UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of	
ARIZONA PUBLIC SERVICE CO., et al.	Docket No. STN 50-528 Docket No. STN 50-529 Docket No. STN 50-530
(Palo Verde Nuclear Generating Station, Unit 1 Facility Operating License No. NPF-41)	(Indirect Transfer of Control; Antitrust Issues)
(Palo Verde Nuclear Generating Station, Unit 2 Facility Operating License No. NPF-51)	
(Palo Verde Nuclear Generating Station, Unit 3 Facility Operating License No. NPF-74)	

PETITION OF PLAINS ELECTRIC GENERATION AND TRANSMISSION COOPERATIVE, INC. FOR LEAVE TO INTERVENE; REQUEST FOR FINDING OF SIGNIFICANT CHANGE AND FOR ANTITRUST HEARING; AND PRELIMINARY COMMENTS ON ANTITRUST ISSUES

Plains Electric Generation and Transmission Cooperative, Inc. ("Plains") petitions for leave to intervene, and files this request for finding of significant change and for antitrust hearing and its preliminary comments on antitrust issues in these proceedings, pursuant to Section 2.714(a) of the Commission's Rules of Practice (10 C.F.R. § 2.714(a)). This pleading is filed in accordance with the Commission's notices dated March 2, 1994 (59 Fed. Reg. 9999, 10001) and March 14, 1994 (59 Fed. Reg. 11813) of the January

13, 1994 application for the Commission's consent to the indirect transfer of control of the interest of El Paso Electric Company ("EPE") in Operating Licenses NPF-41, NPF-51 and NPF-74 as the result of EPE's proposed acquisition by Central and South West Corporation ("CSW").

Plains believes that (1) EPE's continuing failure to implement the June 5, 1987 settlement agreement in connection with the Commission's previous antitrust review and (2) the concentration of control in relevant product and geographic markets which will result from the proposed merger of which the application is an integral part both constitute significant changes in EPE's activities under the license that implicate the Commission's antitrust responsibilities under Section 105c of the Atomic Energy Act (42 U.S.C. § 2135(c)). With respect to EPE's failure to implement the June 5, 1987 settlement agreement in connection with the Commission's prior antitrust review, those changes also require Commission action to protect the integrity of the Commission's policies on settlement in proceedings before it. See 10 C.F.R. § 2.759; Policy Statement on Conduct of Proceedings, CLI-81-8, 13 NRC 452 (1981).

The foregoing issues in connection with the current application require a hearing for their resolution, and Plains therefore requests that the Commission hold such a hearing.

Finally, Plains reserves the right to supplement its comments on the antitrust aspects of the current application in comments it proposes to file on the April 13, 1994, in accordance with the Commission's notice dated March 14, 1994 (59 Fed. Reg. 11813).

The persons designated pursuant to 10 C.F.R. § 2.708(e) to receive service of pleadings, orders and other documents in connection with this proceeding on behalf of Plains are:

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I. PLAINS' INTEREST IN THE PROCEEDINGS

Plains is an electric generation and transmission cooperative, which serves the electric power needs of 13 member cooperatives located throughout the State of New Mexico1/ and has a total system peak of approximately 300

1/ Plains supplies the full requirements for electric power and energy of thirteen member cooperatives in New Mexico,
(continued...)

MW. Plains has a 115 kV interconnection with EPE at the Las Cruces substation in New Mexico, and competes with EPE for wholesale sales of electricity within the southern New Mexico geographic market.

On November 28, 1986, Plains filed comments in connection with the Commission's previous antitrust inquiries relating to proposed issuance of Facility Operating License No. NPF-74 for Palo Verde Unit 3 in Commission Docket No. STN 50-530A ("1986 Comments") (Exhibit 1).2/ In its 1986 Comments, Plains alleged that EPE had engaged in anticompetitive conduct by unjustifiably excluding Plains from access to essential transmission facilities owned by EPE, thereby attempting to preclude Plains from (1) serving the electric needs of its own member cooperatives and (2)

1/(...continued)
namely Sierra Electric Cooperative, Inc., Northern Rio Arriba Electric Cooperative, Inc., Central New Mexico Electric Cooperative, Inc., Springer Electric Cooperative, Inc., Socorro Electric Cooperative, Inc., Otero County Electric Cooperative, Inc., Columbus Electric Cooperative, Inc., Mora-San Miguel Electric Cooperative, Inc., Kit Carson Electric Cooperative, Inc., Jemez Mountain Electric Cooperative, Inc., Continental Divide Electric Cooperative, Inc., and Southwestern Electric Cooperative, Inc., and the full requirements of a cooperative in Arizona, namely Navopache Electric Cooperative, Inc. The service areas of Plains' member cooperatives extend to Arizona, Texas and Oklahoma.

2/ Plains' comments of November 28, 1986 were submitted in accordance with the Commission's Notice of Receipt of Antitrust Information, dated October 29, 1986 (51 Fed. Reg. 39599).

competing with EPE for wholesale sales of electricity to other wholesale customers in southern New Mexico and western Texas (Exhibit 1 at pp. 3-18). In order to resolve the issues raised in Plains' 1986 Comments, EPE and Plains entered into a letter agreement dated June 5, 1987 (Exhibit 2), on the basis of which Plains withdrew its 1986 Comments and submitted a request to the Commission's trial staff that all action cease on the allegations raised in the 1986 Comments (Exhibit 3).

Under the June 1987 letter agreement, Plains is entitled to a 13.8 percent or 50 MW interest in the Arizona Interconnection Project, a 313 mile, 345 kV transmission line running from Tucson Electric Power Company's Springerville plant to EPEC's Rio Grande plant in Sunland Park, New Mexico, which provides EPE access to, inter alia, its generation entitlement in the Palo Verde units. The agreement also entitles Plains to transmission rights with respect to EPE's transmission system in southern New Mexico. To date, EPE has failed to provide Plains with the transmission rights and interests contemplated under the June 5, 1987, letter agreement.

The Commission's Rules of Practice (10 C.F.R. § 2.714(d)(1)) provide that the following considerations, among others, govern the determination of whether to grant a timely petition for leave to intervene:

(i) The nature of the petitioner's right under the Act to be made a party to the proceeding;

(ii) The nature and extent of the petitioner's property, financial or other interest in the proceeding; and

(iii) The possible effect of any order that may be entered in the proceeding on the petitioner's interest.

These considerations are generally treated by the Commission as encompassing the requirements of the "contemporaneous judicial concepts" of standing. Florida Power & Light Co. (St. Lucie Nuclear Power Plant), CLI-89-21, 30 NRC 325, 329 (1989); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327 332-333 (1983).

Plains demonstrably satisfies each of these considerations, as well as the general requirement of standing because it is (1) a utility interconnected with EPE, (2) a competitor of EPE for sales of electricity at wholesale within southern New Mexico, a relevant geographic market and (3) the direct and intended beneficiary of a settlement agreement intended to resolve allegations of anticompetitive conduct raised in connection with the Commission's previous antitrust review, which agreement remains unimplemented. Plains is a "person whose interest may be affected" by the "application to transfer control" in this proceeding, within the meaning of Section 189a of the Atomic Energy Act of 1954, as amended (42

U.S.C. § 2239(a)(1)), and is therefore entitled to be admitted as a party to this proceeding and to be heard on the matters set forth herein.

II. ANTITRUST ISSUES

Section 105c of the Atomic Energy Act (42 U.S.C. § 2135(c)) requires the Commission to determine whether "activities under the license" for the operation of a nuclear power plant "would create or maintain a situation inconsistent with the antitrust laws" identified in Section 105a (42 U.S.C. § 2135(a)) as the Sherman Act, the Clayton Act and the Federal Trade Commission Act. Where the Commission determines "with reasonable probability" that an anticompetitive situation would result from the grant of an application, it may either refuse to grant, or condition the grant of, the application. Consumers Power Co. (Midland Plant Units 1 and 2), ALAB-452, 6 NRC 892, 908 & nn. 32-33 (1977). Findings of actual violations of the antitrust laws are not required for the exercise of the Commission's conditioning authority; rather, procompetitive license conditions are authorized to remedy situations inconsistent with the "policies clearly underlying" the antitrust laws. Midland, supra, ALAB-452, 6 NRC at 907-909 and authorities cited.

The Commission's review also encompasses the requirement of a "nexus" between "activities under the

license" and the "situation inconsistent with the antitrust laws. The requisite nexus is not limited to nuclear plant operations, and may be established with reference to the control and operation of transmission facilities used to access plant output. Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3; Perry Nuclear Power Plant Units 1 and 2), LBP-77-1, 5 NRC 133, 240 (1977), aff'd, ALAB-560, 10 NRC 265 (1979).

Finally, where as here the application involves a situation in which the Commission has previously conducted an antitrust review, the Commission conducts a three-part inquiry under Section 105c(2) (42 U.S.C. § 2135(c)(2)) to determine whether "significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review" (South Carolina Electric and Gas Co. (Virgil C. Sumner Nuclear Station, Unit No. 1), CLI-80-28, 11 NRC 817, 823-825 (1980); South Carolina Electric and Gas Co., 13 NRC 862 (1981)). First, the requisite "significant changes" must have occurred since the previous antitrust review. Second, the changes must be reasonably attributable to the licensee. Third, the significant changes must portend anticompetitive implications that are likely to warrant the imposition of a remedy by the Commission.

In this case, as we show in detail below, each of these requirements is satisfied. First, consummation of the proposed transfer of indirect control will assist in maintaining a situation inconsistent with the antitrust laws in that, unless this Commission acts to protect the integrity of its settlement processes, the transfer will leave uncured the exclusionary conduct intended to be remedied by June 5, 1987 settlement agreement which EPE has yet to honor. Second, the merger, which has triggered the instant application before the Commission will result in the creation of additional market power in EPE and CSW through concentration of control over short-term capacity available for sale into the southern New Mexico geographic market. In short, the merger will "create a situation inconsistent with" Section 7 of the Clayton Act (15 U.S.C. § 18). Third, both of the anticompetitive problems raised by the transfer and the merger to which it relates -- the unremedied exclusionary conduct with respect to transmission and the merged company's dominance of the short-term capacity market in southern New Mexico -- have a clear nexus to EPE's participation in Palo Verde and the control and operation of the transmission system it uses to import its Palo Verde entitlement. Fourth, both EPE's failure to implement a settlement agreement intended to remedy past anticompetitive conduct and the merger-related

increase in market power over the southern New Mexico short-term capacity market plainly satisfy the three-part "significant change" analysis adopted by the Commission in Sumner, CLI-80-28, 11 NRC at 823-825.

A. The Public Interest in Protecting the Integrity of the Commission's Settlement Process Requires That the Transfer of Indirect Control Be Preconditioned on The Full and Complete Implementation of The June 5, 1987 Settlement Agreement

The Commission has consistently recognized the significant public interest in the process of settlement in proceedings before it. Thus, Section 2.759 of the Commission's Rules of Practice (10 C.F.R. § 2.759) provides:

> The Commission recognizes that the public interest may be served through settlement of particular issues in a proceeding or the entire proceeding. Therefore, to the extent not inconsistent with hearing requirements under Section 189 of the Act (42 U.S.C. 2239), the fair and reasonable settlement of contested initial licensing proceedings is encouraged. The Commission expects that the presiding officer and all of the parties to those proceedings will take appropriate steps to carry out this purpose.

The June 1987 letter agreement between Plains and EPE (Exhibit 2) was intended to resolve Plains' allegations, in its 1986 Comments in the Commission's antitrust review of the application for Operating License NPF-74 for Palo Verde Unit 3, that EPE had engaged in unjustified and anticompetitive exclusionary conduct toward Plains with respect to EPE's transmission system in southern New Mexico.

The settlement agreement provides for Plains' acquisition of a 13.8 percent interest in EPE's Arizona Interconnection Project ("AIP") and related transmission rights with respect to EPE's transmission system in southern New Mexico (Exhibit 2 at ¶¶ 1-3, 6, 7). The parties have completed the studies required under the settlement, and in June 1988 Plains duly notified EPE of Plains' intention to exercise its ownership option under the settlement agreement.

To date, almost seven years after the execution of the settlement agreement, the agreement remains unimplemented. As a result, EPE retains exclusive control of the transmission facilities from which, as Plains demonstrated in its 1986 Comments, Plains was unjustifiably and anticompetitively excluded by EPE. Indeed, since the completion of the Commission's antitrust review for Operating License NPF-74, the southern New Mexico transmission assets under EPE's exclusive control have increased through the addition of the AIP, and Plains remains as excluded from those facilities as it was when it filed its 1986 Comments.

The nexus between the failure to implement the settlement agreement and EPE's activities under the license is manifest from the fact that EPE constructed and operates the AIP in significant part as a means of importing its Palo Verde entitlements from Arizona into EPE's service area. The nexus

analysis explicated in Davis-Besse, supra, 5 NRC at 240 (1977), aff'd, ALAB-560, 10 NRC 265 (1979) is thus fully satisfied in these circumstances.

EPE's failure to date to implement the June 1987 settlement agreement constitutes a "significant change" within the criteria explained by the Commission in Sumner, supra, 11 NRC at 823-825. EPE's failure to implement the settlement has occurred since the completion of the prior antitrust review, and is clearly attributable to EPE as a matter of causation. In addition, EPE's failure to date to implement the agreement warrants a remedy which it is particularly within the purview and the interest of this Commission to impose as a condition to granting the present application.

The Commission's policies on settlement, as expressed inter alia in Section 2.759 of its Rules of Practice (10 C.F.R. § 2.759) and its Policy Statement on Conduct of Proceedings, CLI-81-8, 13 NRC 452 (1981) necessarily require that the Commission, no less than a court, have inherent authority to enforce settlement agreements reached in connection with proceedings before it. See, e.g., United States v. Hardage, 982 F.2d 1491, 1496 (10th Cir. 1993); Tiernan v. Devoe, 923 F.2d 1024, 1031 (3d Cir. 1991); Community Thrift & Loan Association v. Suchy (In re Suchy), 786 F.2d 900, 902-903 (9th Cir. 1986). In this proceeding,

the Commission's grant of consent to the proposed transfer of indirect control over EPE's interest in the Palo Verde licenses without requiring full and complete implementation of the settlement as a precondition to that consent would both (1) leave unremedied the anticompetitive exclusionary conduct which was the subject of Plains' 1986 Comments, and the remedial objective of the settlement; and (2) permit the significant exacerbation of that situation by increase in EPE's market power as a result of the merger, as we discuss below.

Either of those results would seriously undermine the integrity of the Commission's settlement policies. The confluence of both results would make a mockery of both the Commission's settlement policies and its antitrust responsibilities under Section 105c of the Act. Accordingly, the Commission should precondition its consent to the transfer of indirect control sought in the application on the attainment of the full and complete implementation of the settlement agreement prior to the occurrence of that transfer.

B. The Merger Will Create Significant Market Power Over Short-Term Capacity And Transmission in Southern New Mexico

The Commission's analysis of antitrust issues in the licensing context generally encompasses a three-part analysis: (1) delineation of relevant product markets; (2) delineation

of relevant geographic markets; and (3) examination of the applicant's exercise of market power, or other anticompetitive activity, in the relevant markets. Davis-Besse, supra, LBP-77-1, 5 NRC 133, 159-165, aff'd 10 NRC 265 (1979). Applying this analysis to the Applicants' merger proposal, it is apparent that the merger will result in a significant increase in the merged entity's market power in the short-term capacity and transmission markets in southern New Mexico. The exercise of this market power will likely be facilitated by EPE's existing dominance over key transmission facilities in the relevant geographic market, and the Applicants' proposed FERC "open access" transmission tariff for EPE fails to ameliorate -- and may worsen -- the effects of the merger-created market power.

1. The Relevant Product and Geographic Markets

a. Relevant Product Markets

The testimony of Applicants' principal economic witness, Dr. George R. Hall,3/ posits the existence of four relevant product markets: (1) long-term capacity; (2) short-term capacity; (3) transmission; and (4) non-firm energy sales. Accepting for the present Dr. Hall's delineation of these product markets as the product markets relevant to the

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3/ Dr. Hall's FERC testimony was filed with this Commission as Exhibit APP-92 to Appendix IV to the present application for transfer of indirect control.

analysis of the proposed merger's impact on competition, it appears that the merger as proposed threatens the competitive situation in the short-term capacity and transmission product markets in at least one relevant geographic market as described below.

b. Relevant Geographic Markets

Contrary to Dr. Hall's analysis, Plains believes that, because of the existing transmission situation with respect to bulk power transfers within the State of New Mexico, the southern portion of New Mexico constitutes an area of potential price discrimination which warrants scrutiny as a distinct geographic market in connection with the transmission and short-term and long-term capacity product markets. Under the analytical model prescribed in Section 1.22 of the Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines (57 Fed. Reg. 41552-41563 at p. 41556) (the "1992 Merger Guidelines"), it is appropriate to analyze the competitive effects of a merger "if a hypothetical monopolist can identify and price differently to buyers in certain areas ('targeted buyers') who would not defeat the targeted price increase by substituting to more distant sellers in response to a 'small but significant and nontransitory' price increase for the relevant product" and if

other sellers would likely not engage in arbitrage of the relevant product.4/

In this case, the merger will combine EPE's existing control of EHV transmission facilities into southern New Mexico with the CSW Operating Companies' control of generating capacity available for sale into that region. These factors, along with the merger-related incentives for the merged entity to extract supracompetitive profits from "targeted buyers" in southern New Mexico, establish that southern New Mexico should be analyzed as a distinct geographic market in connection with this merger.

Transmission capacity into southern New Mexico is largely dominated by EPEC's existing ownership of the following 345 kV transmission facilities: (a) the West Mesa-Arroyo line, which is the principal north to south transmission path within New Mexico; and (b) the Southern New Mexico Transmission System, jointly owned by Public Service Company of New Mexico from Hidalgo to Luna, and solely owned by EPEC from Luna to the Artesia HVDC tie. The significant potential "targeted buyers" located in southern New Mexico include the City of Las Cruces (which is currently in the

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4/ The significance of potential price discrimination in delineating geographic markets was also recognized in Section 2.33 of the Justice Department's 1984 Merger Guidelines (Trade Reg. Rep. (CCH) ¶ 13,013 at p. 20,559).

process of evaluating wholesale power supply alternatives following the expiration of its franchise to EPEC);5/ Holloman Air Force Base (which has a power supply contract with EPEC that is due to terminate this year and which has already issued a request for proposals for a new power supplier) and White Sands Missile Range; as well as Plains itself, with respect to the power requirements of its member cooperatives.

As to each of these potential targeted wholesale buyers, EPEC's existing control of key transmission facilities already gives it the ability to control the price of bulk power and transmission or to exclude competing suppliers -- in a phrase, market power.6/ As we show below, the concentration of control resulting from the merger is likely to exacerbate an already problematic competitive situation.

5/ Plains is in the process of evaluating whether to respond to a request for power supply proposals from the City of Las Cruces. Any such response will be dependent on Plains' ability to acquire and transmit power to Las Cruces.

6/ Hospital Corp. of America v. FTC, 807 F.2d 1381, 1386 (7th Cir. 1986), cert. denied, 481 U.S. 1038 (1987); Southern Pacific Communications Co. v. American Telephone & Telegraph Co., 740 F.2d 980, 1000-1001 (D.C. Cir. 1984), cert. denied, 470 U.S. 1005 (1985). The definition of market power is, of course, familiar in the Commission's decisions as well. See, e.g., TECO Power Services Co., 52 FERC ¶ 61,191 at p. 61,697 (1990); Doswell Limited Partnership, 50 FERC ¶ 61,251 at p. 61,757 & n. 12 (1990).

2. Market Power Resulting from the Merger

There are presently five potential utility sources of short-term capacity available to the southern New Mexico geographic market: EPEC, Plains, Public Service Company of New Mexico (PNM), Tucson Electric Power Company (TEP) and Texas-New Mexico Power Company (TNP). According to Applicants' economist, Dr. Hall (Exh. APP-99, p. 5), Plains and TNP are expected to have no excess capacity available during the 1995-1998 period he defines as the short-term.

Dr. Hall's projections of the available capacity controlled by the remaining market participants tend to overstate the amount of short-term available capacity controlled by PNM while significantly understating the amount of short-term available capacity likely to be controlled by the merged company. For example, Dr. Hall's analysis ignores the additional 133 MW of surplus capacity that would be transferrable into the WSCC from the combined surplus of CSW subsidiaries Public Service Company of Oklahoma (PSO) and Southwestern Electric Power Company (SWEPCO) under the transmission arrangements sought by the Applicants in FERC Docket No. TX94-2-000.7/ In addition, although Applicants'

7/ Once transferred into the WSCC through EPEC's transmission system, this capacity could either be sold directly into southern New Mexico from the east, or used to displace part of EPEC's system requirements for its

(continued...)

witnesses characterize as "unlikely" (APP-92 at p. 40-41 (Hall)) or "uneconomic" (APP-13 at pp. 14-15 (Kolodziej)) the possibility of wheeling the combined surplus of CSW's ERCOT subsidiaries, West Texas Utilities (WTU) and Central Power & Light Company (CPL), through transmission facilities of Mexico's Comision Federal de Electricidad (CFE), the Applicants' testimony stops far short of establishing that the surplus capacity of CSW's ERCOT subsidiaries cannot be transferred and sold into southern New Mexico.

The most conservative of these likely future scenarios involves adjusting the available short-term capacity shown in Dr. Hall's Exhibit APP-99 at p. 5 for the availability of 133 MW of the PSO/SWEPCO surplus to EPEC for resale into the southern New Mexico market and the restatement of PNM's uncommitted capacity in accordance with its 1992 New Mexico Power Pool ("NMPP") forecast (Exhibit 1 hereto). That scenario shows that (1) the merged company will acquire a share of the southern New Mexico short-term capacity market ranging from 25 percent in 1995 to 46 percent in 1999 as a result of the merger, and that (2) following the merger, the combined market shares of the two largest firms in the market

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7/(...continued)
Palo Verde power, which could then be sold into the southern New Mexico market from the west.

(PNM and EPE) will total between 69 and 87 percent over the relevant period.

TABLE
CORRECTED FORECAST OF POST-MERGER UNCOMMITTED CAPACITY
AVAILABLE FOR SALE INTO SOUTHERN NEW MEXICO

	1995	1996	1997	1998	1999
PNM (MW)	220	314	206	200	140
PNM (share)	.44	.44	.41	.47	.41
EPE (MW)	123	127	178	150	159
EPE (share)	.25	.26	.36	.35	.46
TEP (MW)	142	145	112	78	43
TEP (share)	.29	.30	.23	.18	.13
Total (MW)	491	487	496	428	342

Explanatory Notes:

(1) PNM uncommitted capacity calculated from January 1992 NMPP forecast (Exhibit 4) as [Generation + Interchange] - [Loads + Losses + 20% reserve margin + 35 MW sale to UAMPS (not included in 1992 NMPP forecast)].

(2) EPE uncommitted capacity is the sum of capacity surplus (deficit) stated in Exhibit GRH-7 (APP-99) plus 133 MW of PSO/SWEPCO surplus transferrable to WSCC via 133 MW of transmission sought in Docket TX94-2-000 for all years except 1999. For 1999, EPE surplus is calculated from 1992 EPE forecast appearing at Hall Workpapers p. GRH0024 for 1999, plus 133 MW.

(3) TEP uncommitted capacity is from Exhibit GRH-7 (APP-99).

The resulting concentration of control over the short-term capacity market in southern New Mexico is problematical by itself -- even ignoring the as yet untested

extent of Applicants' ability to increase the merged entity's market share by other means. When viewed in connection with EPEC's past history of excluding competitors from this market, discussed below, and the incentives that the merger will create for the expanded exercise of this market power, the likely competitive conditions resulting from the merger in this market are plainly an appropriate subject for the exercise of the Commission's remedial conditioning authority under Section 105c.

3. The Merger's Adverse Impact on Competition

The merger as proposed will create or enhance opportunities for the merged entity to exercise market power in the short-term capacity and transmission product markets in the southern New Mexico geographic market. The merger-related increase in market power, and opportunities for its exercise, would have been substantially alleviated by implementation of the June 1987 settlement agreement.

a. EPEC's Past and Current Exclusion of Competition in Southern New Mexico

In the mid-1980s, EPEC was able to use its dominance of the Southern New Mexico transmission system to foreclose Plains from providing competing service to Rio Grande Electric Cooperative. Plains raised EPEC's anticompetitive denial of transmission service to Plains before this Commission, in Plains' 1986 Comments on the application for Facility

Operating License No. NPF-74 for Palo Verde Nuclear Generating Station Unit 3. On June 5, 1987, Plains and EPEC entered into a letter agreement (Exhibit 2 hereto) pursuant to which EPEC agreed to provide Plains with a 50 MW interest in the AIP, along with equivalent transmission service over its facilities in southern New Mexico, in exchange for Plains' withdrawal of its comments to the NRC and its support for EPEC's certification application to the NMPSC for the AIP.

To date, almost seven years after the execution of the June 1987 letter agreement, EPEC has yet to provide Plains with the AIP ownership and transmission rights contemplated thereunder. Although Applicants' testimony acknowledges the existence of a "dispute" with Plains over EPEC's failure to date to implement the June 1987 agreement and claims that resolution of that dispute will "have no impact on the merger synergies" (Exh. APP-28 at p. 14), EPEC's history of avoiding the fulfillment of the settlement agreement is clearly relevant to assessing the merged entity's future behavior in response to competition.8/

8/ See FTC v. Cement Institute, 333 U.S. 683, 705 (1948) ("[T]estimony of prior. . . transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transaction under scrutiny"); Utah Power & Light Co. (Opinion No. 318), 45 FERC ¶ 61,095 at p. 61,289 & n. 157 (1988), order on reh'g, Opinion No. 318-A, 47 FERC ¶ 61,209

(continued...)

b. The Merger Will Increase the Merged Entity's Incentives to Exercise Market Power

The merger will create incentives for the merged entity to use its dominance of key transmission facilities (particularly the AIP and the West Mesa-Arroyo line) to market surplus capacity needed in the short and medium term by utilities interconnected to EPE. Indeed, current and future state regulatory pressures on the retail rate base treatment of the merged entity's $700 million buyout of EPEC's Palo Verde leases are likely to provide significant motivation for the merged entity to attempt to use its transmission dominance to dispose of excess capacity in wholesale transactions that it will likely facilitate through its dominance of key transmission facilities accessing the southern New Mexico market, specifically including the AIP and the West Mesa-Arroyo line. In addition, the complex system of intercorporate accounting among the CSWS operating companies, including EPEC once the merger is consummated, will make it difficult to track and remedy excessive charges for transmission services.

4. There Has Been No Showing That the Merger's Anticompetitive Impacts Will Be Remedied

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8/(...continued)
(1989), order on reh'g, Opinion No. 318-B, 48 FERC ¶ 61,035, aff'd in part and remanded in part sub nom. Environmental Action, Inc. v. FERC, 939 F.2d 1057 (D.C. Cir. 1991).

The proposed EPEC "open access" tariffs (Exh. (TVS-5) APP-6 -- on which Applicants' witness Hall places such heavy reliance in formulating his predictions about the competitive impact of the proposed merger -- in fact does nothing to ameliorate the anticompetitive impacts of the merger on the southern New Mexico geographic market, and may well exacerbate those impacts. First, the tariff may in fact be prejudicial to Plains' rights under the June 1987 agreement. The tariff's definition of "Transmission System" (Exh. TVS-6, Section 1.34) is sufficiently vague that it may or may not give rise to conflicting claims of entitlements on facilities as to which Plains already has rights by virtue of the June 1987 agreement.

Further, the EPEC tariff contains a number of restrictive provisions which, in the context of the post-merger incentives and ability that the merged entity will have to use its regional transmission dominance to exclude competition for capacity transactions, may in themselves assist in the creation and maintenance of an anticompetitive situation. To give but one example, the proposed EPEC "open access" tariffs contain a reciprocity provision (Exh. APP-6 (Firm Transmission Service Tariff at p. 13, Section 2.11, Coordination Service Tariff at p. 6, Section 2.8) which is plainly not appropriate in the context of a merger proceeding

precisely because it can be used as a means of maintaining and reinforcing market power. Northeast Utilities Service Co., 62 FERC ¶ 61,294 at p. 62,915 (1993).

III. THE NEED FOR A HEARING

The Commission's March 14, 1994, Notice of Consideration of Transfer of Control of Ownership of Licensee and and Opportunity for Public Comment on Antitrust Issues (59 Fed. Reg. 11813) states that the Commission's staff "is aware of and is closely following a proceeding at the Federal Energy Regulatory Commission (FERC) concerning CSW's proposed acquisition of EPE" and "will consider the FERC proceeding to the maximum extent possible in resolving issues brought before the NRC." Whatever the merits of a posture of "watchful deference" as a general matter,9/ the appropriate discharge of this Commission's responsibilities requires a hearing on this application for the following reasons.

First, this Commission's antitrust mandate under Section 105c of the Atomic Energy Act (42 U.S.C. § 2135(c)) is considerably different from that of the FERC under Section 203 of the Federal Power Act (16 U.S.C. 824b). Under Section 203

9/ There are, of course, circumstances in which "watchful deference" to the deliberations of a sister agency may be appropriate. City of Holyoke Gas & Electric Department v. SEC, 973 F.2d 358, 363-364 (D.C. Cir. 1992); Wisconsin's Environmental Decade v. SEC, 882 F.2d 523, 527 (D.C. Cir. 1989).

of the Federal Power Act, the FERC considers itself bound to approve a merger that it finds to be "consistent with the public interest" -- a determination which demonstrably does not encompass the strict application of the antitrust laws. Northeast Utilities Service Co. v. FERC, 993 F.2d 937, 947 (1st Cir. 1993). This Commission's mandate under Section 105c, on the other hand, applies a stricter standard in requiring that the Commission exercise its conditioning authority where "activities under the license" may "create or maintain a situation inconsistent with the antitrust laws." As a result of these differences in the respective statutory mandates of the FERC and this Commission, this Commission's responsibilities under Section 105c require an independent review of the facts through an evidentiary directed to the fulfillment of this Commission's antitrust responsiblities. Cf. Municipal Electric Association of Massachusetts v. SEC, 413 F.2d 1052, 1056-1057 (D.C. Cir. 1969).

In addition, because this application involves a request for transfer of control, a hearing on the request of a party such as Plains "whose interest may be affected by the proceeding" appears to be mandatory under Section 189a of the Act (42 U.S.C. § 2289(a)). Thus, at least with respect to the issues raised by Plains with respect to EPE's failure to implement the June 1987 settlement agreement, this Commission

cannot accomplish its statutory duties merely by "consider[ing] the FERC proceeding to the maximum extent possible in resolving issues" brought before it.

Finally, as demonstrated above, Plains' intervention in this proceeding raises serious issues about the need to protect the integrity of the Commission's settlement processes. Wherever else Plains may be entitled to seek relief over the non-implementation of that agreement,10/ it is entitled to seek such relief before this Commission in this proceeding, and the interests of both the Commission and the public in protecting the integrity of the Commission's settlement processes require at least that Plains be heard on these issues.

IV. CONCLUSION AND REQUEST FOR RELIEF

WHEREFORE, and for all of the foregoing reasons, Plains respectfully requests that the Commission:

1. Grant Plains' petition for leave to intervene in this proceeding, and make Plains a party to this proceeding with full rights of participation herein;

2. Make and enter a finding of "significant changes" in the EPE's activities under the license, pursuant

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10/ See United States v. Pacific Gas & Electric Co., 714 F. Supp. 1039, 1050-1051 (N.D. Cal. 1989) (licensee's "commitments" in connection with issuance of NRC license enforceable in District Court in appropriate circumstances).

to Section 105c(2) of the Act (42 U.S.C. § 2135(c)(2)), in connection with the application for consent to transfer of indirect control presently before the Commission;

3. Convene an antitrust hearing on the issues of (a) EPE's failure to implement the June 1987 settlement agreement, and (b) the increase of market power that will result from the proposed acquisition of EPE by CSW, of which acquisition the application before the Commission is an integral part; and

4. Require at a minimum that, as a precondition to the indirect transfer of control for which authorization is sought in the application, the full and complete implementation of the June 1987 settlement agreement be certified to the Commission before the transfer is permitted to be effected; and

5. Grant Plains such other and further relief as may be necessary, just and proper in the circumstances.

Respectfully submitted,

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Dated at Washington, D.C.
this 1st day of April, 1994.