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UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

Arizona Public Service Co., et al.,) Docket No. STN 50-530A
Receipt of Antitrust Information)

COMMENTS OF PLAINS ELECTRIC GENERATION
AND TRANSMISSION COOPERATIVE, INC.,
ON ANTITRUST INFORMATION, REQUEST FOR FINDING
OF SIGNIFICANT CHANGE, REQUEST FOR ANTITRUST HEARING
AND REQUEST FOR IMPOSITION OF LICENSE CONDITIONS

Plains Electric Generation and Transmission Cooperative, Inc. ("Plains"), files these comments in response to the Notice of Receipt of Antitrust Information by the Nuclear Regulatory Commission ("NRC") published in the October 29, 1986, Federal Register. 51 Fed. Reg. 39599. Plains asserts that El Paso Electric Company ("EPE"), a participant in the Palo Verde Unit 3, has taken actions that would create or maintain a situation inconsistent with the antitrust laws. These actions consist of blocking Plains' ability to transmit power from northern New Mexico to load centers in southern New Mexico. Such actions represent significant changes in EPE's activities, and they have occurred subsequent to the previous antitrust review by the Attorney General and the NRC in connection with the construction permit for Palo Verde 3. Plains requests that the NRC (1) find that EPE's actions constitute a significant change; (2) hold a hearing into EPE's anti-competitive conduct; and (3)

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impose certain conditions on EPE in the Palo Verde 3 operating license to remedy EPE's anti-competitive activities and to prevent further anti-competitive activities by EPE in the future.

Plains' Comments are divided into the following sections: (1) Overview of Plains and Plains' Electric System; (2) Dependence of Plains on EPE for Transmission of Power to Serve Load Growth in Southern New Mexico; (3) Significant Changes in EPE's Actions With Respect to its Control of Transmission for Load Growth in Southern New Mexico; (4) Need for the Conduct of an Antitrust Hearing on EPE's Actions; (5) Conditions which Plains Recommends for Inclusion in Palo Verde 3 Operating License; and (6) Conclusion.

I

OVERVIEW OF PLAINS AND PLAINS' SYSTEM

Plains is a generation and transmission cooperative consisting of thirteen distribution cooperatives, located throughout New Mexico and eastern Arizona. Exhibit 1 shows the general service area of all of Plains' members and lists each such member. Plains' members had a peak demand in 1985 of 308 MW and total energy sales of 1,910 Gwh. Plains' member electric demand and energy requirements are supplied by the Plains Escalante Generating Station Unit 1 (PEGS-1), a 230 MW coal fired unit owned by Plains; the purchase of

hydroelectric power and energy from the Western Area Power Administration (WAPA); the purchase of power and energy from Public Service Company of New Mexico (PNM); and periodic purchases from other interconnected utilities. Plains also owns the Algodones station, consisting of three 15 MW gas or oil fired generating units which currently supply emergency back-up power to Plains' members.

The total generating capacity of all of Plains' resources currently exceeds member demand for that capacity by a substantial amount, and as a result, Plains has sought aggressively to market PEGS-1 output off system. Twelve buyers purchased 973,763 MWH from Plains in 1985, generating revenues to Plains of over $10 million, which revenues were passed through to its members.

Plains owns a transmission grid consisting of transmission lines and substation facilities located in New Mexico and Arizona. Plains owns 1202 miles of 115 kV line, with 43 delivery points for member systems. Plains also owns a limited amount of 69 kV and 230 kV line and 38 miles of 345 kV line which is currently operated at 115 kV. Plains' transmission system totals 1273 miles of line.

II

DEPENDENCE OF PLAINS ON EPE FOR TRANSMISSION OF POWER TO SERVE LOAD GROWTH IN SOUTHERN NEW MEXICO

A critical element of Plains' system is to have secure, long-term transmission access between northern and southern

New Mexico. [1/] This is demonstrated by a comparison of the location of Plains' member loads with Plains' generating resources and purchased power delivery points. As shown on Exhibit 1, four of Plains' members--Socorro, Sierra, Otero and Columbus Electric Cooperatives--are located in southern New Mexico. These systems had a combined load of 55 MW at the time of Plains' peak load, and consumed 395,373 Mwh of energy in 1985, which represented 18% of Plains' peak load and 21% of the total energy requirements of all of Plains' members in that year.

Plains' primary sources of wholesale power and energy, however, are located in central and northern New Mexico. The 230 MW PEGS-1 is located mid-way between Gallup and Albuquerque in the northwest central part of New Mexico. WAPA power is delivered principally at the West Mesa 115 kV substation located in the Albuquerque area, at the Ambrosia 115 kV substation near Ambrosia Lake, New Mexico, and at the Four Corners 345 kV substation near Farmington, New Mexico. The WAPA power is delivered to the West Mesa and Ambrosia substations pursuant to the terms of a contract

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1/ In these Comments, southern New Mexico is defined as Catron, Socorro, Lincoln, Chavez, Otero, Dona Ana, Sierra, Grant, Luna, and Hildago Counties and also areas of west Texas within practical transmission distance.

with PNM over the Shiprock-Four Corners-Ambrosia-West Mesa 230 kV transmission line. See Exhibit 2.

There is only a limited amount of power available to Plains in southern New Mexico to serve load in that area. Plains purchases 25 MW of power from PNM which is delivered at the Hidalgo 345 kV bus in Hidalgo County in southern New Mexico, and Plains purchases 22 MW of power from WAPA at the Elephant Butte substation. However, no additional competitively priced power supplies are available in southern New Mexico. PNM has informed Plains, in recent conversations in which Plains requested that PNM provide transmission capacity to delivery points in southern New Mexico, that no such capacity was available because of disputes between PNM and EPE over their respective rights in the existing 345 kV system. See Exhibit 3. The Elephant Butte power is also fully subscribed.

In addition, while in theory it might be possible to purchase locally (El Paso, Texas) generated power from EPE, such power would not be competitively priced. Based on EPE's recently filed tariffs, the cost of such power would be approximately 60 mills per kwh, as compared with power Plains could generate at PEGS-1 at an incremental cost of 20 mills.

Thus, in order to serve a substantial portion of its existing southern load, and all of its future southern load, Plains must have power transmitted into southern New Mexico.

Plains currently is able to transmit power from northern to southern New Mexico through its 115 kV West Mesa-Dona Ana line shown on Exhibit 2. Plains currently transmits a maximum of approximately 35 MW of power through this line, which parallels a newer 345 kV line operated by EPE, also shown on Exhibit 2. In the past, Plains has transmitted approximately 40 MW through the line. Plains' 115 kV line has an operating capability of 60 MW as well as the capability of transmitting the output of the Elephant Butte hydroelectric project. See Exhibit 4. The difference between the line's 60 MW operating capability and the 35 MW load which Plains currently transmits over it leaves Plains with 25 MW of transmission capability for the future. 2/

After the 25 MW is utilized, there will be no further existing transmission available for Plains to use to import power to southern New Mexico. There are currently only two north-south transmission routes into southern New Mexico. One consists of EPE's 345 kV line, which runs from West Mesa

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2/ As noted below, because EPE's 345 kV line parallels Plains' 115 kV line, approximately 87% of Plains' power actually flows on EPE's line. Based on this fact, and on the fact that the import capability into southern New Mexico is fully utilized, EPE takes the position that Plains does not even have the right to utilize the 25 MW of unused operating capability of Plains' own 115 kV line. As discussed more fully in Section III below, Plains believes that it has the right to transmit the full 25 MW of unused operating capability of its 115 kV line, regardless of the fact that most of that power will actually flow on EPE's 345 kV line.

to the Arroyo Substation near Las Cruces, and Plains' parallel 115 kV line. The other transmission route is a 345 kV transmission line from Greenlee, Arizona, to Hidalgo, New Mexico, owned jointly by PNM, EPE and Texas-New Mexico Power Company ("TNP") shown on Exhibit 2. These two routes are now electrically loaded under the normal operating procedures of the members of the New Mexico Power Pool ("NMPP"), whose members are PNM, EPE, WAPA, TNP and Plains.

Under such procedures, the transmission system must be operated in a manner capable of withstanding the loss of the most critical transmission facility. In the current situation for southern New Mexico, this means that if the Greenlee-Hidalgo 345 kV line is removed from service, the total amount of power imported into southern New Mexico should not cause unacceptable operating conditions. This operating procedure (taking into consideration the assumed unavailability of the Greenlee-Hidalgo 345 kV line) limits the amount of power that can be imported into southern New Mexico to 500 MW, although the maximum physical capability of the system is approximately 1400 MW. The established values for the operating limits are demonstrated by the nomogram shown in Exhibit 5. The operating nomograms are empirically derived through a series of computer simulations to measure system performance at a given load and generation level with the critical facility removed from service. The

nomogram demonstrates that if imports to southern New Mexico exceed 500 MW, it will be impossible to maintain a minimally acceptable system voltage level without adversely impacting the total New Mexico import capability. Currently, imports to southern New Mexico are at or near 500 MW.

Since the existing transmission system into southern New Mexico is now fully loaded, Plains must look to new transmission capacity (in addition to the 25 MW of unused operating capacity in Plains' 115 kV line) in order to serve load growth in southern New Mexico. There are two possibilities. Both are controlled by EPE.

The first possibility is EPE's proposed new 345 kV line from the Springerville substation in eastern Arizona to the Luna substation in southern New Mexico by which EPE intends to transmit remote generation which includes its shares of Four Corners Units 4 and 5 and Palo Verde Units 1-3. It appears from statements made by EPE witnesses in a proceeding pending before the Public Service Commission of New Mexico (Case No. 2044), involving the certification of such line, that there are 20-120 MW of unused, uncommitted capacity in the line. See Exhibit 6.

The second possibility involves making modifications to the existing and proposed New Mexico transmission system which, based on preliminary studies, could result in the addition of approximately 100 MW of transmission. A

substantial portion of these modifications would be made on EPE's system. These studies are discussed in Section III below.

A third possibility is in reality not feasible for Plains: That of constructing its own transmission line to serve future loads in southern New Mexico. A potential project which would independently supply to Plains the necessary transmission capability would extend from PEGS into southern New Mexico and cost approximately $75 million. This is clearly prohibitively expensive to serve the additional amount of load that is presently projected.

In short, in order to serve load growth in southern New Mexico beyond the 25 MW of operating capability which Plains has in its 115 kV line, Plains will be required to rely on transmission through EPE's proposed 345 kV Springerville-Luna line or on new transmission capacity that is made available through potential modifications to EPE's system.

This reliance is immediate. Plains currently has before it an expression of interest by Rio Grande Electric Cooperative (Rio Grande) in West Texas to purchase from Plains power and energy to meet its load of approximately 5 MW in the winter and 15 MW in the summer. This potential sale is discussed more fully below. In addition, at the current time all of the southern system members of Plains are pursuing new industrial loads, and some have potential

new loads under active consideration. Columbus Electric Cooperative made an offer to the Pacific Texas Pipeline Company ("PacTex") to provide electric service to its proposed compressor station. PacTex requires up to 14 MW of power and associated energy by 1989. See Exhibit 7. Otero Electric Cooperative has been requested to serve a new sawmill on the Mescalero Apache Reservation. This new load will have a power requirement of approximately 4 MW. Plains has an obligation to meet the load requirements of these new consumers through its member systems.

Furthermore, the United States Army Strategic Defense Command has recently released a draft Environmental Impact Statement concerning the Ground Based Free Electron Laser Technology Integration Experiment at White Sands Missile Range, New Mexico. This load is estimated by the Army to have electrical requirements in the 80 to 100 MW range. All of the locations proposed for this load could be served by Plains' members Otero Electric or Socorro Electric Cooperatives. See Exhibit 8.

In addition to these new loads, Plains' members are expected to add new load through normal load growth. As shown on Exhibit 9, this load growth (which does not include the major new loads discussed above) will quickly (by 1991) require the use of the 25 MW of unused operating capability of Plains' 115 kV line.

In sum, Plains has a concrete, immediate reliance on EPE for transmission capacity to serve new load in southern New Mexico. Without EPE cooperation, Plains will be severely restricted in serving this new load.

III

SIGNIFICANT CHANGES IN EPE ACTIONS WITH RESPECT TO ITS CONTROL OF TRANSMISSION FOR LOAD GROWTH IN SOUTHERN NEW MEXICO

EPE recently changed its actions with respect to its transmission bottleneck and now refuses to grant Plains transmission access to southern New Mexico. EPE's actions challenge Plains' ability to transmit power for Plains' future load and Plains' ability even to utilize the 25 MW of unused operating capability in Plains' own 115 kV West Mesa-Dona Ana line.

EPE's changed actions originated in the context of Plains' attempt to respond to the expression of interest of Rio Grande to purchase power from Plains. Rio Grande currently is a customer of EPE and, therefore, Plains is competing with EPE to sell power to Rio Grande.

Rio Grande presently purchases power from EPE under two separate agreements involving two delivery points. The agreement associated with the largest load, Dell City, Texas, terminates on December 31, 1986, if notice is given by December 1, 1986. The second agreement provides for the delivery of power at Van Horn, Texas, and may be terminated

on two years notice. Rio Grande, after investigating various alternatives, indicated an interest in purchasing power from Plains starting January 1, 1987. Such power would be transmitted utilizing the 25 MW of unused operating capability in the West Mesa-Dona Ana 115 kV line. It would be picked up by EPE at the Las Cruces Substation near Las Cruces, New Mexico, and wheeled to Rio Grande.

In a letter to Rio Grande's agent, Golden Spread Electric Cooperative, dated October 21, 1986, EPE flatly refused to wheel the Plains power. See Exhibit 10. According to EPE, Plains cannot deliver its power to EPE at the Las Cruces substation. EPE claims that the parallel transmission lines running from West Mesa to Dona Ana and Arroyo are fully loaded, and any use of such lines to deliver Plains' power to EPE at Las Cruces, for ultimate delivery to Rio Grande, would cause EPE to reduce its own present use of the lines.

As shown in Exhibit 10, EPE's refusal to wheel is based on its assertion that Plains does not have the right to transmit an additional 25 MW from West Mesa utilizing the unused operating capability of Plains' own line. EPE's assertion is based on the fact that, as noted, since EPE constructed its 345 kV line parallel to Plains' 115 kV line, approximately 87% of the power which Plains transmits over the 115 kV line actually flows over the 345 kV line. Based

on this fact, EPE claims that it does not have to recognize Plains' right to the full 60 MW capability of Plains' own line. According to EPE, Plains, despite owning a 60 MW transmission line, is only entitled to transmit 35 MW of power, which represents Plains' current winter load in southern New Mexico less the delivery of 25 MW from PNM at the Hidalgo 345 kV substation.

EPE's argument is an absurd rationalization for its refusal to wheel. The 115 kV line was constructed by the Bureau of Reclamation as a part of the Rio Grande Project before EPE constructed its 345 kV line. In 1969, when the 345 kV line was under construction, the Bureau, EPE, Plains, PNM and Community Public Service Company (now TNP) executed an Interconnection Agreement (Contract No. 14-06-500-1605) which, inter alia, specifically provided for the parallel operation of the 115 kV line and the 345 kV line. See Exhibit 11. Section 7 of the contract recited that EPE and the United States recognized that the two lines would be parallel and that power and energy may inadvertently flow over either line. It provided that no charge would be made by either party for such inadvertent flow. Section 7(c) further provided that:

> Nothing herein contained shall obligate either El Paso or the United States to reserve a portion of their respective transmission capability for the use of the other, or restrict the party owning the paralleling line from enjoying its full usage and capability.

The Bureau sold the 115 kV line to Plains in 1978 pursuant to Contract No. GS-07-PK(S)-80038. That contract specifically provided that conveyance of the government's interest in the 115 kV line was subject to the terms of Contract No. 14-06-500-1605. The obligations of EPE under Contract No. 14-06-500-1605, therefore, survive the acquisition by Plains of the 115 kV line from the Bureau.

Section 7(c), by its terms, guaranteed to the Bureau, and guarantees to Plains as successor in interest to the Bureau, the enjoyment of the "full usage capability" of the 115 kV line. Such guarantee was made in the context of the construction by EPE of the 345 kV line and with specific recognition that power transmitted on the Bureau's lines could inadvertently flow on either line. EPE's claim that Plains cannot transmit 60 MW over its 60 MW line, because of the existence of EPE's 345 kV line, is a patent interference with Plains' right to the full use and enjoyment of its line. Obviously, if Plains can transmit only 35 MW over its 60 MW line, Plains is not enjoying the full use of its line. EPE's interference is in direct conflict with section 7(c) of Contract No. 14-06-500-1605, and, therefore, there is no valid basis for EPE's refusal to wheel for Plains. 3/

3/ Section 7(c) also provides that neither EPE nor the United States shall be required to reserve a portion of its transmission systems for the use of the other. (continued)

Moreover, EPE never disputed that Plains had the right to transmit 60 MW of power from West Mesa to southern New Mexico until EPE was requested to wheel power from its competitor Plains to its customer Rio Grande. The timing and context of EPE's assertion strongly indicate that such assertion is a flimsily disguised rationalization for EPE's refusal to wheel power on behalf of a competitor.

EPE's actions strike right at the heart of Plains' ability to serve future load in southern New Mexico. As noted above, in addition to the prospective Rio Grande load, two of Plains' members have prospective loads totaling 18 MW under active consideration (not including the potential 80-100 MW load at the White Sands Missile Range). Heretofore, Plains properly had assumed that it currently possessed adequate transmission capacity to serve a major portion of such loads. But EPE is now attempting to erect a major roadblock that would prevent Plains from serving any such new loads.

Plains' interpretation of section 7(c) is not inconsistent with this provision. The two clauses in section 7(c) can be read together only if one assumes that EPE's transmission capability on its parallel transmission line is measured with the understanding that there was a pre-existing parallel 115 kV line. In other words, the capacity in EPE's transmission line should be considered to be reduced by the capacity that the EPE 345 kV line preempts from the Plains 115 kV line. Any other reading of section 7(c) would emasculate the second clause and would be inconsistent with other portions of the Contract.

EPE's actions with respect to the potential Rio Grande load appear to be part of an across-the-board effort by EPE to choke off access by Plains to new load in southern New Mexico. Notwithstanding the testimony of its own witness, cited above, that there appears to be 20-120 MW of unused, uncommitted capacity in the proposed Springerville-Luna line (see Exhibit 6), EPE has informed Plains that it cannot make any capacity in that line available to Plains. In a meeting with Plains' representatives on August 27, 1986, members of EPE's staff indicated to Plains that the full operating capacity of this line will be needed by EPE to import EPE's remote generation, including shares of Four Corners Units 4 and 5 and Palo Verde Units 1-3, and to meet commitments for transmission capacity EPE has made to other systems. The new transmission capability that the new 345 kV line would make available would obviously be a major way for Plains to serve future load.

In addition, EPE has so far refused to participate in studies of corrective actions that could be taken to increase the capability of the existing or proposed transmission system. At the August 27, 1986 meeting, Plains suggested to EPE that system studies be conducted to see if additional apparatus could be installed or modified on the transmission system either on the proposed or existing lines to increase the import capability to southern New Mexico.

Plains indicated a willingness to pay for the studies as long as EPE committed to make available to Plains a portion of the capacity increases that were identified through the studies. Studies independently conducted by Plains personnel have indicated that there are corrective measures, which include the use of variable transmission line compensation schemes and series compensation on the proposed and existing transmission lines, which could increase southern New Mexico import capability. Using these methods, it appears that import capability could be improved by approximately 100 MW. 4/

To this date, however, EPE has not responded to the proposed system studies or even expressed a willingness to explore the need for the studies.

In sum, EPE has taken the position that no additional Plains power can flow south unless Plains constructs prohibitively expensive new transmission. This position makes it impossible for Plains to serve new load in the south, since, as noted, additional wholesale power is not available in southern New Mexico at competitive rates. This places Plains and Plains' members in an untenable competitive position. Plains' members will be unable to compete for new industrial load, which load, as a result, might locate in

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4/ Making corrections to achieve this amount of power would also require the cooperation of PNM.

the service area of other retail suppliers, such as EPE. Even without new industrial load, Plains will be placed in a very difficult position with respect to serving the wholesale needs of its own members. To serve the normal load growth of Plains' members, any new industrial load of these members or any new wholesale customers, Plains would, in effect, become a captive customer for EPE's expensive local generation. Without relief, Plains and its members are subject to an unacceptable monopolistic squeeze.

IV

NEED FOR THE CONDUCT OF
AN ANTITRUST HEARING ON EPE'S ACTIONS

Section 105 of the Atomic Energy Act, 42 U.S.C. § 2135, provides that the NRC may decline to issue an operating license, or it may condition such license as appropriate, if it finds, after consulting with the Attorney General, that "the activities under the license would create or maintain a situation inconsistent with the antitrust laws." Prior to consulting with the Attorney General with respect to such finding, the Commission must determine that an antitrust "review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission . . . in connection with the construction permit for the facility."

In South Carolina Electric and Gas Company and South Carolina Public Service Authority, 11 NRC 817 (June 30, 1980) and South Carolina Electric & Gas Company and South Carolina Public Service Authority, 13 NRC 862 (June 26, 1981), the NRC set forth three standards that it would utilize in determining whether there had been significant changes in a licensee's activities subsequent to the previous review by the Attorney General and NRC. First, the significant changes must have occurred since the previous antitrust review. Second, the significant changes must be reasonably attributable to the licensee. Third, the significant changes must have antitrust implications that would be likely to warrant remedy by the NRC.

All three standards are satisfied in the instant situation.

With respect to the first standard, all of EPE's anticompetitive activities have occurred this year, well after the previous antitrust reviews that have been conducted in this proceeding. EPE did not assert its position that Plains is not entitled to the 25 MW of unused operating capability in Plains' 115 kV line until October 1986, in connection with Rio Grande's attempt to purchase power from Plains. See Exhibit 10. EPE did not assert to Plains that no capacity was available for sale or trade to Plains in the proposed 345 kV Springerville-Luna line until August 1986.

And the subject of potential corrections to the existing and proposed transmission system was not raised until August 1986.

Plains has been aware for some time that, even with the 25 MW of unused operating capability in its 115 kV line, new transmission capacity would be required to serve new load in southern New Mexico. But Plains was not aware until the summer and fall of 1986 that EPE would deny Plains access to new transmission capacity nor did Plains even suspect that EPE would attempt to deny Plains access to the 25 MW of unused operating capability in Plains' 115 kV line. EPE's actions in this regard have been quite recent, and Plains has brought them to the attention of the NRC as soon as possible and appropriate.

In short, EPE's specific anti-competitive acts occurred well after the previous antitrust review in this proceeding, and meet the NRC's first standard for showing a significant change.

With respect to the second standard of significant change, EPE's actions are directly attributable to EPE, one of the prospective licensees of Palo Verde 3. No other entity, known to Plains at any rate, has been responsible for EPE's actions against Plains.

With respect to the third standard of significant change, EPE's actions clearly have antitrust implications that would be likely to warrant Commission review. EPE's

actions constitute a monopolistic refusal to deal and denial of access to an essential facility prohibited by section 2 of the Sherman Act, 15 U.S.C. § 2. See Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). Cf. Aspen Skiing Co. v. Aspen Highlands Skiing, ___ U.S. ___, 86 L.Ed.2d 467 (1985).

EPE's transmission facilities are clearly an essential facility without which Plains cannot compete for the sale of wholesale power to new load in southern New Mexico and without which Plains' members cannot compete for the sale of retail power to new load. As noted above, no other transmission facilities to import power into southern New Mexico are available, and there are no competitively priced new sources of wholesale power located in southern New Mexico.

By denying Plains reasonable access to its essential facilities, EPE is clearly intending to injure its competitor Plains. There are at least four aspects of EPE's actions that Plains has identified at this time which evince EPE's anti-competitive intent, all of which show EPE's intent to preserve and expand its monopoly power.

First, EPE has refused to wheel Plains' power to Rio Grande based on the assertion that Plains cannot deliver power to EPE at Las Cruces, because EPE's 345 kV line preempts 87% of the use of Plains' 115 kV line. As discussed above, EPE's assertion is not a valid business reason for refusing to wheel.

Second, EPE's assertion that Plains does not have the right to use the 25 MW of unused operating capability in its 115 kV line is an improper use of EPE's market power in transmission capability for import into southern New Mexico, thus demonstrating an intent to monopolize. EPE is attempting, based on an improper business reason, to prevent Plains and Plains' members from competing for new load.

Third, EPE's refusal to grant Plains access to the proposed Springerville-Luna line, which is the only transmission line into southern New Mexico currently proposed, is a simple and improper refusal to grant access to an essential facility.

Fourth, EPE's refusal to date to cooperate in studies of possible correction to the existing and proposed transmission system further demonstrates EPE's monopolistic intent. Such studies could identify further capacity that could be used to transmit Plains' power. By refusing, to date, to cooperate in such studies, EPE is seeking to perpetuate Plains' reliance on EPE and to prevent Plains and Plains' members from competing for new load.

Denial of access to essential facilities is commonly considered by the NRC in antitrust reviews and remedied directly or indirectly as a result of NRC action. See, e.g., Alabama Power Co. v. Nuclear Regulatory Commission, 692 F.2d 1362 (11th Cir. 1982); Consumers Power Co., 12 NRC

177 (Aug. 4, 1980); Toledo Edison Co. and Cleveland Electric Illuminating Co, 10 NRC 265 (Sept. 6, 1979), aff'g 5 NRC 133 (Jan. 6, 1977); Pacific Gas & Electric Co., 5 NRC 1017 (April 15, 1977). Certainly, for purposes of the significant change analysis, EPE's actions have antitrust implications that would be likely to warrant NRC review, within the meaning of the third standard for significant change set forth by the NRC.

In sum, all three significant change factors are met, and the NRC should find that further antitrust proceedings and a hearing into EPE's actions are justified.

V

CONDITIONS WHICH PLAINS RECOMMENDS FOR INCLUSION IN PALO VERDE 3 OPERATING LICENSE

In order to remedy EPE's anti-competitive activities, and to prevent further anti-competitive activities by EPE in the future, Plains recommends the inclusion of the following conditions in the Palo Verde 3 operating license, which would assure Plains long term transmission access to southern New Mexico:

(1) EPE shall recognize Plains' right to transmit up to 60 MW of power, plus any power generated by the Elephant Butte hydroelectric project, on the West Mesa-Dona Ana 115 kV transmission line regardless of where the power actually flows.

(2) EPE shall wheel power delivered by Plains to EPE at the Las Cruces substation, or at another point where Plains and EPE are interconnected, to meet the requirements of Rio Grande Electric Cooperative, Inc.

(3) EPE shall make available to Plains transmission capacity made available by the construction of the Springerville-Luna line, which would enable Plains to transmit up to 100 MW of power to southern New Mexico. This transmission capacity shall be made available through any of the following means: (1) a capacity purchase of 100 MW in the West Mesa-Arroyo 345 kV line, with delivery of the power to delivery points on Plains' existing 115 kV system in southern New Mexico; (2) a capacity purchase of 100 MW in the Springerville-Luna line which would be traded for capacity rights in the West Mesa-Arroyo 345 kV line, with delivery of the power to delivery points on Plains' existing 115 kV system in southern New Mexico; (3) perpetual wheeling rights in the amount of 100 MW in the EPE system from points of existing interconnection with EPE in northern New Mexico to points of interconnection with EPE in southern New Mexico; or (4) such other means of providing Plains with up to 100 MW of transmission capacity to southern New Mexico as may be suitable to Plains.

(4) EPE shall cooperate with Plains in performing studies for ensuring that EPE's transmission system is

designed to provide maximum power transfer to southern New Mexico. If such studies lead to recommendations that it is economically feasible to make such additions, modifications, or corrections, then EPE shall make such additions, modifications or corrections, and Plains shall be given access to 100 MW or less, as Plains chooses, of new capacity thereby made available as required pursuant to the third condition.

(5) EPE shall make available to Plains 50% or less, as Plains chooses, of future transmission. EPE shall cooperate with Plains in future transmission planning in performing studies to ensure that future transmission facilities are designed to provide maximum power transfer to southern New Mexico.

VI

CONCLUSION

As demonstrated above, EPE has taken actions that would create or maintain a situation inconsistent with the antitrust laws. Such actions represent a significant change in EPE's activities, and they have occurred subsequent to the previous antitrust review by the Attorney General and the NRC in connection with the construction permit for Palo Verde 3. Accordingly, Plains respectfully requests that the NRC: (1) find that EPE's actions constitute a significant change; (2) conduct a hearing regarding EPE's anticompetitive conduct; and (3) impose the conditions set forth

above on EPE in the Palo Verde 3 operating license to remedy EPE's anti-competitive activities and to prevent further anti-competitive activities by EPE in the future.

Pursuant to 10 C.F.R. § 2.708(e), Plains designates the following persons on whom service of pleadings and other papers regarding this matter shall be made.

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