to newspaper inquiries, Florida Power publically states its official position with respect to the charter proposal — that the company feels this is a matter of internal municipal administration which properly should be left to the citizens of Winter Garden to decide)."

The confidential battle plan included day-to-day activities leading right up to the June 13 election 11 years ago.

May 24, for example, was to be the day for "announcement of the Committee's organization and composition, by means of a news release directed to the Winter Garden Times and the Orange County section of the Orlando Star . . . It is not necessary that the original composition of the Committee be large; as few as five . . . or perhaps even three . . . initial members will suffice for a starter, with others to be announced as they are added . . ."

ACCORDING TO THE Bozell and Jacobs timetable, on June 2, there was to be publication "in the Winter Garden Times only of a series of small one-column advertisements, each by-lined by a member of the committee or by a prominent citizen (e.g., City Clerk E. M. "Doc" Tanner, Police Chief Maynard Mann) whose cooperation can be secured by the Committee Chairman and whose participation can drive a wedge in the ranks of previous company opponents in Winter Garden."

"Each ad in this series — an illustrative example of which is presented as Appendix "C" — is devoted to exposition of a single point in opposition to the charter proposal."

There were suggested themes for the "testimonial ads":

—"The City Commission's right to fire the Police Chief without cause.

—"The 'hurry-up election' with inadequate time for discussion of the issues . . . and with the voters allowed only 48 hours to register after the election proclamation was issued.

—"Introduction of a city manager — 'apparently to do the job which the Mayor and the City Commissioners were elected to do.'"

JUNE 9 was to be set aside, according to the battle plan, for "mailing, to every resident of Winter Garden, of an obviously inexpensive newsprint booklet consisting almost exclusively of the Committee's ads in the Winter Garden Times of June 2 and June 9."

And finally, the confidential plan called on the day after the election for "issuance by the Committee Chairman of a victory statement hailing the result of the election as a clear sign that the people of Winter Garden intend to retain control of the processes of municipal government.

But the voters, by 56 votes, approved the charter.

And two days later six Florida Power Corporation executives huddled in Vice President Gracy's office in St. Petersburg, already at work on an elaborate plan to turn city commissioners out of office in elections upcoming in October. Internal documents of the company reflect the meeting taking place.

WHILE Florida Power lost the charter battle the minutes of that St. Petersburg meeting clearly reflect the next step:

"It was agreed that the company should endeavor to see to it that the committee (the puppet citizens' committee) has good grounds for seeking invalidation for the charter election or at least contesting it for a recount . . . everyone agreed that the company should do its part in the foregoing effort and if necessary to keep the issues alive, should seriously consider going even further than our share."

Donald D. Hoover, who was then president of Borell and Jacobs, retired several years ago, according to Don Carlos, the company's executive vice president in Omaha.

John O. Gunn, the vice president who coordinated the Winter Garden campaign, is no longer with the company, Carlos said.

At one point the records show that a nine-year feasibility study on the Winter Garden Plant was compiled by W. W. Snow, H. K. McKean and A. P. Perez, who is now board chairman of Florida Power.

The study, based on the years 1960-1970, showed that the plant and distribution system would lose a total of $32,930 during that period, but that the trend of losing money would be reversed to making money in 1963. It predicted a profit of $84,000 in 1970.

(There is no indication that Perez, at the time an engineer, was aware of the company's efforts to influence the elections.)

Florida Power Replies

Copies of the papers recording Florida Power's secret plans, obtained by The Times, were offered to the power corporation Tuesday night, in the interest of fairness. After reading them, the power company issued this statement:

"The controversy over the renewal of a franchise to Florida Power by the City of Winter Garden some 12 years ago was typical of the bitter struggle which existed at that time between the advocates of government ownership of electric utilities and the investor-owned companies. Socialization of the electric utility industry has received new interest in recent months by proponents of the populist movement.

"The Winter Garden franchise issue was extensively reported in the state and local press over a period of several years.

"The so-called Florida Power papers were removed from the company's files without permission by a disgruntled employe prior to his resignation some 10 years ago. The company was later given an opportunity, but declined, to purchase these papers from the individual. How the Dade County senator came into possession of the papers is a question that remains unanswered, as probably will the recorded actions of the government - ownership opposition."

UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of ANSWER OF THE DEPARTMENT OF JUSTICE TO APPLICANT'S OBJECTIONS TO DOCUMENT REQUESTS AND MOTION FOR PROTECTIVE ORDERS, dated October 25, 1972, in the above captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 25th day of October:

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