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September 27, 1989

Joseph Rutberg, Esq.  
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11555 Rockville Pike, Room 15B18  
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Dear Mr. Rutberg:

This letter is written on behalf of municipal and rural electric cooperative customers ("Customers") of Consumers Power Company ("Consumers Power"), who are concerned about the potentially unlawful consequences of changes proposed by Consumers Power involving its Palisades nuclear generating plant. Consumers Power and a newly created corporation, Palisades Generating Company ("Palisades Genco"), have submitted to the Nuclear Regulatory Commission a "License Change Request" to amend Operating License DPR-20 to reflect a proposed transfer of ownership of the Palisades Plant from Consumers Power to Palisades Generating Company. Based upon a telephone conversation with you a number of weeks ago, it is my understanding that the Commission has not yet taken any action with respect to an antitrust review of the license change request. We believe that such a review is appropriate. However, it might be preferable to schedule a more informal conference to discuss with the Staff the relief that we think warranted. Further, if the Staff believes that such a conference may resolve matters, we suggest a meeting between potential protestants and Consumers Power and Palisades Genco.

Consumers Power and Palisades Generating Company ("Applicants") are asking this Commission to approve changes which raise very serious questions as to whether the requested license would create a situation inconsistent with the antitrust laws, in violation of the requirements of the Atomic Energy Act of 1954, as amended ("Act"). Important information essential to a thorough review of those issues is not contained in the documents furnished to the NRC with the companies' February 27, 1989 license change request. The purpose of this letter is to identify at this preliminary stage issues of concern to the municipal and cooperative customers and to request that the

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Commission conduct an antitrust review before deciding whether (and, if so, under what conditions) to grant the license change request.

Section 184 of the Atomic Energy Act, 42 U.S.C. § 2234, prohibits the transfer of a license "unless the Commission shall, after securing full information, find that the transfer will be in accordance with the provisions of this chapter [the Atomic Energy Act of 1954, as amended]," which includes compliance with the provisions relating to antitrust. The Applicants have not provided sufficient information to enable the Commission to make supportable findings that the proposed license change would meet the statutory requirements.

Customers' concerns about the potential anticompetitive consequences of the transactions underlying the requested license transfer may be summarized as follows:

- \* The proposed transfer of ownership of the Palisades plant to the newly formed Palisades Generating Company is likely to have adverse competitive consequences, although the extent of those consequences cannot yet be fully known, in part because the ultimate ownership and control of Palisades Genco is unknown. According to the license change request (at 5), the Asset Purchase Agreement between Consumers Power and Palisades Genco allocates 4/9 of Genco's stock to Consumers Power, 3/9 to Bechtel Power Corporation ("Bechtel"), and the remaining 2/9 to unidentified third-party investors. Although it is apparently contemplated that Consumers Power will be the largest stockholder, its counsel recently stated before the Federal Energy Regulatory Commission that Consumers Power would not have a controlling interest in the newly created Genco "under any test that [he is] aware of, legal or otherwise." <sup>1/</sup> While we know of no rational basis for such a highly questionable claim, the transfer of ownership is designed to free Consumers Power of regulatory and other controls such that investigation by this Commission is mandated.
  
- \* Consumers Power is obligated to purchase from Palisades Genco all available energy from the Palisades plant until December 31, 2006, subject to certain qualifications, under the Power Purchase Agreement (Attachment 4 to the license change request, p. 7). The proposed agreement provides for these sales at rates that may be substantially above costs. Applicants assert that the rates are designed to recover costs (including a return on investment) "based on the Palisades Plant achieving an average capacity factor of 55% over its remaining life." (Request, p. 3) They

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<sup>1/</sup> Transcript of proceedings, Palisades Generating Co., FERC Docket No. ER89-256-000, Vol. 1 (August 14, 1989), p. 94.

concede the obvious: "If the plant operates at a higher average capacity factor, greater returns will be realized." (Id. at 7)

- \* The potential for anticompetitive consequences arises from the prospect of purchases at less than arm's length by Consumers Power from its partially-owned affiliate, Palisades Genco, at prices above costs, for the purpose of reselling the power and energy within its captive market. Although the Power Purchase Agreement rates are subject to approval by the FERC, such approval may be premised upon the assumed existence of competitive market conditions that might be further assumed to provide some market discipline as protection against unreasonably high rates. Antitrust review is crucial to determine whether market conditions in fact exist that provide feasible, cost-effective alternatives to the customers of Consumers Power. There is evidence that Consumers Power will favor purchases from affiliates, thereby potentially squeezing other competitive suppliers from the market. See Opinion and Order, Midland Cogeneration Venture Limited Partnership, Michigan Public Service Commission Case No. U-8871 et al., issued June 22, 1989, slip op. at 30-31, 40.
- \* The Purchase Power Agreement between Consumers Power and Palisades Genco is most assuredly not at "arm's length." With its 4/9ths (or greater) ownership of Genco, Consumers Power has an interest in maximizing, rather than minimizing the profit to Palisades Genco. Genco's interest in securing high rates is not contrary. Consumers Power is both seller and buyer in the transaction, thus creating a classic opportunity for self-dealing.
- \* For the same reasons, special scrutiny is required of the provisions for access by Palisades Genco to transmission, coordination and backup services and arrangements from Consumers Power. Given the absence of an arm's length relationship, the incentive exists for Consumers Power to make available services to Palisades Genco and to discriminatorily restrict access to comparable services to competitors of Consumers Power, including customers of Consumers Power. Approval of the requested license change must be conditioned to prevent such anticompetitive favoritism.
- \* In their statement of the purposes of the license transfer, Applicants assert (at 8) that "The proposed transfer of ownership is part of a business transaction that is mutually advantageous to [Consumers Power] and [Bechtel] and is also part of a settlement of claims relating to the cancelled Midland Nuclear Plant." Applicants have provided no information from which the Commission may determine the extent to which the transaction prices have been influenced by the Midland-

related settlements or settlements of other claims. The amount of claims by Consumers Power against Bechtel would have been influenced, among other things, by imprudency of the owner, Consumers Power, and prior releases and contractual arrangements between them. To the extent that these arrangements are influenced by the factors surrounding the cancellation of Midland, the Commission has a double responsibility to assure antitrust compliance.

- \* Customers have sought to discuss with Consumers Power their needs to have equal rights with Consumers Power's affiliates, such as Palisades Genco and the affiliate which will operate the gas turbines under the Midland Cogeneration Venture ("MCV"). The MCV contemplates acquisition of a portion of the Midland nuclear plant facilities. We also have sought discussions to establish fair transmission, coordination and purchased power arrangements. Should Consumers Power, the area's dominant utility, be able to discriminate in providing access to plant, transmission and coordination services, or to deny future economic wholesale power arrangements, the smaller systems will be at severe disadvantage, contrary to the antitrust laws and policies of concern to this Commission. Customers have strong reason to believe, and are prepared to demonstrate, that such discrimination is taking place and that, absent appropriate conditions, such discrimination is likely to take place in the future, thereby creating and maintaining a situation inconsistent with the antitrust laws.
- \* Customers believe and have raised with Consumers Power that there is a compelling need that they have equal rights of ownership in Michigan's transmission grid, true joint power supply planning and improved coordination. These have not been agreed. Without these rights, including equivalent rights to those of Consumers Power's generation affiliates, such as Palisades Generating Company, Customers will be at competitive disability.

The Atomic Energy Act requires the Commission to conduct an antitrust review to evaluate these and other issues prior to deciding whether to allow Palisades Generating Company to become a licensee of the Palisades plant. As noted above, section 184 requires a finding of compliance with all provisions of the Act as a condition of the transfer of a license.

In addition, Palisades Genco's application should be treated as a request for a new license under section 103 of the Act, 42 U.S.C. § 2133, which would directly trigger the antitrust review under section 105, 42 U.S.C. § 2135. Palisades Genco is a newly created corporate entity, whose qualifications to be issued a license must be demonstrated. A transfer in the ownership of a nuclear plant has the potential to alter the competitive

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conditions pertaining to both the original and subsequent owners. See Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), 7 NRC 583 (1978).

Customers recognize that Consumers Power's Provisional Operating License No. DPR-20 was issued pursuant to section 104(b) of the Act, 42 U.S.C. § 2134(b). Accordingly, no antitrust review was conducted when the existing license was issued. Customers further recognize that under the principles expressed in Ft. Pierce Utilities Authority v. United States, 606 F.2d 986 (D.C. Cir.), cert. denied, 444 U.S. 842 (1979), there would be a question as to whether postlicensing antitrust review would be available in the absence of a license transfer. However, beyond the independent antitrust authority contained in section 184 as discussed above, two important factors support treatment of the proposed license change request as an application for a new license under section 103.

The first factor is that Consumers Power has voluntarily undertaken to transfer ownership of the Palisades plant to the new entity, Palisades Genco. As a result, not only are the competitive circumstances altered at the instigation of the licensee, but Palisades Genco possesses none of the interests that an original section 104(b) licensee might claim to have for keeping its antitrust situation protected from review. It would make no sense for this Commission to ignore the reality that the result of the proposed license change would create an entirely new competitive configuration.

The Atomic Safety and Licensing Board recognized the importance of a change in ownership of a plant upon the evaluation of antitrust conditions in Detroit Edison, supra. Although the issue arose as to a plant that had been issued a construction license under section 103, 42 U.S.C. § 2133, the Board pointed out the fallacy of failing to recognize the relationship between antitrust concerns and plant ownership. In rejecting the applicant's argument that, where a plant had been subject to antitrust review at the construction permit stage, the Commission lacked jurisdiction to conduct an antitrust review of a proposed change in ownership until a future operating license proceeding, the Board found that the proposed ownership transfer triggered the antitrust review provisions of section 105(c), 42 U.S.C. § 2135(c). The Board stated (7 NRC at 588):

To construe the statute otherwise would permit a utility with no antitrust problems to undergo an antitrust review and obtain an unconditioned construction permit and then sell an ownership interest to another monopolizing utility. Under the Licensee's argument, there could then be no antitrust review until the later operating license stage, which itself could be a more limited review than the normal prelicensing antitrust review contemplated by the statute. Such an unequal treatment of applicants, insulating

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from prelicensing antitrust review those who came in later by way of amendments to construction permits, would subvert the Congressional intentent [sic] and purpose of § 105c.

The same logic applies here, in that, whatever insulation from antitrust review Consumers Power may have enjoyed, Palisades Generating Company was not insulated, and the transfer of ownership to it requires an antitrust review if congressional intent is not to be subverted.

The second factor that must be evaluated is whether the facility to be licensed under the requested license change meets the statutory criteria for application of section 102(b) and 104(b), 42 U.S.C. §§ 2132(b) and 2134(b). Section 102(b) provides that:

Any license hereafter issued for a utilization or production facility for industrial or commercial purposes, the construction or operation of which was licensed subject to section 2134(b) [104(b)] of this title prior to enactment into law of this subsection [on December 19, 1970], shall be issued under section 2134(b) of this title.

There are substantial questions as to whether the facility to be licensed is the same facility that was licensed pursuant to section 104(b) on September 1, 1972. Customers understand that there are significant new facilities that may be the subject of the proposed new license. For example, Consumers Power has apparently indicated to members of the Commission's Staff in January 1989 that it recognizes that steam generator replacement is necessary. The units are reportedly fabricated and in storage in Chattanooga, Tennessee. 2/ The license change request does not provide sufficient information to determine whether section 102(b) is applicable. Included in the Commission's review should be a requirement that the Applicants provide the necessary information. Certainly if section 102(b) is inapplicable, the new license for Palisades Genco must be issued under section 103, and an antitrust review is required under section 105(c).

For the foregoing reasons, Customers respectfully request that the Commission conduct an antitrust review of the proposed license change. Consumers Power and Palisades Generating Company have proposed transfer of ownership of the Palisades plant to a newly created entity and have sought a new

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2/ See memorandum of A.W. De Agazio, Senior Project Manager, dated April 4, 1989, in NRC Docket No. 50-255. In contrast, counsel for Palisades Generating Company stated in August, 1989 to the Presiding Administrative Law Judge at the FERC that the decision on whether to change those steam generators has not yet been made. (Tr. 74)

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license. Pursuant to section 184 of the Act, compliance with the antitrust provisions of the Act is required. The license change request should be treated as an application for a license under section 103, and an antitrust review should be conducted in accordance with section 105 of the Act.

Because no antitrust review has yet taken place or been noticed, and because of our hopes that these matters may be resolved informally, we are writing you with a copy to the Secretary, rather than proceeding formally. We would appreciate your advice as to how it would be best to proceed.

Respectfully submitted,



Robert A. Jablon



Thomas C. Trauger

RAJ/TCT/pdn

cc: Mr. Samuel Chilk, Secretary  
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