UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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

OBJECTIONS OF INTERVENORS (CITIES OF HIGH POINT, ET AL.) TO DOCUMENT REQUESTS AND INTERROGATORIES OF APPLICANT

The Cities of High Point, et al. ("Cities") hereby set forth their objections to the document requests and interrogatories served on them by Applicant Duke Power Company ("Duke") on 13 September 1972, and move the Board to quash or modify the portions of Duke's discovery request so objected to.

The objections raised herein are those on which Duke and Cities have not succeeded in resolving their differences after several conferences between their counsel. Several other questions, not objected to herein, have been modified by mutual agreement and will be answered by Cities as modified.

The omission of any portion of Duke's request in this motion is not to be construed as a waiver of Cities' right to object on any appropriate ground to the admission of evidence based on such request, or to seek such further orders as may be warranted.

I.

Several questions included by Duke in its request deal with the provision by Cities of utility services other than electricity.

To the extent that such questions go beyond the issue of anticompetive practices allegedly engaged in by Cities, they are objectionably, and irrelevantly, over-broad.

The proper inquiry with respect to utility services other than electricity (i.e., water, sewer, and gas service) is whether the Cities have used their ability to provide such services in an unfair or anticompetitive way vis a vis Duke. It is, of course, still in issue whether the use, if proved, of any such anticompetitive methods is relevant to this case (see Joint Recital of Contested Issues, attached to the Board's order of 20 September 1972, Part I, Paragraph 14); but Cities are prepared to concede that discovery requests plainly centering on such alleged practices are not objectionable. Duke's inquiries, however, extend far beyond the issue as defined by the Board's order.

That issue (Joint Recital, Part I, Paragraph 14), reads as follows:

> 14. Are any alleged anticompetitive activities of the proposed intervenors or other wholesale customers of Applicant relevant to the determination whether Applicant is culpable for a situation inconsistent with the antitrust laws? If so, do alleged tieing and other activities of the proposed intervenors and Applicant's other municipal wholesale customers permit them to compete unfairly with Applicant?

This statement of the issue, which was arrived at through a lengthy process of conferences, drafts, and counterdrafts on the part of counsel for all parties, is clearly designed to elicit argument and proof on such matters as alleged tying (with water, sewer or gas service as the monopoly product and electric service as the tied product) or unfair inducements in the form of discounts, etc.,

designed to persuade gas, water or sewer customers to take electric service as well.

The Board having adopted this statement of the issue "for the purposes only of determining the relevancy of discovery" (Order of 20 September, 1972, p. 1), it becomes impossible to justify any broader discovery on the subject of Cities' non-electric utility operations than is necessary to evaluate the anticompetitive practices, if any, which Cities may have employed. Duke has dealt with this subject comprehensively in its Questions 18 and 19. The first of these is a broad inquiry into any requirement imposed by the City that any person or class of persons buy electricity from it. The second, number 19, deals with tying (question 19(a) and (b)) and any other inducements, whether related to other utility services or not, which the City holds out. Question 19 calls for both documents and narrative descriptions. Cities have not objected to these two questions and will undertake to answer them to the best of their ability. By the same token, it is Cities' position that as questions 18 and 19 cover completely whatever inquiry into these non-electric utility services may be necessary and proper, Duke's further questions on this subject are irrelevant and should be so declared by the Board.

Question 14(c) asks for information on all activities of the Cities designed "to attract commercial and/or industrial facilities to locate in the municipality or within the area served by any of its sewage, gas, water, or electric facilities". Cities believe

that the reference to sewage, gas and water facilities should be deleted.[1/]

The present litigation is concerned centrally with the attraction of electric customers. It is the electric systems of the several municipalities which compete with Duke, and the inquiry before the Board is whether, through actions taken by Duke, they are unlawfully hindered from doing so. Whatever advantages to the municipality may accrue from the rendering of other utility services are irrelevant. The Alcoa case (United States v. Aluminum Company of America, 148 F.2d (CA 2, 1946) furnishes an analogy. There was no inquiry there into the overall economics of the other sheet manufacturers who were attempting unsuccessfully to compete with Alcoa; the only question was whether an unlawful price squeeze had been employed. Insofar as the existence of municipal gas, water, and sewer utilities has some bearing on competition in the electric market, it is covered by the questions referred to on p. 3 above, to which Cities do not object. Otherwise, these nonelectric operations have no place in this litigation.

Question 14(d) depends for its content on 14(c), and should be limited in the same way.

Insofar as it extends the inquiry beyond the area of electric competition, question 15(b) is subject to the same objection.

Question 72 asks for the number of customers, by customer class, which are located outside the city's corporate limits and

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1/ There are other objections to question 14(c), not directly germane to the question of nonelectric utility services, which are dealt with below at pages 5-6.

are served by it with electricity, gas, water, or sewage service. This question does not appear to bear any relation to competition for electric sales, since if answered it would in no way indicate the correlation, if any, between purchase of gas, water, or sewer service from the city and purchase of electricity from the municipal electric department. Accordingly, Cities object to question 72 in toto.

Question 73 asks for the number of customers, by class, located outside the municipal limits and supplied with water or sewer service by the city and with electricity by another supplier. The significance of this information, in relation to the issues in this case, is so tenuous as to make it unreasonably burdensome to provide. If there has been any anticompetitive conduct on the part of Cities, as contemplated by Issue I (14), the questions referred to on p. 3, supra, will elicit adequate information about it. Question 73 merely seeks to elicit a mass of raw data, subject to the most speculative of interpretations. To establish, if it be a fact, that most of the customers outside the city limits who receive municipal water and sewage service also buy their electricity from the city does not show with any degree of certainty why they do so; yet that is the question really involved.

II

Before leaving the group of questions discussed above, it will be necessary to note further objections to questions 14 and 15. They refer at several points, in defining the scope of the desired response, to "the area served by its [i.e., the City's] electric facilities" (e.g., questions 14(a) and (b) and 15) or

"the service area of the system" (question 15). Literally, these equivalent phrases require a response on a purely geographical basis -- without reference to the presence or absence of any question of electric service by the municipality. The issue in this case is whether the cities have been able to compete for electric customers, not whether they have succeeded in attracting industries to locate within or near the city limits. To require information on attempts to attract commercial and industrial establishments to settle in or about the Cities, without attempting to limit the response to those cases where an attempt was made to sell electric service to such establishments, would extend the inquiry far beyond the reasonable requirements of this case. The burden on the respondents and the Board would exceed any possible benefit to the record.

This objection would be met by narrowing the scope of the question to activities designed to attract electric customers for the municipal system. Cities urge the Board to permit inquiry only as to such activities, and not on the over-broad basis proposed by Duke.

III

At various points in the discovery request, Duke has asked for studies, projections, etc., prepared by or for the Cities, dealing with such matters as "expected construction or development of production capability" (question 59(a)), plans "alone or jointly with any other utility or entity * * * to install generating or additional transmission capacity" (question 76(b)), etc. We do not provide an

exhaustive list of the questions falling into this category, because the Cities' objection is more simply stated as a general proposition. Insofar as Duke seeks by any such question to compel the production of documents, studies, plans, etc., prepared by or for EPIC, Inc., Cities believe that such request is improper.[2/] EPIC is a nonprofit corporation established under the laws of North Carolina. As such, it has a juridical personality separate from the nine[3/] Cities which are parties here, or any of them separately. Its corporate papers and records, and any studies and plans prepared by it or on its behalf by consultants, are not in the "possession, custody or control" of any one of the Cities, nor do the Cities have an inherent or independent legal right to obtain such possession. See F.R.C.P., Rule 34(a). Accordingly, any such documents are not proper subjects of discovery herein.

By the same token, since EPIC, Inc., is not a party to this proceeding, it is not subject to interrogatories.

In view of the above, it should not be necessary to present further argument on the subject of questions addressed to EPIC and its future plans. However, since there is one item in particular which seems especially directed to those plans -- question 76(b) -- we subjoin a few remarks on the relevance of the EPIC project to this case.

2/ We are given to understand by Duke that the phrase "prepared by or for the system or the municipality," which appears in a number of questions, means "by or for the municipality's system alone, and having to do solely with that particular system."

3/ EPIC in fact exists and acts on behalf of over 40 cities and 29 rural electric membership corporations.

Question 76(b) seeks a detailed description of the plans formulated by any such joint project as EPIC. Assuming arguendo that the intent of the question is to reach EPIC's plans, it is of very questionable relevance. The importance of EPIC for this litigation lies not in what sort of system it may eventually build, nor in how far it has progressed toward that goal, but simply in the fact that it is a potential competitor with Duke in the bulk power market of the Piedmont Carolinas. The Board is called upon to determine, not by what particular means the Cities or an entity of which they may become wholesale customers may compete with Duke in the future, but whether they have been hindered from doing so in the past, and whether they can do so at present. EPIC, in other words, is of significance not because it may at some future time operate certain generating plants and transmission lines, but because it has been perceived as a threat to Duke's monopoly and has thus evoked a particular response from Duke. Accordingly, a mass of details regarding its plans for building a bulk power system would serve no useful purpose in this proceeding.

IV

A substantial number of the questions posed by Duke have to do with the transfer by municipal electric systems of some part of their revenues to other funds of the City, for the performance of other public services than the provision of electricity. Some also refer to the rendition of electric service for less than full compensation, which we treat in this section under the general head

of 'transfers'. As to some aspects of these inquiries (and indeed, some aspects of other financial and engineering matters raised by Duke) the detailed documents asked for may well be unavailable. We have pointed out before (in our motion for an extention of time, filed October 2, 1972) that the Cities are not required to, and in many if not most cases do not, keep records similar to those maintained by a company like Duke. In conferences with Duke's counsel, Cities have undertaken to make available the annual audit reports of the systems (which will in most cases comprise the report of the system itself, plus the report of the City Treasurer or analogous official).

Without in any way waiving or limiting their right to argue that the entire question of whether moneys are transferred from the electric system to other public-service functions of the respective Cities, and if so, in what amounts, is completely irrelevant here.[4/] Cities are prepared to help simplify matters by entering into a stipulation on such transfers. This stipulation, the text of which is attached as Appendix A hereto, would remove from dispute the entire question whether such transfers are in fact made. It would leave Duke free to argue that the competitive position of the Cities' electric systems would improve if the transfers were not made, which is the only possible relevance they possess in this litigation, while freeing the record of a large amount of irrelevant detail and obviating the unnecessary burden on Cities of collecting it.

4/ It is not adverted to in the Joint Recital of Contested Issues adopted by this Board in its order of 20 September 1972.

This stipulation is offered on the understanding that no further information -- other than that derivable by Duke from the audit reports referred to above -- would be demanded as to this topic This condition would affect the following questions:

24(b)

25(b)

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30 - 32

As to these questions, the stipulation, plus the audit reports referred to, would constitute a full and complete answer.

V

There are several questions which demand conclusions of law as part of the answer. Cities object to them for that reason. Typically, these questions take the form of a request to supply all statutes, ordinances, etc., which contain a particular requirement of law. As to such questions, Cities have no objection to providing copies of all local ordinances, by-laws, etc., which purport on their face to deal with the subject matter inquired into. They do not undertake, however, to state that these responses would be "complete" in the sense evidently contemplated by Duke; a collection of legislative or decisional materials purporting to be complete is logically the equivalent of the compiler's conclusion of law on the subject, which is the objectionable feature of these questions. Moreover, Cities believe that the statutes and decisions of the State of North Carolina and of the United States are at least as easily available

to Duke as to the Cities, and thus have no place in a discovery request.[5/]

The questions to which this objection applies (in whole or in part) are the following:

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65(a)

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71, except subparagraph (c)

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Cities will undertake to provide local materials, in the manner and with the limitations described above, as to all of these questions.

WHEREFORE, Cities move the Board to strike or modify as described herein the several questions in Duke's Initial Interrogatories and Request for Documents, as set forth in the body of this motion.

Respectfully submitted,

David F. Stover

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Attorneys for Intervenors

5/ By asking for these materials, which obviously apply equally to all of the nine Cities, Duke is in effect requesting nine opinions of law where even one would be superfluous.

APPENDIX A

PROPOSED STIPULATION AS TO
TRANSFERS OF MONEYS AND
RENDERING OF ELECTRIC SERVICE
TO THE MUNICIPALITY

Cities offer the following stipulation of fact, reserving at the same time their right to object on grounds of relevance and/or materiality to its inclusion in the record:

> Each City collects from its electric ratepayers and through its electric rates, revenues normally sufficient in the aggregate --
>
> FIRST, to pay all costs of owning and operating and maintaining its electric system, and
>
> SECOND, thereafter to permit the transfer of money to other funds of the City which are devoted to the provision of municipal services other than electricity, and/or (in some but not necessarily all cases) to permit the rendering of electric service to the municipality or its departments or agencies, for public purposes, for less than full compensation. To the extent of such transfers of electric system revenues to other municipal funds, and/or to the extent of the savings accruing from such rendering of electric service, where applicable, at less than full compensation, rates and taxes which are required in order to provide such other services can be reduced by the municipality, or otherwise necessary increases in such rates and taxes can be lessened, deferred, or avoided.

The above stipulation is tendered on the conditions expressed in the Objections of Intervenors (Cities of High Point, et al.) to Document Requests and Interrogatories of Applicant, dated 18 October, 1972, at pp. 9-10.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document OBJECTIONS OF INTERVENORS (CITIES OF HIGH POINT, ET AL.) TO DOCUMENT REQUESTS AND INTERROGATORIES OF APPLICANT in the above captioned matter have been served on the following by deposit in the United States Mail, first class or air mail:

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Washington, D.C., this 18 day
of October, 1972.