

JUL 3 1979

Docket Nos. 50-390A  
50-391A

MEMORANDUM FOR: C. Stahle, License Project Manager, LWR 4  
FROM: A. Toalston, AIG  
SUBJECT: WATTS BAR UNITS 1 & 2, OPERATING LICENSE  
ANTITRUST REVIEW

Section 105c(2) of the Atomic Energy Act of 1954, as amended, provides for an Antitrust review of Operating License Applications if the Commission determines that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review in connection with the construction permit. Based upon examination of events that have transpired since issuance of the construction permits for the captioned nuclear units, it is our conclusion that no significant changes of an antitrust nature have occurred that would warrant an operating license antitrust review. The Office of the Executive Legal Director concurs in this conclusion.

Attorney General Reviews

The Tennessee Valley Authority (TVA) filed its application for construction permits for Watts Bar 1 and 2 on May 24, 1971. The Commission's rules and Regulations at that time did not list the information required for antitrust review. Consequently, initial antitrust information was requested on July 14, 1971 and additional information on July 22, 1971. TVA responded partially to the information requests on August 17, 1971 but declined to furnish the majority of the information requested on the basis that the antitrust laws did not apply to TVA.

The initial application and the August 17, 1971 letter was forwarded to the Assistant Attorney General on August 23, 1971, requesting his advice in accordance with Section 105c of the Atomic Energy Act of 1954, as amended.

In subsequent discussions between TVA and the Department of Justice, TVA allegedly took the position that it would furnish the requested antitrust information only if it received assurances from the Justice Department

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that TVA was not subject to the antitrust laws. The Justice Department declined to give such assurances, stating that in its view TVA's status under the antitrust laws was not at issue and that the question was whether TVA was excused from compliance with the provisions of the Atomic Energy Act. The Department of Justice stated that it would not render antitrust advice on TVA's application until the requested information was furnished by TVA.<sup>1/</sup>

In June 1972, the AEC received from TVA the information requested by the Attorney General and this was immediately transmitted to the Department of Justice. Subsequently, the advice letter, which was received on December 11, 1972, recommended no hearing. The advice letter stated:

"Prior to 1959, TVA's operating and constructing budget was dependent upon annual appropriations by Congress. Under these circumstances TVA's ability to supply power in bulk in competition with other bulk power supply sources was regulated directly by Congress in the annual appropriations process. In 1959 Congress permitted TVA to obtain additional construction funds from the private money market but imposed a limitation on the geographic areas in which TVA could market bulk power supply. Additionally, it restricted TVA's interconnection and coordination with adjacent bulk power suppliers except as to those with which it was interconnected as of July, 1957. Section 15d(a) TVA Act, 16 U.S.C. 831n-4; Hardin v. Kentucky Utility Co., 390 US 1 (1967)."

The advice letter continued:

"It is not presently clear the exact extent to which amended Section 15d(a) restricts TVA in its ability to enter into coordination arrangements with other electric utility systems. However, we are persuaded that, in any event, the statute would not justify TVA in discriminating in the establishment of operation of coordination arrangements among similarly situated electric systems."

<sup>1/</sup> April 25, 1972 letter from J. J. Saunders to Marcus Rowden.

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Thus, the Justice Department in its advice letter appeared to focus its concerns on two aspects of TVA's ability (or inability) to exercise its dominance or to otherwise act in an anticompetitive manner:

1. limits on territory expansion; and
2. limits on its ability to discriminate against other electric utilities.

Although the Justice Department in its advice letter did not so state, the concerns of the Justice Department were apparently limited to those listed above as compared to other aspects of TVA's dominance. Presumably, this limited concern was because TVA's business is principally to supply electric power in bulk for resale by independent distributors, who are almost exclusively non-profit agencies, such as municipalities and cooperatives.

The Attorney General's advice on Watts Bar was published in the Federal Register in December 1972. No petitions for intervention on antitrust matters were received.

Subsequent to the antitrust review of Watts Bar, TVA applied for construction permits for the Bellefonte Nuclear Plant, Units 1 and 2. After review of information submitted with this Application, the Justice Department again advised on December 27, 1973 that no hearing was required, stating:

"We have examined the information submitted by applicant in connection with the present application, as well as other pertinent information with respect to Applicant's competitive relationships, which has become available during the past year. None of the foregoing information provides any basis for changing the conclusions which we set forth with regard to the Watts Bar application."

During the Commission's 30 day period which allows intervention requests following publication of the advice letter in the Federal Register, no petitions to intervene on antitrust matters with respect to Bellefonte were received.

Later in March 1975, advice was received from the Justice Department with respect to TVA's Hartsville Nuclear Plant, in July 1975 with respect to the Phipps Bend Nuclear Plant and in April 1976 with respect to the Yellow Creek Nuclear Plant. In each case the advice was almost identical to the Bellefonte advice, stating that no information had come to the attention of the Justice Department that would cause it to change its previous advice. Similarly, in each subsequent case no petitions to intervene with respect to antitrust matters were received.

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Changes Since Construction Permit Antitrust Review

Construction permits Nos CPPR-91 and CPPR-92 were issued on January 23, 1973 for Watts Bar Units 1 and 2 respectively. Approximately four years later, on October 4, 1976, the FSAR applications for operating licenses were docketed. Initially, TVA resisted submittal of the antitrust information specified in Regulatory Guide 9.3 as being unnecessary and duplicative. However, by letter dated August 31, 1978, it submitted the information for both Watts Bar and Bellefonte. The changes in TVA's system and operations listed in TVA's submittal can be summarized as changes in load projections, additions in transmission, and changes in rate schedules. There have also been a number of inquiries and discussions regarding power exchanges between TVA and neighboring electric utilities. There have been no acquisitions or mergers by TVA, no changes in the contractual allocation or output of Watts Bar, and no changes in TVA's service area or in its wholesale customers. Each of these individual changes are discussed below.

TVA's projected load has decreased compared to that projected at the time of the construction permit antitrust review. The Watts Bar start-up date has been correspondingly postponed more than two years, consistent with the decrease in load growth. Decreases in load growth have occurred throughout the electric utility industry since the oil embargo in 1973 and such reductions of load in the absence of any connected anticompetitive activity are not considered to have any antitrust significance.

Transmission additions at 500 kv have been made with respect to the transmission of power from the Cumberland and Widows Creek power plants. Transmission additions within the TVA service area such as the aforementioned are expected as a normal growth of the system and likewise do not suggest any antitrust implications.

Also, in response to Regulatory Guide 9.3, TVA indicates a revision in its rate schedules in 1977, stating:

"The revision which includes changes in design, provisions, and conditions of rate schedules, became effective in January 1977 and was developed to permit rates and charges to reflect existing cost conditions, to improve the relationship between wholesale power costs and retail revenue, and to provide a more suitable allocation of the costs of subtransmission service in the rate structure."

TVA's rate schedule of 1970 for Wholesale Power (Rate Schedule A) was replaced in 1977 by Schedule WS; rate schedules of 1970 for residential customers (Schedules R through R-9) were replaced in 1977 by Schedules RS-1 through RS-12; and rates schedules of 1970 for commercial and

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industrial customers (Schedules C through C-9) were replaced in 1977 by Schedules GS-1 through GS-12.1/

Wholesale power contracts between TVA and the individual distributors identify the applicable level of resale rates. The higher numbered schedules have lower rates in both the 1970 and 1977 versions. TVA, in consultation with its distributors, selects a rate for each distributor which will allow the distributor to remain on a self-supporting and financially sound basis. This would correspond to criteria used by regulatory agencies to permit a reasonable rate of return.

A comparison of TVA's 1977 rate schedules to its 1970 rate schedules indicates higher rates in 1977 and a rate structure that is more energy related, i.e., the total cost is more related to total usage than to the kw demand requirement. Both the higher rate and energy related aspect would be expected because of inflation and because of the rapid rise in fuel costs which has even exceeded the inflation rate during this period.

Both the 1970 and 1977 wholesale rates have an adjustment clause (adjustment 2) that adds to a distributor's wholesale bill if the distributor has large customers. Since this occurs in both the 1970 and 1977 schedules, it does not represent a significant change. It could, however, have a competitive impact if a TVA distributor and TVA itself were competing for a large industrial load, and TVA's retail rate was less than its wholesale rate as adjusted for large customers thereby increasing the propensity for a price squeeze. A comparison of billing for a single large load served under the wholesale rate schedule WS to the billing for a large load served under TVA's industrial rate schedule GS-8 showed the wholesale rate to be about 3 percent less. For more than one large load, or a combination of large and small loads, the differential would be greater. Thus, there would not normally be any price squeeze. In response to an inquiry to TVA as to the reason for the adjustment for large loads charged to its distributors, TVA indicated that the adjustment reflected the advantage (lower cost) of supplying large concentrated loads. This is a reasonable explanation and as there is no price squeeze involved, it can be concluded that the large customer adjustment has no anticompetitive effect or intent.

Since the construction permit antitrust review, there have been several inquiries of TVA by other electric systems for various coordination and power supply arrangements. The TVA Act prohibits TVA from entering into contracts that would make TVA a source of power supply outside the areas

1/ The TVA Board sets retail rates for its distributors as well as wholesale and large industrial rates for itself.

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for which the Corporation or its distributors were the primary source of power supply on July 1, 1957. Because of this, the inquiries are conveniently grouped to distinguish those that may make TVA a supplier of power, as follows:

1. those requesting TVA to sell power;
2. those requesting TVA to buy power;
3. those requesting TVA to engage in joint projects; and
4. those requesting TVA to wheel power.

While the TVA Act restrains TVA from territorial expansion, it does not completely restrict TVA from growth within its area even though that growth may involve newly established customers or customers previously served by another electric utility, provided that TVA had been the primary source of power supply in the area.<sup>1/</sup>

Alabama Electric Cooperative, Big Rivers Electric Corporation, Southern Illinois Power Cooperative and South Mississippi Electric Power Association have each approached TVA at various times regarding power sales to TVA. TVA agreed to buy power some of the time and declined at other times depending on the price and its needs at the time. Review of these purchase opportunities did not disclose any pattern of refusal to deal that would indicate anticompetitive action.

Big Rivers Electric Corporation, the City of Clarksdale, East Kentucky Power Cooperative, East Mississippi Electric Power Association, and Jackson Purchase RECC have each approached TVA at various times regarding power purchases from TVA. In each instance TVA declined, stating that the TVA Act precluded it from selling power to or entering into other arrangements that would have the effect of making it a source of power supply for these areas. AIG and OELD agree that the TVA Act would prohibit such sales.

Big Rivers Electric Corporation inquired if TVA would be interested in Big Rivers' participating in the installation of a nuclear unit on TVA's

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<sup>1/</sup> In Harding v. Kentucky Utility Co., 390.US1 (1967), the Supreme Court ruled that TVA could supply through its Tennessee distributors two small villages in which the Kentucky Utilities Company had previously been the primary source of supply. The ruling was based on the fact that TVA was the primary source of supply in Clariborne County, the county in which the villages were located. Thus the Court in essence ruled that "Area" as used in the Act was not so small as a village or even two villages plus their immediate areas.

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system or TVA's participating in the installation of a coal-fired generating unit on the Big Rivers' system. TVA declined both proposals -- the first on the basis that its generation had at that time (December 1973) already been planned through 1983, and the second proposal on the basis that TVA would have adequate power supply. Although this appears to be an instance in which TVA's refusal to construct generation jointly was not strongly supported by the circumstances, TVA has never constructed jointly owned units. This, therefore, does not appear to indicate a change in TVA's policies or practices since the construction permit antitrust review.

The City of Clarksdale, Mississippi inquired as to the possibility of entering into arrangements with TVA for seasonal diversity capacity of 10 Mw. TVA responded that, under the TVA act, TVA could only enter into power exchange arrangements with other generating organizations with which it had exchange agreements on July 1, 1957. Section 15d.(a) of the TVA act contains a special proviso regarding exchange power. It states:

"Nothing in this subsection shall prevent the Corporation, when economically feasible, from making exchange power arrangements with other power-generating organizations with which the corporation had such arrangements on July 1, 1957,....."

It is noted that the above proviso does not specifically forbid TVA from entering into exchange arrangements with others with which it had no such arrangements on July 1, 1957. The proviso simply reinforces one thing that TVA can do, but does not in itself limit TVA with respect to those it can deal with as long as such arrangements do not have the effect of expanding TVA as a source of supply into new areas. Thus, it is possible that TVA could exchange diversity power with other entities as long as TVA did not become a source of power supply.

Even if an exchange of diversity power did not represent a net supply of kw hrs. over a given timeperiod, such a transaction could be considered as a temporary source of power for both demand and energy. An inquiry of TVA, as to whether its interpretation had been tested in the courts, brought a reply that it had not been tested. In view of this, Staff cannot say that TVA acted anticompetitively by refusing to enter into a diversity exchange that could be controversial with respect to the legality of such an action.

Big Rivers Electric Corporation and Jackson Purchase RECC each asked TVA about possible wheeling services. In each instance, TVA responded that any wheeling arrangements could not conflict with the area limitation of

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the TVA Act. On further inquiry from the NRC Staff as to what type of arrangements would conflict with the area limitation, TVA responded:

"contributions of power from TVA's system if and when the initial source (of wheeled power) is interrupted for any reason would appear to be inconsistent with the provisions of the Act"

AIG made further telephone inquiry of Mr. William Thorpe, General Manager of Big Rivers Electric Corporation, regarding wheeling arrangements with TVA. He indicated that they are currently working on arrangements for transmission that would be consistent with the TVA Act for delivery of power to one of Big Rivers' customers. He indicated further that TVA has been cooperative and that working relations between TVA and Big Rivers have been good.

Summary

The Attorney General recommended no antitrust hearing for Watts Bar Nuclear Units 1 and 2 in 1972. Subsequently, "no hearing" recommendations were received with respect to Bellefonte, Hartsville, Phipps Bend and Yellow Creek nuclear plants in 1973, 1975, 1975 and 1976, respectively. In each subsequent antitrust review after Watts Bar, the Attorney General advised that there was no basis to change the conclusions with respect to Watts Bar.

For Watts Bar, and for each nuclear plant application thereafter, no requests for intervention on antitrust matters or other antitrust complaints were lodged with the NRC against TVA.

Staff has reviewed the materials furnished by TVA in response to Regulatory Guide 9.3 and in response to specific follow-up questions asked of TVA and Big Rivers Electric Corporation. None of TVA's actions since the Watts Bar construction permit review suggests an anticompetitive intent. Only two actions suggest a possible anticompetitive effect:

1. Refusal to engage in diversity interchange with the City of Clarksdale, Mississippi and
2. refusal to wheel (transmit) power for Big Rivers Electric Corporation and Jackson Purchase RECC. --

Each of the above refusals were seemingly justified on the basis that such actions could be illegal or at least inconsistent with Section 15d.(a) of the Tennessee Valley Authority Act. In any event, such refusals do not represent changes in TVA's policy or actions subsequent to the antitrust review with respect to the Watts Bar Construction

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Permit Application, and therefore do not represent "significant changes" in the context of Section 105c(a) of the Atomic Energy Act of 1954, as amended.

The AIG Staff and the antitrust section of OELD therefore find no basis for the Commission to make a "significant change" determination with respect to antitrust aspects of TVA's application for operating licenses for the Watts Bar Nuclear Units 1 and 2.

*Argil A. L. Toalston*

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