4/16/73

UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

In the Matter of

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

APPLICANT'S OBJECTIONS TO AND MOTION TO STRIKE REVISED INTERROGATORY OF THE DEPARTMENT OF JUSTICE

Pursuant to section 2.740b of the Commission's Rules of Practice, 10 C.F.R., Part 2, Duke Power Company ("Applicant") objects to and moves to strike the Revised Interrogatory filed by the Department of Justice on March 30, 1973 ("Revised Interrogatory").[1/]

The Department's revised interrogatory is unduly burdensome and does little to meet Applicant's objections of March 26, 1973 ("March 26 Objections"). In addition, the

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1/ The Department filed its first Special Request for Interrogatories on March 9, 1973. On March 26, 1973, Applicant responded in part and objected in part to that Request. Prior to any determination by the Atomic Safety and Licensing Board, the Department filed its revised request wherein it purportedly "reformulated and limited" the interrogatory to which Applicant objected (Revised Interrogatory, p. 2).

request is unjustified in that no showing has been made that the information sought is "reasonably calculated to lead to the discovery of admissible evidence" as required by section 2.740(b)(1). Finally, regarding individual items, item (a) improperly calls upon Applicant to make a legal characterization, and item (c) is so vague that it provides no indication of what is sought.

THE REVISED INTERROGATORY SEEKS TO IMPOSE AN EXCESSIVE AND UNREASONABLE BURDEN ON APPLICANT.

The Department of Justice calls on Applicant to describe its filing "system" and to do so "in sufficient detail to enable the identification and location of a particular document or documents" (Revised Interrogatory, p. 3). It does so even though the Department concluded that "Applicant has merely files, not a filing system." (Revised Interrogatory, p. 2) This conclusion of the Department expressly relied on affidavits attached to Applicant's March 26 Objections, which clearly demonstrated that Applicant lacks a principled, consistent filing arrangement.[2/]

The Department, then is again seeking a specially

2/ In his affidavit, William L. Porter, assistant general counsel of Applicant, stated:

> . . . The Duke Power Company has no uniform system for organizing and maintaining official

compiled list of Applicant's files--not all files, as previously sought, but a large number of them. While the interrogatory itself avoids requesting this compilation, there is clearly no way available, in the absence of an overall company filing

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2/ (Cont'd from previous page)

> records. There is also no uniform method used at all filing areas for charging out files or for providing continuity on older files which are still active. Furthermore, there is a lack of uniformity in the method of arranging files. This means there may be several ways of filing the same type of record. Each time a new major project is started, a new filing arrangement may be started. Each functional area has different filing methods--numerical, decimal, alphabetical, subjective, or some combinations of these arrangements. . . .
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> 5. The use of indexing and cross referencing techniques runs the gauntlet from nothing at all to extremely detailed and complex systems.
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> 6. There is no established policy on location and maintenance of official record copies at designated filing locations. There is no official file copy easily identifiable as such, thereby permitting its segregation from informational, courtesy, and other duplicate copies.
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> 7. There is no policy regulating the exact number of copies to be made. The preparation of many extra copies, in addition to regular required file copies, has resulted in wide-spread duplication of files. . . .
>
> 8. Throughout the file areas, there is a lack of consistency in the types of folders, guides and labels used.

procedure or policy, to respond to the inquiry except by developing a list of the pertinent files.

Company officials previously have estimated that Applicant has approximately 2-1/2 million file folders, 1-1/2 million of which are located in its Charlotte headquarters.[3/] There is no way of estimating how many of these folders would have to be considered in complying with the Department's request, short of a search of practically all of them. Possibly some files (e.g., personnel files) readily could be excluded. However, a very substantial proportion would have to be "described" and a larger group still would have to be examined and their contents analyzed to determine if they should be "described."

The parameters provided do little to restrict the task. Documents "relating to competing power systems" are likely to be found in virtually every unit of the Applicant's Home Office from the President's Office to the billing section and in almost every District and Branch office maintained by

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3/ See Affidavits of John C. Goodman, Jr., and William L. Porter, Applicant's Objections to Special Request for Interrogatories, Mar. 26, 1973.

Applicant.[4/] Such documents could be in any correspondence file pertaining to any customer or any construction project. In much the same way, bulk power supply planning touches most components of the Applicant and involves virtually all of its senior officials. And "the Company president's files relating to policies toward adjacent electric systems" could cover a wide spectrum of activity and are unlikely to be segregated. Thus, proper compliance with this request may well involve consideration of most of the President's files, which, in 1969, involved 21 separate pieces of filing equipment and 180 cubic feet of files.[5/]

Applicant recognizes, of course, that discovery may appropriately require a substantial effort on its part. However, it submits that the task here contemplated is reminiscent of that involved in Riss v. Association of American Railroads, 23 FRD 211, 213 (D.D.C., 1959) where the court concluded "that interrogatories under Rule 33 [the counterpart of section 2.740b of the AEC Rules] were never intended to

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4/ See p. 17, infra, regarding the use of the term "competing."

5/ See Attachment to Affidavit of William L. Porter, Applicant's Objections to Special Request for Interrogatories, Mar. 26, 1973.

compel an adversary to search and analyze more than five million documents in order to furnish the answers."

Certainly, it is far beyond what was under discussion when (at the Prehearing Conference on November 17, 1972) the Chairman of this Atomic Safety and Licensing Board made the following observations:

> MR. LECKIE: If Applicant has prepared a list including his 50,000 file titles, we would be happy to have that. If not--
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> CHAIRMAN BENNETT: What do you want 50,000 titles for? You couldn't possibly make any use of it (Tr. 144).
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> * * * * *
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> CHAIRMAN BENNETT: One of the real problems in these cases is the amount of detailed information which is being processed here, which is holding up the proceedings.
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> Now, isn't there some practical way you can limit this? You don't want 50,000 titles, that is ridiculous (Tr. 145).
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> * * * * *
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> MR. LECKIE: We presume they don't have a list of that sort.
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> CHAIRMAN BENNETT: They undoubtedly have file folders, but I wouldn't order them to produce 50,000 folders, that wouldn't make sense (Tr. 145). 6/

6/ This discussion had concerned item #2 of the Joint Document Request and counsel for Applicant had estimated that 50,000 file folders were involved. This estimate was made

If that characterization was appropriate with reference to the cataloging of 50,000 file folders, it is applicable here with even greater force where the task involved is of far greater magnitude.

6/ (Cont'd from previous page)

to facilitate discussion and without opportunity for consultation with appropriate company officials. The figures in William L. Porter's affidavit attached to Applicant's March 26 Objections are estimates developed by those most familiar with Applicant's filing arrangements.

THE REVISED INTERROGATORY IS CLEARLY REPETITIVE AND THEREFORE NOT "REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE."

Section 2.740(b)(1) of the AEC Rules of Practice, paralleling Rule 26 of the Federal Rules of Civil Procedure, provides that the information sought must be "reasonably calculated to lead to the discovery of admissible evidence". The Department has acknowledged that its various inquiries regarding Applicant's files are not intended to produce directly material that will be admissible into evidence at the hearing (Tr. 141-42). The information sought, therefore, must be reasonably calculated to lead to the discovery of admissible evidence. The Revised Interrogatory fails to satisfy this test for two reasons:

(1) The interrogatory is substantially duplicative of the Joint Document Request of September 5, 1972.[7/]

(2) It is unsuited to develop information that would facilitate identifying additional discoverable documents.

1. Substantial Duplication

The courts strongly disfavor repetitive discovery in complex antitrust proceedings. In Banana Distributors v. United

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7/ As amended by Prehearing Order Number Two of November 27, 1972, and the modification thereof dated December 11, 1972.

Fruit Co., 19 F.R.D. 493, 495 (S.D.N.Y., 1956), for example, Judge Kaufman rejected such a request, stating:

> "Although plaintiffs are certainly entitled to equal access to relevant writings, requiring the defendants to describe the nature and content of what may prove to be many hundreds or even thousands of documents in a case where it is likely that the plaintiffs already have copies of most if not all is unduly oppressive. . . . Although I believe that where evidence exists which may tend to prove or disprove a disputed issue of fact great weight should not be given to the cry of burdensomeness in making it available to the parties, nevertheless, the questionable likelihood of such evidence existing and its uncertain relevancy to the case, as well as the real danger of duplicating volumes of work must be weighed against the burden which its discovery will entail."

See also Hopkinson Theatre v. RKO Radio Pictures, 18 F.R.D. 379 (S.D.N.Y., 1956), holding that where a subsequent discovery request was likely to be redundant, the burden was on the inquiring party to demonstrate the gaps in the prior request.

In the present instance, files which might be identified in response to the three items requested would contain documents already called for by requests in the Joint Document Request. Obviously, to the extent that all pertinent material in those files have been (or will be) produced, a description of the files will not advance a search for "the discovery of admissible materials." For example, if the term "competing power systems" as used in the Revised Interrogatory were to

be interpreted to mean electric utilities operating in or adjacent to Applicant's service area,[8] production in response to no fewer than 55 items in the Joint Document Request would almost certainly have uncovered all pertinent documents regarding the activities of those other utilities.[9] Similarly, item (b) of the Revised Interrogatory calling for specification of files concerned with "bulk power planning" overlaps with another 55 items of the Joint Document Request.[10]

Item (c) of the Revised Interrogatory calls for "Company president's files relating to policies toward adjacent electric systems." This request is so vague that we are unable to determine how it compares with the Joint Document Request.[11] However, it would seem that the documents contained in files that would be listed in response to this item

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8/ But see the problem of interpretation discussed infra at p. 17.

9/ 4(a), 4(b), 4(c), 4(d), 4(e), 4(g), 4(i), 4(k), 5, 6(a), 6(d), 6(e), 6(f), 6(g), 6(h), 6(j), 6(k), 6(l), 6(m), 6(n), 6(q), 6(r), 7(a), 7(b), 7(c), 7(d), 9(a), 9(c), 10(a), 10(b), 10(c), 11(a), 11(b), 12, 13, 15, 17, 18, 19, 20, 21, 22, 24, 25(a), 25(b), 25(c), 25(e), 29, 33, 34, 35(b), 35(d), 36, 42.

10/ 4(a), 4(b), 4(c), 4(k), 5, 6(j), 6(l), 6(m), 6(n), 7(a), 7(c), 9(b), 9(c), 10(a), 10(b), 10(c), 11(a), 11(b), 12, 18, 19, 20, 21, 22, 23, 24(a), 24(b), 25(a), 25(b), 25(c), 25(d), 26(a), 26(b), 26(c), 26(d), 27(a), 27(b), 33, 34, 35(a), 35(b), 35(c), 35(d), 41 (all items), 42 and 43.

11/ See p. 19, infra, for discussion of this point.

now are called for by item 9 of the Joint Document Request,[12/] which seemingly closely parallels for a larger class of officials the scope of this request. If there are gaps in item 9, the other items listed in note 9, supra, must surely cover them.

Thus, the Revised Interrogatory is highly unlikely to lead to the description of any files which might contain any relevant material not now being produced -- and the Department has not contended otherwise.

2. Further Discoverable Documents

The Department's Revised Interrogatory is unlikely to produce the kind of information from which additional pertinent discovery could be derived. The location of documents

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12/ "Documents pertaining to the following subjects located in the files of those individuals who by job or title are now or have been since January 1, 1960, responsible for, prepare analysis of, or forecast the effects of these subjects:

(a) long-term competitive aspects of the Company's relationship with other electric utilities serving or able to serve at wholesale or retail in areas overlapping or in close proximity to the Company's service area;

(b) interconnection arrangements with other electric utilities;

(c) coordinated system operation, generation and transmission facilities expansion, and pooling arrangements involving other electric utilities."

Counsel have agreed that the term "files" means the personal files of those designated.

within a particular file is, of course, of no independent significance; its location does not affect its content and has no probative force regarding its importance.

Indeed, a description of "Applicant's filing system in sufficient detail to enable the identification and location of a particular document or documents" will very rarely do more than permit the identification of a group of files, one or more of which might contain a specific document. This reflects simply the conventional nature of file arrangements and file labels. It is hard to imagine of what value it might be to the Department to know, hypothetically, that virtually every member of the Applicant's Management Committee had a file marked "City of High Point" and that certain subordinates and field units also had files so designated.

Applicant suspects that the Department of Justice hopes that a few file designations in the mass requested might point the Department to new directions of inquiry, perhaps suggesting some significant incident of which the Department was previously unaware. This is precisely the "fishing expedition" condemned by the Atomic Energy Commission. 10 CFR 2, App. A, §IV(a).[13/]

13/ See also the frequently cited policy of Broadway and 96th St. Realty Co. v. Loew's Inc., 21 FRD 347, 352 (S.D.N.Y. 1958): ". . . practical considerations dictate that the parties should not be permitted to roam in shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so."

Certainly, the only reason offered by the Department of Justice in support of the Revised Interrogatory does not in any way require the kind of compilation sought. In the revision, the Department contends that the request is necessary to comply with the Board's direction that "all further requests for discovery will specify in detail not only the information desired, but where possible, will also indicate the source material to be examined." (Prehearing Order Number Six, P. 24).

The Department already has ample information available to it in order to comply with this requirement. Applicant has committed itself to identify the file from which any particular produced document came (March 26 Objections, p. 1). Moreover, Applicant has furnished 259 pages of material regarding its internal organization. This material will permit the Department to determine with a high degree of specificity where documents relating to a particular topic might be found.

The Board's directive was clearly intended to restrict the time and resources that will be diverted into further discovery. The Department should not be permitted to use it to launch a massive new discovery procedure in the hope of turning up a few leads which the massive Joint Document Request may have missed.

In sum, the Department improperly seeks to impose on Applicant a massive task which is totally unjustified in view of its dubious aid to the Department.

APPLICANT HAS COOPERATED FULLY WITH OPPOSING PARTIES IN MAKING AVAILABLE ALL MATERIALS PERTINENT TO THE PREPARATION OF THEIR CASES

The Department of Justice apparently seeks to convey the impression that Applicant has not provided adequate access to relevant documents in this proceeding. In this connection, the Department has quoted an observation of the Chairman of the Atomic Safety and Licensing Board that:

> It seems to me that all this business about hiding behind where the files are and what they are is nonsense. We have got to get to this thing and get the documents produced. If there are any. (Tr. 879.)

Applicant believes that is it important to deal with the implications thus suggested by Justice.

Far from "hiding behind" anything, Applicant submits that it has made a fair and energetic effort to provide the opposing parties with the documents requested. To date, many thousands of hours, including several thousands of hours of lawyers' time, have been expended in this process and this work will necessarily intensify between now and June 1. A substantial proportion of Applicant's huge number of files

have been reviewed in detail at most of its 430 filing locations. As of April 15, over thirteen thousand pages of documents have been produced and present indications make it clear that production between now and June 1 will substantially exceed that total.

In conducting this search, Applicant has assembled documents called for by the extremely broad range of topics included in the Joint Document Request. The Department of Justice and the Intervenors thus are being provided a thorough examination of Applicant's post-1960 activities in the areas of interest to them.

The Chairman's remarks quoted above were made in the context of a discussion of Justice's attempts to impose upon Applicant the burden of listing all of its file folder titles. Here again, Applicant is hiding nothing. The original Joint Request sought a "file index" listing all of these file titles. Applicant objected to this item on the ground that it was burdensome and irrelevant. The Board agreed (Tr. 145) but asked Applicant to determine if there existed a document describing its filing system in general

terms (Tr. 152). Inquiry on this point was made and it was determined that there was no such document, a fact reported to the Board (Tr. 569). Justice then propounded an interrogatory asking that Applicant provide a general description of its filing system and that question was answered in our response of March 26, 1973. Once again, however, Applicant resisted the attempt by Justice to require a listing of all its file folder titles. By affidavit, Applicant pointed out that there were over two million such folders and that the task would be enormous, if not overwhelming.

We submit, therefore, that the dispute about file descriptions does not involve any attempt by Applicant to hide anything. Rather, it reflects a legitimate and well-founded concern by Applicant that an unnecessary and extremely burdensome task not be imposed upon it. This concern is bolstered by Applicant's awareness that it is already engaged in an exhaustive file search for the specific categories of documents which are of interest to Justice and the intervenors. We trust that the Board will not accept Justice's attempt

to rely on the Chairman's remarks as establishing that Applicant is hiding anything about its files.

Accordingly, Applicant believes that the conclusion that its document production efforts are inadequate is not only untimely, but unjustified.

ITEM (a) OF THE REVISED INTERROGATORY CALLS FOR AN IMPROPER LEGAL CHARACTERIZATION BY APPLICANT

Item (a) asks for certain information regarding "competing power systems." In order to respond to this item, Applicant would have to assert who its competitors are in all relevant markets. In so doing, it would necessarily be putting forward much of its analysis of one of the key issues in this proceeding: the definition of competitive markets.[14/] Applicant's

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14/ See Final Statement of Subissues, Prehearing Order Number Six, para. C, which provides in part:

> 2. What is the structure of the relevant market including the nature and extent of competition for electric power at wholesale and retail, arrangements for coordinating and wheeling power, and arrangements for and with customers?
>
> (a) What are the relevant product and geographic markets for antitrust analysis in this proceeding?
>
> (i) What is the nature and extent of existing and/or potential competition in any of the relevant markets?

response to an interrogatory about its filing system is a highly inappropriate point in this proceeding for it to set forth its position on this issue. Indeed, Applicant cannot reasonably be expected to make the necessary detailed determination of the competitive status of all possible electric utilities prior to the completion of its own discovery.

Moreover, it is clear that discovery of such legal conclusions is not contemplated under the AEC Rules of Practice. The AEC interrogatory rule, section 2.740b, is closely patterned after Federal Rule 33. But section 2.740b, promulgated in 1972, does not contain a key sentence added to Rule 33 by a 1970 amendment. That sentence provides: "An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact . . . "

By failing to include this sentence in its own Rule the AEC was presumably intending to adopt the pre-1970 construction of Rule 33 in this regard. "Prior to the 1970

amendments to the discovery rules, weight of authority rejected questions calling for the opinions, legal conclusions or contentions of the deponent." 4 Moore, Federal Practice ¶26.56[3] at 26-160 [footnote omitted].

Most pertinent to the present issue is the holding under the pre-1970 Rule 33, in United States v. Columbia Steel Co., 7 F.R.D. 183, 185 (D. Del., 1947), that an antitrust defendant cannot be required by means of an interrogatory to characterize who its competitors are. That is precisely what Applicant is asked to do here.

APPLICANT CANNOT ASCERTAIN WHAT IS MEANT BY THE PHRASE "POLICIES TOWARD ADJACENT ELECTRIC SYSTEMS" IN REVISED INTERROGATORY, ITEM (c)

Interrogatories must be phrased with sufficient precision that the responding party can be certain of what is sought. This is particularly crucial where, as here, an interrogatory must be used by responding party as the yardstick by which it makes a series of determinations and characterizations. "Policies toward adjacent electric systems" is not an adequate description of what is sought. It leaves far too many questions open: Does it cover all conceivable subjects? How important need a matter be to be a "policy"? Is

an isolated decision a "policy"? Is a legal interpretation a "policy"? How formal must the determination be? Must the Applicant intend an effect on adjacent electric systems?

In Applicant's view, this phrase is so vague as to be incapable of confident interpretation. Certainly, it is totally unsuitable as a standard to characterize file folders.

CONCLUSION

WHEREFORE, Applicant objects to and moves to strike the Revised Interrogatory of the Department of Justice concerning Applicant's filing system.

Respectfully submitted,

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April 16, 1973

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ATOMIC ENERGY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of APPLICANT'S OBJECTIONS TO AND MOTION TO STRIKE REVISED INTERROGATORY OF THE DEPARTMENT OF JUSTICE, dated April 16, 1973, in the above-captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 16th day of April, 1973:

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