UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
SOUTH CAROLINA ELECTRIC & GAS COMPANY	)	Docket No. 50-395A
	)	
	)	
(Virgil C. Summer Nuclear Station, Units 1 and 2)	)	

SOUTH CAROLINA ELECTRIC & GAS COMPANY'S
ANSWER TO CENTRAL ELECTRIC'S AMENDED PETITION AND
RESPONSE TO COMMISSION ORDER OF JANUARY 26, 1979

Preliminary Statement

Under a directive from the Nuclear Regulatory Commission ("Commission") "to state more clearly the changes it believes have occurred that should cause the Commission to refer the matter to the Attorney General for his advice,"[1/] Central Electric Power Cooperative, Inc. ("Central") has submitted a ponderous and unilluminating document. Central has combined its amended petition with its opposition to the pending motions to dismiss by South Carolina Electric & Gas Company ("SCE&G") and South Carolina Public Service Authority ("Santee-Cooper"). The result is a confusing document that satisfies neither the requirements of a petition nor an opposition. Instead, it muddles factual assertions and legal arguments without distinguishing between the two.

While Central labors mightily to obscure the weakness of its pleading and the paucity of factual averments in sup-

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1/ Order of January 26, 1979 at 2.

port of its allegations, its essential allegations and averments have their genesis in the territorial allocation provisions of South Carolina Acts No. 412, S.C. Code §§59-18 to 28.

Boiled down to its essence, Central's argument is that inasmuch as the South Carolina General Assembly's approval of Santee-Cooper's purchase of an ownership interest in the Summer facility occurred in the same time frame as the territorial legislation, the latter must have been the quid pro quo for the former. Such is a clear example of fallacious post hoc, ergo propter hoc reasoning. Aside from the unsubstantiated, double hearsay of one individual, there is nothing to link the two events.

If Central had cause to believe an antitrust violation had occurred, it should have raised the matter at the time of the construction permit antitrust review. Obviously, Central consciously decided that there was no antitrust problem inasmuch as the Attorney General's letter dated March 31, 1972 states that "[Central] has no plans to intervene in this proceeding," and was awaiting the outcome of negotiations between SCE&G and Santee-Cooper prior to discussing an acquisition of part ownership in the Summer facility for itself. In any event, by noting the change in South Carolina laws "seriously" curtailing retail competition and examining the competitive situation resulting from it, the Attorney General demonstrates recognition of

the State's authority to restrict competition in the utility field.

When analyzed in this light, we have neither a situation inconsistent with the antitrust laws created nor maintained by the activities of the licensee. Also, there have been no significant changes in the licensee's activities or the factual situation involving the Summer facility. As discussed below, Central has not met its pleading burden and is not entitled to an antitrust hearing at the operating license stage. Further, Central has not shown that referral to the Attorney General is warranted. Nevertheless, should the factual issues be reached, SCE&G is entitled to summary disposition. Finally, the questions raised in the Commission's Order of January 6, 1979 are addressed.[2/]

I. CENTRAL'S AMENDED PETITION FAILS TO STATE A BASIS FOR A FINDING OF SIGNIFICANT CHANGE UNDER SECTION 105c AND FAILS TO RAISE A GENUINE ISSUE OF FACT WITH RESPECT TO THE MOTION FOR SUMMARY DISPOSITION BY SOUTH CAROLINA ELECTRIC & GAS COMPANY

Essentially, Central believes that it can avoid dismissal or summary judgment with a deluge of redundant and unsubstantiated claims. When examined critically, Central's amended petition alleges no more than its original pleading, that is, that SCE&G agreed to sell Santee-Cooper a share of the Summer facility in exchange for an elimination of compe-

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2/ Section II of this Answer discusses the Commission's third question, Section III discusses the first question, and Section IV discusses the second question.

tition in the retail and wholesale power markets. However, SCE&G has moved for summary judgment against these allegations based on the affidavits of Arthur M. Williams, Chairman of the Board and Chief Executive Officer of SCE&G, and Virgil C. Summer, President and Chief Operating Officer of SCE&G. Each of these affiants specifically states that he has read the allegations of Central's petition relating to an alleged agreement between SCE&G and Santee-Cooper to restrict competition in the sale of electric power at wholesale and at retail on or after July 9, 1973. Each affiant categorically states in response:

> No such agreement to restrict competition between SCE&G and the Authority [Santee-Cooper] exists now or ever existed. . . . The only agreements between SCE&G and the Authority are written agreements.

The written agreements enumerated in these affidavits obviously could not result in an antitrust violation, and Central does not argue otherwise. These affidavits could not be more precise in refuting the allegations of the petition regarding the existence of anticompetitive agreements. The fact that the only agreements between SCE&G and Santee-Cooper are written clearly excludes the existence of any oral agreements. The gloss that Central would put on the plain language of these affidavits, in effect accusing the affiants of making misleading statements bordering on perjury, is entirely unjustified. Nonetheless, Central

would have the Commission conduct a will-o'-the-wisp search for such nonexistent agreements on no stronger authority than its own unsubstantiated surmise.

Under the Rules of Procedure adopted by the Commission, such surmise will not survive a well-pleaded motion for summary disposition with supporting affidavits. Thus, the Rules provide in 10 C.F.R. §2.749(b), as follows:

> (b) . . . When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of his answer; his answer by affidavits or as otherwise provided in this section must set forth specific facts showing that there is a genuine issue of fact. If no such answer is filed, the decision sought, if appropriate, shall be rendered. [Emphasis added.]

Accordingly, Central's mere suspicions are insufficient to withstand SCE&G's motion for summary judgment, based upon uncontradicted affidavits.

The Supreme Court reached the same conclusion in interpreting the nearly identical provisions of Rule 56 of the Federal Rules of Civil Procedure in First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968). As here, the plaintiffs in that case alleged an anticompetitive conspiracy against it, which was denied on the basis of an affidavit by a knowledgeable corporate officer that conclusively disproved the conspiracy theory. The trial court granted summary judgment to the defendant. On appeal the

Supreme Court affirmed the judgment on the ground that the refuting affidavit had not been answered by the plaintiff:

> What Rule 56(e) does make clear is that a party cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him. Yet the analysis of the facts undertaken above demonstrates that, due to the absence of probative force of Cities' failure to deal with Waldron as being in itself evidence of conspiracy, petitioner's position is, in effect, that he is entitled to rest on the allegations of conspiracy contained in his pleadings. Thus petitioner repeatedly states that Cities has never disproved its participation in the alleged conspiracy, despite the fact that the only evidence of such participation is his allegation that the failure to deal resulted from conspiracy.
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> . . . . . .
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> To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it. While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint. 3/

3/ 391 U.S. at 288-90 (emphasis added).

Central's position is exactly what the Supreme Court rejected as an inadequate response to a well-supported motion for summary judgment, that is, Central presents no evidence whatever to create a genuine issue of fact as to the unrebutted Williams and Summers affidavits.

Instead, Central merely cites a string of antitrust decisions and principles which, while perhaps correct statements of law in and of themselves, are entirely irrelevant to this case. For example, Central cites Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-452, 6 NRC 892 (1977). That decision, unlike the instant one, involved a flat refusal to wheel and coordinate with smaller utilities. Here, however, Central simply avers that Santee-Cooper "turned down our ownership interest in backbone transmission," while at the same time conceding that it was offered participation in the Summer facility, which it rejected because of an "implication" that Central would have to assume certain costs.[4/] Central also concedes that SCE&G has not refused to wheel power to it.[5/] The federal court decisions

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4/ Affidavit of Patrick T. Allen at ¶10.

5/ Id. at ¶13.

cited by Central are also inapposite.[6/]

By comparison, Central's amended petition alleges no predatory or anticompetitive practice. It merely describes anticipated harm based upon a theory that Santee-Cooper and SCE&G have entered an anticompetitive "agreement" to eliminate competition. For example, Central discusses

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6/ United States v. Aluminum Co. of America, 148 F.2d 416, 438 (2d Cir. 1945), involved a price squeeze, not alleged in Central's amended petition, and the court stated that a violation of the antitrust laws exists only if "the ingot price must be regarded as higher than a 'fair price.'" There is no allegation here that any rate charged by SCE&G is higher than the fair market price. Similarly, United States v. Otter Tail Power Co., 410 U.S. 366 (1973), involved a monopoly of the retail distribution of power by (1) defendant's refusal to sell at wholesale to the plaintiffs or wheel power to them, (2) harassing litigation, and (3) invoking provisions of transmission contracts with other utilities to deny access to them by plaintiffs. The District Court found that defendant had used its strategic dominance in the transmission of power "to foreclose potential entrance into the retail area from obtaining electric power from outside sources of supply." 410 U.S. at 377.

Berkey Photo, Inc. v. Eastman Kodak Co., 457 F.Supp. 404 (S.D.N.Y. 1978), involved anticompetitive practices to exclude the introduction of a new product to the market. The instant case involves no new product, nor any evidence that Santee-Cooper or SCE&G have acted to exclude petitioner from new markets. Likewise, Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701 (7th Cir. 1978), involved a dealership reduction. Obviously, Central Electric is not franchised by either Santee-Cooper or SCE&G.

the consequences that may arise when title to existing thermal generating and transmission facilities owned by Central will vest in Santee-Cooper at some unspecified time[7] and when its "full requirements" contract with Santee-Cooper expires in 1987.[8] Central's allegations regarding SCE&G merely reflect ongoing negotiations between the parties and Central's rejection of an ownership interest in the Summer facility.

Thus, Central's vague allegation of an anticompetitive "agreement" or "alignment" between Santee-Cooper and SCE&G fails to plead specific predatory or anticompetitve practices. Nor do such allegations satisfy Central's burden in meeting the uncontradicted affidavits supporting SCE&G's motion for summary disposition. Finally, if Central believes that its position in the market is threatened by its dependence on Santee-Cooper, its position was the same at the time of the Attorney General's Section 105c antitrust review and advice in 1972 when Central had already "linked its destiny to Santee-Cooper."[9] Accordingly, Central's allegations do not rise to the level of "significant changes" under Section 105c(2).

7/ Affidavit of Patrick T. Allen at ¶9.

8/ Id. at ¶11.

9/ Amended petition at 43.

II. ANY ANTICOMPETITIVE ACTS ALLEGED BY CENTRAL RESULT FROM STATE REGULATORY LEGISLATION AND ARE THEREFORE EXEMPT FROM COVERAGE UNDER FEDERAL ANTITRUST LAWS

Aside from the unrebutted affidavits of Messrs. Williams and Summers, which categorically deny the existence of any such anticompetitive "agreement" between SCE&G and Santee-Cooper, Central's allegations are obviously only another way of challenging South Carolina Acts No. 412, relating to the establishment of certain service areas. Clearly, the Commission has no jurisdiction to consider, let alone invalidate, that statute. Thus, in answer to the Commission's specific question to the parties by its Order of January 26, 1979, changes in the competitive structure flowing from South Carolina Acts No. 412 may not constitute or contribute to "significant changes" within the meaning of Section 105c(2). In two lines of cases, the Supreme Court has delineated the application of federal antitrust laws to State regulatory legislation and efforts to influence the passage of such legislation. The Parker doctrine provides that activities which might otherwise be anticompetitive under the federal antitrust laws may be immunized by State legislation. Moreover, lobbying activities for such legislation, which might otherwise violate federal antitrust laws are immune under the Noerr-Pennington doctrine.

A. The Nature of the Electric Power Industry and State Regulation

The application of the Parker and Noerr-Pennington doctrines in this context must be considered within the framework of the electric power industry. As the court noted in

Gainsville Utilities v. Florida Power & Light Co., 573 F.2d 292, 299 (5th Cir. 1978), "the heavily regulated electric power industry is often characterized by governmental sanctioned territorial agreements." The division of markets and services among competitors is justified by its close supervision and regulation. As explained in Storey v. Mayo, 217 So.2d 304, 306-07 (Fla. 1968):

> The powers of the Commission over these privately-owned utilities is omnipotent within the confines of the statute and the limits of organic law. Because of this, the power to mandate an efficient and effective utility in the public interest necessitates a correlative power to protect the utility against unnecessary, expensive competitive practices. While in particular locales such practices might appear to benefit a few, the ultimate impact of repetition occurring many times in an extensive system-wide operation could be extremely harmful and expensive to the utility, its stockholders and the great mass of its customers . . . . It was recognition of this basic concept that led us to approve territorial service agreements between two regulated utilities. . . . [W]e [have] noted that often a regulated or measurably controlled monopoly is in the public interest, and that in the area of public utility operations competition alone has long since ceased to be a potent or even a reasonably efficient regulatory factor.

Also, joint efforts between government and industry for the adoption of regulatory laws are protected against attack under the antitrust laws because "[i]n many instances government regulators are highly dependent on the regulated industries for reliable and accurate information."[10/]

10/ D. Fischel, "Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine," 45 U. Chic. L.R. 80, 118 (1977).

The choices of the legislature as to the manner, degree or scope of regulation obviously require input from the affected industry. As the Supreme Court stated in Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 141 (1939), "whether competition between utilities shall be prohibited, regulated or forbidden is a matter of state policy." State policy cannot be created in a vacuum. The Parker and Noerr-Pennington doctrines should be analyzed, therefore, with an appreciation of the options that were open to South Carolina's General Assembly such that competition could be regulated or forbidden.

In this regard, the statutory provisions challenged by Central are only a part of an active and pervasive scheme of the State's regulation of electric utilities. The enabling Act creating Santee-Cooper and later enactments relating to its provision of electric power to customers occupy an entire chapter of the South Carolina Code.[11/] The rights and obligations of other electric utilities and electric cooperatives are governed by equally comprehensive measures, including the assignment of service areas.[12/] One provision by which Santee-Cooper maintains the right, if chosen by a customer, to serve any load of 750 KW or larger within any territory assigned to Central's cooperatives was actually drafted and sponsored by Central.[13/] In enacting the

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11/ S.C. Code §58-31-10 to 390.

12/ S.C. Code §58-27-10 to 2460.

13/ S.C. Code §58-31-390. See discussion at pages 28-29, infra.

State's comprehensive scheme restricting competition among electric utilities, the General Assembly has therefore weighed and considered Central's interests. Under Parker, the courts - and certainly not the Commission - are not authorized to reformulate the State's duly enacted program.

B. The Parker Doctrine

Parker v. Brown, 317 U.S. 341, (1943), involved California's Agriculture Prorate Act, under which farmers petitioned a State commission for the establishment of a prorate marketing plan. A prorate marketing plan could be submitted only upon the consent of 65% of the farmers. Thus, under the State law, the farmers initiated among themselves a plan restricting competition that was subsequently ratified by the State commission. Nonetheless, the Supreme Court held that the adoption of the prorate marketing plan by the State commission immunized it against allegations under the Sherman Act. Said the Court:

> Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since. . . it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative au-

> thority in making the regulation and in prescribing the conditions of its application.14/

In City of Lafayette, Louisiana v. Louisiana Power & Light Co., 435 U.S. 389 (1978), the Supreme Court examined the Parker doctrine to decide whether a municipality may operate a power plant under anticompetitive restraints without express direction from the State. For the Court to address this question necessarily implies the power of the State itself to restrict competition within the electric power industry, since any legal rights of the municipality under the Parker doctrine would be strictly derivative to those of the State. Indeed, the Court explicitly restated the principle "that the Federal antitrust laws do not prohibit a State 'as sovereign' from imposing certain anti-competitive restraints 'as an act of government.'"15/ As the Court explained, "the Parker doctrine exempts . . . anticompetitive conduct . . . as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or

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14/ 317 U.S. at 352. South Carolina Acts No. 412 is an even more emphatic statement of State policy, since the law involves no delegation of authority to an intermediate State commission. The clear articulation by the South Carolina legislature of its regulatory policy regarding the electric power industry thus stands in contrast to the publication of a fee schedule by the Fairfax County Bar Association, enforced through the Virginia State Bar, which was struck down in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). Defendants' fee-setting activities merely "complemented the objective of the [Virginia Supreme Court] ethical codes." Id. at 79. (emphasis added).

15/ 435 U.S. at 391.

monopoly public service."[16] In conclusion, while holding that a municipality does not, acting under its own authority, enjoy an antitrust exemption under Parker, the Supreme Court carefully circumscribed its holding so as not to disturb the unquestioned authority of a State to designate electric utility monopolies:

> Today's decision does not threaten the legitimate exercise of governmental power, nor does it preclude municipal government from providing services on a monopoly basis. Parker and its progeny make clear that a State properly may, as States did in Parker and Bates, direct or authorize its instrumentalities to act in a way which, if it did not reflect state policy would be inconsistent with the antitrust laws. . . . True, even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization. . . . But assuming that the [utility] is authorized to provide a service on a monopoly basis, [this decision] will not hobble the execution of legitimate governmental programs.[17]

16/ Id. at 413 (emphasis added). The Court emphasized the importance of each State's freedom to regulate and restrict competition in accordance with local interests:

> The Parker doctrine, so understood, preserves to the States their freedom under our dual system of federalism to use their municipalities free of the inhibitions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the Nation's free market goals. [Id. at 415-16.]

17/ Id. at 416-17. Also, the Supreme Court expressly recognized that in Otter Tail Power Co. v. United States, supra, an earlier electric utility case, "there was [among the Justices] agreement that a lawful monopolist could violate the antitrust laws." Id. at 417 n. 47.

Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), also clarified the power of a State to authorize monopolistic practices by private utilities, even though the Court narrowly held that a tie-in between the sale of lightbulbs and electric power to a utility's customers was not protected under Parker. In essence, the Court held that the sale of lightbulbs was merely ancillary to the sale of electric power and unrelated to any clearly articulated State policy restricting competition in the enabling legislation or the rules of the Commission itself. The Court observed as follows:

> The distribution of electric light bulbs in Michigan is unregulated. The statute creating the Commission contains no direct reference to light bulbs. Nor, as far as we have been advised, does any other Michigan statute authorize the regulation of that business. Neither the Michigan Legislature, nor the Commission, has ever made any specific investigation of the desirability of a lamp-exchange program or of its possible effect on competition in the light-bulb market. Other utilities regulated by the Michigan Public Service Commission do not follow the practice of providing bulbs to their customers at no additional charge. The Commission's approval of such a program does not, therefore, implement any statewide policy relating to light bulbs. We infer that the State's policy is neutral on the question whether a utility should, or should not, have such a program.
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> . . . [T]here is no statute, Commission rule, or policy which would prevent respondent from abandoning the program merely by filing a new tariff providing for a proper adjustment in its rates. . . 19/

19/ 428 U.S. at 584-85.

In contrast, however, the Court stated that:

> . . . Michigan's regulation of [Detroit Edison's] distribution of electricity poses no necessary conflict with a federal requirement that [Detroit Edison's] activities in competitive markets satisfy antitrust standards.
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> [I]f the federal antitrust laws should be construed [in subsequent proceedings] to outlaw [Detroit Edison's] lightbulb-exchange program, there is no reason to believe that Michigan's regulation of its electric utilities will no longer be able to function effectively. Regardless of the outcome of this case, Michigan's interests in regulating its utilities' distribution of electricity will be almost entirely unimpaired.20/

20/ 428 U.S. at 596-98 (emphasis added). The Court in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), emphasized the decisive distinction between clearly articulated areas of State regulatory concern and areas of only peripheral concern. The Court in Bates observed that in Cantor, Michigan "had no independent regulatory interest in the market for lightbulbs . . . . There was no suggestion that the bulk program was justified by flaws in the competitive market or was a response to health and safety concerns and the exemption for the program was not essential to the state's regulation of electric utilities." 433 U.S. at 361. As the Fourth Circuit Court of Appeals stated in City of Fairfax Hospital Association, 562 F.2d 280, 287 (4th Cir. 1977), upon which Central relies, the crucial issue in determining immunity under Parker is whether the State has asserted a "strong regulatory interest . . . and more specifically, whether the allegedly anticompetitive activity is part of an existing program of regulation that could be disrupted by the superimposition of antitrust standards. The evil sought to be avoided is the unnecessary disruption of existing State regulatory schemes." We have already demonstrated that the territory and service allocation by the South Carolina General Assembly bespeaks such a strong interest that is part of its larger program for the State's regulation of electric utilities.

The antitrust exemption for anticompetitive activities mandated by State law was again affirmed by the Supreme Court in New Motor Vehicle Board v. Fox, 47 U.S.L.W. 4017 (December 5, 1978), where the Court sustained the constitutionality of California's Automobile Franchise Act, which requires an automobile manufacturer to obtain approval from the New Motor Vehicle Board prior to opening a retail dealership within the market area of an existing franchisee if the franchisee files a protest. The Court's rejection of the challenge to the statute likewise disposes of Central's claims:

> Appellees next contend that the Automobile Franchise Act conflicts with the Sherman Act. They argue that by delaying the establishment of automobile dealerships whenever competing dealers protest, the state scheme gives effect to privately initiated restraints on trade, and thus is invalid under Schwegmann Bros. v. Calvert Distillers, 341 U.S. 384 (1951).
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> The dispositive answer is that the Act's regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships. The regulation is therefore outside the reach of the antitrust laws under the 'state action' exemption. Parker v. Brown, 317 U.S. 341 (1943); Bates v. State Bar of Arizona, 433 U.S. 350 (1977). See also City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).

> Appellees also argue conflict with the Sherman Act because the Automobile Franchise Act permits auto dealers to invoke state power for the purpose of restraining intrabrand competition. "This is merely another way of stating that the . . . statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act "our charter for economic liberty" . . . . Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the . . . statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed. Exxon v. Governor of Maryland, 437 U.S. 117 (1978).21/

The application of Parker to the activities of SCE&G is also supported by the legislative history of Section 105c(2) of the Act. The Joint Committee on Atomic Energy stated that "significant changes" . . .

> . . . refers to the licensee's activities; the Committee considers that it would be unfair to penalize the licensee for significant changes not caused by the licensee or for which the licensee could not reasonably be held responsible or answerable.22/

21/ 47 U.S.L.W. at 4021 (footnote omitted). In the Exxon case cited by the Court, it was also observed that the courts cannot review the wisdom of such legislation and thus sit as a "superlegislature." Exxon v. Governor of Maryland, supra at 124.

22/ H.Rep. 91-1470, 91st Cong., 2nd Sess. (1970), cited in 3 U.S. Code Cong. Adm. News 4981, 5009-10 (1970).

Thus, Congress itself realized that certain anticompetitive conditions in the industry might result from activities for which the licensee was not answerable. Congress distinguished between these different activities so as to hold the licensee accountable only for its own actions under Section 105c(2) antitrust review. It follows, therefore, that the territorial and service allocations established by South Carolina Acts No. 412 are clearly within the power of the State to restrict injurious competition in a manner which would be unlawful if undertaken by private parties.

Notwithstanding these clear precedents and the legislative history of Section 105c(2), Central maintains that immunity under Parker should not be accorded SCE&G and Santee-Cooper for the activities alleged in the amended petition. None of its reasons is persuasive. First, Central states that the South Carolina statute is "directly contrary to the national policy of competition embodied in the Sherman Act and the Commerce Clause," thus requiring "that the state law be invalidated."[23/] This is simply a misstatement of law.

23/ Amended petition at 33-34. Central argues that "the state has no interest in promoting destructive competition," Id. at 40, and that "[n]o justification for Section 59-26 [sic] can be found in the Act or in the legislative history." Id. at 42. In New Motor Vehicle Board, the Supreme Court rejected the identical assertion: "The dispositive answer is that the Act's regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom" with regulated competition." (47 U.S.L.W. at 4021 (emphasis added)). Further, in Cantor, the Supreme Court approved a utility's "exercising its natural monopoly powers" under the State's "regulation of [its] distribution of electricity" under a State regulatory scheme. 428 U.S. at 596. As Mr. Justice Blackmun stated in his concurring opinion: "One could not doubt the legality of Detroit

As the preceding discussion indicates, the Supreme Court in Parker, Bates, Cantor, City of Lafayette, and New Motor Vehicle Board, carefully staked out the power of the States to regulate and restrict competition among industries, including electric utilities, holding that Congress had not intended to eliminate the States' exercise of their traditional police powers by enactment of the Sherman Act.[24/] Also, Central's citation of case law under the Commerce Clause of the Constitution is inapposite because the Commission's review is limited by statute to antitrust laws.[25/]

23/ cont.

Edison's electric power monopoly." By enactment of South Carolina Acts No. 412, the South Carolina legislature has made such a "clearly articulated and affirmatively expressed" decision to displace unfettered business freedom with a regulatory scheme. The particular blend of competitive forces at work under the statute is necessarily a matter of legislative judgment and discretion which the NRC may not undertake to reevaluate.

24/ In this context, we note that Central's reliance upon Schwegmann Brothers v. Calvert Corp., 341 U.S. 384 (1951), is misplaced. The price-fixing in Schwegmann was not exempt under Parker because the anticompetitive scheme imposed upon unwilling retailers was the product of distributors rather than the State legislature or any State regulatory body. In effect, Louisiana had given distributors carte blanche to violate the antitrust laws without any articulation of a State policy or any State regulatory scheme. Central's arguments under Schwegmann Brothers were considered and rejected by the Supreme Court in its New Motor Vehicle Board decision.

25/ Further, the Commerce Clause cases upon which Central relies do not discuss the Parker doctrine or the States' regulatory police powers to restrict competition among utility competitors as recognized by the Supreme Court in Cantor and City of Lafayette.

Section 105c of the Atomic Energy Act simply does not authorize the Commission to investigate or decide the questions raised by Central under the Commerce Clause, which would involve issues of constitutional rather than statutory dimensions. In any event, the NRC has no authority to consider, much less determine, the validity of the South Carolina statute.[26/]

Central also argues that the South Carolina legislature authorized but did not compel "SCE&G to sell, or Santee-Cooper to purchase, part of the Summer Unit,"[27/] so that Parker does not apply. However, the fact that the legislature did not compel a sale of a one-third interest in the Summer unit to Santee-Cooper is irrelevant. What the legislature did require was territorial and service allocation. It is that situation, not the sale of an interest in the Summer facility, which Central challenges.[28/] Therefore, although it is true that the South Carolina legislature did not "compel" SCE&G to sell a one-third interest in the Summer facility to Santee-Cooper, the circumstances of that

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26/ Northern States Power Co. (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 375 (1978); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 748 (1977).

27/ Amended petition at 19.

28/ Central does not ask the NRC to set aside the sale of the one-third interest to Santee-Cooper. Nor, for that matter, does Central now apparently seek an ownership interest for itself in the Summer facility, which it has already rejected. The Attorney General has already reviewed the sale of a one-third interest in the Summer facility to Santee-Cooper in 1972.

sale are altogether immaterial to an analysis of the territorial and service allocations enacted under South Carolina Acts No. 412 and their protection under the Parker doctrine.

C. The Noerr-Pennington Doctrine

Central tries to distinguish the Noerr-Pennington cases, but its efforts are unavailing. In Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), the Supreme Court held that a railroad's successful campaign to influence favorable governmental action detrimental to the business interests of trucking competitors was not actionable under the Sherman Act. After restating the general rule under Parker that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out,"[29/] the Supreme Court said:

> We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly . . . .
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> In the first place, such a holding would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to the representatives. . . . Secondly, and of

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29/ 365 U.S. at 136.

> at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.30/

In a key passage, the Supreme Court expressly held that, even where the "sole purpose in seeking to influence the passage and enforcement of laws was to destroy [competition] . . ., this fact could [not] transform conduct otherwise lawful into a violation of the Sherman Act."31/ The Court thereby sustained the right of industrial concerns to lobby for their self-interests:

> The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors . . . . Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.32/

30/ Id. at 136-38 (emphasis added).

31/ Id. at 138-39 (emphasis added).

32/ Id. at 139.

Nor could a violation of the Sherman Act be made out on an allegation of an intent to inflict a direct injury upon a competitor:

> It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interest of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.33/

In United Mine Workers v. Pennington, 381 U.S. 657 (1963), the Supreme Court reaffirmed Noeer, stating:

> Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.34/

With respect to the electric power industry, the concurring opinion of Mr. Justice Blackmun in Cantor v. Detroit Edison Co., supra, is instructive on the application of this principle:

> Every state enactment is initiated, in its way, by its beneficiaries. It would scarcely make sense to immunize

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33/ Id. at 143-44.

34/ 381 U.S. at 670 (emphasis supplied).

> only those powerful enough to speak entirely through their governmental representatives, or, for that matter, to stifle such speech with the threat that it will destroy antitrust immunity. Moreover, the process of enactment is likely to involve such a complex interplay between those regulating and those regulated that it will be impossible to identify the true "initiator."18/

The Noerr-Pennington doctrine has been applied to immunize lobbying and other activities substantially more aggressive than those alleged by Central. For example, in Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 175), the defendant cable television company sucessfully blocked the grant of a franchise by a City Council to a competitor. Noting the interplay between the Parker doctrine, protecting anticompetitive activities undertaken pursuant to State statute, and the Noerr-Pennington doctrine, protecting lobbying activities for legislation with a potentially anticompetitive effect, the Court of Appeals stated as follows:

> Since the governmental actions of the city council and its committees were not themselves subject to the Sherman Act, the same was true under Noerr of concerted efforts to induce those governmental actions, even though those efforts had the anticompetitive purpose and effect alleged by plaintiff, if those efforts were genuinely aimed at inducing the governmental actions and were not a pretext for inflicting

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18/ 428 U.S. at 610 (concurring opinion of Mr. Justice Blackmun).

on plaintiff an injury not caused by any governmental action.35/

Accordingly, Central's allegations that SCE&G and Santee-Cooper were "associating together in an attempt to persuade"36/ the South Carolina legislature to enact territorial and service allocations do not amount to a violation of the Sherman Act. One cannot reasonably assume that the South Carolina legislature would desire to undertake the allocation of territories and services without input from affected utilities. The courts have repeatedly held that such lobbying and assistance are lawful.37/ Thus, even if proved, it is irrelevant that SCE&G and/or Santee-Cooper prepared, sponsored or lobbied on behalf of the territorial

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35/ 516 F.2d at 229. Likewise, in American Telephone and Telegraph Co. v. Delta Communications Corp., 408 F.Supp. 1075 (S.D. Miss. 1976), the court held that alleged activities pursuant to a conspiracy to restrain the development of UHF television by maintenance of a high tariff structure were exempt under the Noerr-Pennington doctrine.

36/ 365 U.S. at 136.

37/ The cases Central relies upon are inapposite. In United States v. Northern California Pharmaceutical Association, 335 F.Supp. 778 (N.D. Cal. 1964), the petitioning organization's very purpose had been to fix prices among members, and had been found guilty of criminal violations of the Sherman Act. Under the circumstances, the court was understandably reluctant to authorize consultation among members in violation of its decree to engage in possibly non-exempt activity. In Webb v. Utah Brokers Association, 568 F.2d 670 (10th Cir. 1977), the court merely held that exempt conduct could be introduced to evidence defendants' motives with regard to non-exempt activities. However, this evidentiary rule has no application here, since it is clear that all of SCE&G's activities are exempt under Parker and Noerr-Pennington. This analysis applies as well to United States v. Southern Motor Carriers Conference, 439 F.Supp. 29 (N.D. Ga. 1977), which simply recites the same evidentiary rule.

and service allocation legislation, either singly or in conjunction with each other.

Finally, Central tries to take this case outside the scope of Parker and Noerr-Pennington, by resorting to vague allegations that Santee-Cooper has now "aligned itself" with SCE&G. Central discusses its attempted entry into the bulk power business, the offer to Central to participate in the Summer facility, its negotiations regarding power exchange services, its "all requirements" contract with Santee-Cooper, and its position as a competitor in the market.

None of these allegations, however, involves any anticompetitive or predatory tactic by its competitors. Each allegation is predicated upon the invalidity of the challenged legislation or the assumption that SCE&G and Santee-Cooper must somehow pledge their resources as guarantors of Central's independent business judgment. Thus, Central does not allege that either Santee-Cooper or SCE&G has refused to wheel or transfer power, only that current negotiations have failed to bring about the best deal available to Central. Moreover, Central concedes that it was offered participation in the Summer facility, which it rejected out of hand only on the "implication" that it would have to assume certain heavy financial burdens."[38/]

The hazards of permitting, in effect, a collateral challenge to South Carolina Acts No. 412 by way of a Com-

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38/ Amended petition at 45.

mission antitrust review are nowhere more evident than in the recent recantation by Central of its charge that "[a]s part of the retail allocation scheme, Santee-Cooper and SCE&G agreed that Santee-Cooper could serve any load of 750KW or larger outside the three county area, as long as such load was within the territory of a cooperative."[39/] Central initially contended that an "agreement" existed between SCE&G and Santee-Cooper as "manifested in Section 59-26 [sic]. . .the obvious result of an anticompetitive conspiracy directed at Central."[40/] But counsel for Central now concedes, by letter of February 16, 1979, that the objectionable provision was drafted as a "pro-competitive measure" by Central itself and enacted at its behest by the General Assembly. Central's strategic retreat demonstrates the sheer folly of trying to unravel participation and motive in South Carolina Acts No. 412. In plain language, Central has admitted to that which it is accusing others of doing.

In effect, Central seeks to use the antitrust laws and the authority of the NRC for proceedings under Section 105c to hold it harmless against any flaws in its own business judgment when it "linked its destiny to Santee-Cooper."[41/] However, the antitrust laws and Section 105c cannot be invoked, as Central does, as a substitute for business acumen.

39/ Amended petition at 39.

40/ Id. (emphasis added).

41/ Id. at 43.

III. CENTRAL ELECTRIC'S AMENDED PETITION SHOULD BE DENIED AS UNDULY LATE

Aside from its insufficiency as a matter of law, Central's amended petition should be denied on the ground that it has been submitted long after any reasonable period of time allowable under Section 105c(2) for a petitioner to request from the Commission a finding of "significant changes." In answer to the question specifically addressed to the parties by the Commission's Order of January 26, 1979, the statute states that the operative date for determining whether significant changes have transpired is the date of the previous review by the Attorney General and the Commission.[42/] It does not follow, however, as Central argues, that Central could not have pleaded its antitrust allegations at the construction permit stage, or at the time the permit was amended to add Santee-Cooper as a one-third owner. In this respect, Central has failed to rebut or even address the arguments regarding its lateness in seeking a finding of significant changes, except to note its general manager's unfamiliarity with licensing proceedings before the Commission.[43/]

As we noted in our initial brief, the Commission gave foraml notice to the public that it had received an appli-

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42/ In this instance, the Attorney General completed his review by his transmittal letter of March 31, 1972. The Commission's review ended with its finding upon issuance of the construction permit that no antitrust hearing was necessary. See SCE&G's Motion to Dismiss at 7.

43/ Affidavit of Patrick T. Allen at ¶12.

cation for an operating license for the Summer Nuclear Station by publication in the Federal Register on April 18, 1977. Moreover, notice by publication had also been given on October 17, 1974 that SCE&G had requested an amendment of its construction permit for the Summer facility to reflect the sale of a one-third ownership interest to Santee-Cooper. Publication in the Federal Register of these applications was, by law, "sufficient to give notice of the contents of the document to a person subject to or affected by it,"[44/] including Central and its officers.

Moreover, an examination of the advice given by the Attorney General by letter dated March 31, 1972, belies Central's claimed lack of knowledge. The Attorney General analyzed SCE&G's relations with other utilities and relevant competitive considerations involving Santee-Cooper and other utilities, specifically, Central. The Attorney General explicitly noted:

> No competing utility has indicated to us any antitrust objection to licensing the Summer nuclear facility. Santee-Cooper is presently negotiating with SCEG for participation in a substantial share in the plant's output either on an ownership or a purchase basis, and we are advised that negotiations are proceeding smoothly. Central is definitely interested in obtaining the benefits of a share in the Summer facility but because of its contractual relations with Santee-cooper is awaiting the outcome of the

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44/ 44 U.S.C. §1507.

> negotiations between the later and SCEG. [I]t has no plans to intervene in this proceeding. 45/

The Attorney General's letter indisputably shows that Central knew that Santee-Cooper might acquire an ownership interest in the Summer facility, and that Central was aware of but elected not to intervene in the antitrust proceedings at the construction permit stage. The Attorney General's statement therefore shows that Central fully comprehended the nature of the antitrust proceedings in 1972 and that it could take action on its own behalf if "the outcome of the negotiations between [Santee-Cooper] and SCEG" cited by the Attorney General did not work out to its satisfaction. Inasmuch as the whole thrust of Central's amended petition is to attack Santee-Cooper's acquisition of an ownership interest in the Summer facility, its allegations of antitrust considerations present in the proposed acquisition or the alleged "alignment" between SCE&G and Santee-Cooper should have been raised in the construction permit proceedings.

Further, Central missed a second opportunity to raise its antitrust allegations when SCE&G sought to amend its construction permit and public notice was given on October 17, 1974 in the Federal Register. The Commission has recognized that certain events intervening between construction and operating license may be so critical as to trigger the ini-

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45/ 32 Fed. Reg. 7266 (April 12, 1972) (emphasis added).

tiation of antitrust review upon request, even though not "explicitly referred to in the statute or its history."[46/]

Notwithstanding notice of the amendment of the SCE&G construction permit to add Santee-Cooper as a one-third owner in 1974, Central has waited until December 1978 to seek a finding of significant changes on the basis of an alleged tie between ownership acquisition in 1974 and the passage of South Carolina Acts No. 412 (1973). It is incomprehensible that Central would wait until 4 1/2 years after SCE&G had filed its request to amend its construction permit reflecting the very acquisition of an ownership interest by Santee-Cooper that Central claims was offered illegally in consideration for lobbying support. It is equally incredulous that Central would wait some 22 months after submission of the application for an operating license. A lack of familiarity with NRC proceedings or related rights under the Atomic Energy Act certainly cannot excuse such lateness. Tolerance of lateness on these grounds would essentially nullify the Commission's requirements for timely pleadings.

46/ Houston Lighting & Power Co. (South Texas Project, Unit Nos. 1 and 2), CLI-77-13, 5 NRC 1303, 1318 (1977). The Commission stated that "[a]s a matter of sound practice," postponing resolution of antitrust questions that could be addressed prior to the operating license stage "would be undesirable. Faced with the prospect of an antitrust hearing, we must realistically consider the impact of delay upon the overall licensing process. Antitrust hearings tend typically to be time consuming." Id.

Otherwise, under Central's construction of the statute, an allegation of significant changes occurring on April 1, 1972 could be pleaded even now, almost 7 years later. Obviously, the provisions of Section 105c(2) must be construed to impose reasonable time constraints related to the pleaded events and the petitioner's knowledge of those events.[47/]

IV. THE ADVICE OF THE ATTORNEY GENERAL TO THE COMMISSION TOOK ACCOUNT OF THE KIND OF ACTIVITIES CENTRAL CITES AS A BASIS FOR "SIGNIFICANT CHANGES"

The Commission has also asked the parties to address the issue of whether the Attorney General's advice took account of matters now alleged by Central in recommending that an antitrust hearing was unnecessary. A review of the Attorney General's letter of March 31, 1972 clearly indicates that he did.

It is apparent that the Attorney General did not have under consideration South Carolina Acts No. 412, enacted on July 9, 1973. However, the Attorney General did conduct his review so as to give consideration to the effect of 1969 and 1972 statutes, likewise territorial service legislation, now codified as South Carolina Code §58-27-610 to 670. The Attorney General stated as follows:

> The impact of these restraints on retail competition [which were

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47/ The Commission is respectfully referred to SCE&G's Motion to Dismiss at pages 20-23 for a fuller discussion of the Commission's rulings under 10 C.F.R. §2.714(a)(1) as applied to Section 105c(2).

> abandoned by SCE&G pursuant to the Attorney General's advice] has been affected to some extent, however, by 1969 amendments to South Carolina law dealing with rights of investor-owned utilities and cooperatives to territorial service areas outside municipalities. These amendments impose broad restrictions on competition in retail distribution. In relevant part, these provisions generally grant each utility exclusive rights to a corridor extending 300 feet outward on both sides of all its existing distribution line and later extensions thereof, except where these corridors overlap in other utilities corridor or service area. In addition, the South Carolina Public Service Commission is to demarcate each utility's exclusive retail service area boundaries, giving due regard to the corridors so established.
>
> . . . . . .
>
> With the comparatively large number of distribution co-ops scattered throughout SCEG's service area, there has been considerable scope for retail competition in the past. This will be seriously curtailed in the future, but only as a result of the change in South Carolina law. 48/

Accordingly, the Attorney General has already determined that the kind of territory and service allocations challenged by Central in the instant proceedings do not raise antitrust problems with respect to the Summer licensing proceeding. Moreover, it is evident from the preceeding analysis of recent Supreme Court decisions that the Attorney General would not reach a different view with respect to the 1973 South Carolina statute.

48/ 37 Fed. Reg. 7266 (April 12, 1972)(footnotes omitted) (emphasis added).

The Attorney General's review in 1972 was in every respect a comprehensive and detailed analysis of competition in the areas served by SCE&G. As we have shown, Central's allegations of anticompetitive actions by SCE&G and Santee-Cooper are, in essence, simply a challenge to the validity of the 1973 statute pursuant to which the alleged activities have been conducted.[49/]

Accordingly, there is nothing more for the Attorney General to consider at this time and the matter should not be referred to him by the Commission.

Respectfully submitted,

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March 7, 1979

49/ We note that Central would have the Attorney General consider the provisions of the statute governing competition for 750 KW loads, which it now concedes it drafted and sponsored itself. Central would also have the Attorney General consider "negotiations" on power exchange services and facilities and a "merger proposal." Amended petition at 53. Obviously, §105c does not authorize either the Attorney General or the Commission to consider such nebula as "negotiations" or "proposals."

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
South Carolina Electric & Gas Company, et al.	)	Docket No. 50-395A
	)	
(Virgil C. Summer Nuclear Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "South Carolina Electric & Gas Company's Answer to Central Electric's Amended Petition and Response to Commission Order of January 26, 1979," dated March 7, 1979, in the captioned matter, have been served upon the following by deposit in the United States mail this 7th day of March, 1979:

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