

NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

ALABAMA POWER COMPANY

(Joseph M. Farley Plant,
Units 1 and 2)

Docket Nos. 50-348A
50-364A

ANTITRUST

ORAL ARGUMENT

Place - Bethesda, Maryland

Date - Thursday, 8 March 1979

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Fifth Floor Hearing Room
East-West Towers
4350 East-West Highway
Bethesda, Maryland

Thursday, 8 March 1979

Oral Argument in the above-entitled matter was convened,
pursuant to notice, at 9:30 a.m.

BEFORE:

MICHAEL C. FARRAR, Chairman, Atomic Safety and Licensing
Appeal Board

RICHARD S. SALZMAN, Member

JEROME E. SHARFMAN, Member

APPEARANCES:

S. EASON BALCH, ESQ., and ROBERT A. BUETTNER, ESQ.,
Balch, Bingham, Baker, Hawthorne, Williams & Ward,
Post Office Box 306, Birmingham, Alabama 35201; and
TERENCE H. BENBOW, ESQ., and DAVID LONG, ESQ.,
Winthrop, Stimson, Putnam & Roberts, 40 Wall Street,
New York, New York 10005; on behalf of Applicant Alabama
Power Company.

DAVID HJELMFELT, ESQ., 1700 Pennsylvania Avenue, N. W.,
Washington, D. C. 20006; on behalf of Intervenor
Municipal Electric Utility Association.

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P R O C E E D I N G S

1
2 CHAIRMAN FARRAR: Good morning.

3 Please be seated.

4 We are hearing argument to day in the Farley antitrust
5 proceeding in which both sides have taken appeals from the
6 Licensing Board's initial decisions.

7 On the one hand, the company argues that those
8 decisions went too far in finding situations inconsistent
9 with the antitrust and imposing remedial conditions.

10 It's opponents say the decisions didn't go far
11 enough.

12 We have allocated an hour and a half for each side
13 for oral argument.

14 At this point, would counsel be so good as to
15 identify themselves for the record? Tell us who your associates
16 are and inform us on how you are dividing your argument, both
17 in terms of time and subject matter.

18 Mr. Balch.

19 MR. BALCH: Mr. Farrar, I am S. Eason Balch, a member
20 of the law firm of Balch, Bingham, Baker, Hawthorne, Williams &
21 Ward, Birmingham, Alabama.

22 With me, is my law partner, Mr. Robert Buettner.
23 And I have with me today, also, Mr. Benbow, from Winthrop,
24 Stimson, Putnum & Roberts, and Mr. David Long of the same firm
25 in New York.

1 And we will be undertaking to divide our time, hope-
2 fully about equally.

3 And I will undertake to go first, with the permission
4 of the Board, with Mr. Benbow following me.

5 Unless we have to indicate at this point, I think we
6 would rather reserve just how we utilize our rebuttal time. We
7 expect to use an hour, which I understand has been allotted
8 initially; unless the Board needs some indication, at this
9 point we would prefer to wait and see what happens at the
10 second round if that is satisfactory with the Board.

11 CHAIRMAN FARRAR: That's fine, Mr. Balch.

12 Thank you.

13 Mr. Hjelmfelt.

14 MR. HJELMFELT: I am David Hjelmfelt. I am here for
15 the Municipal Electric Utility Association of Alabama.

16 CHAIRMAN FARRAR: Can you tell me how you have all
17 split up your time?

18 MR. HJELMFELT: I think I have got 20 minutes. I
19 believe Mr. MacGuineas has got 20 minutes. Miss Axelrad, I
20 think, has 15 minutes. And the remainder of time -- for
21 Mr. Whitler.

22 CHAIRMAN FARRAR: All right.

23 What order?

24 MR. HJELMFELT: Mr. Whitler and Miss Axelrad and
25 Mr. MacGuineas; and then I am coming last.

1 CHAIRMAN FARRAR: Okay.

2 MR. MAC GUINEAS: My name is Biard MacGuineas. I am
3 with the firm of Volpe, Boskey & Lyons.

4 I represent Alabama Electric Cooperative. With me
5 here my partners, Bennett Boskey and James C. Hair.

6 CHAIRMAN FARRAR: Thank you, Mr. MacGuineas.

7 Miss Axelrad.

8 Ms. Axelrad. Yes.

9 My name is Jane Axelrad. I am representing the
10 Nuclear Regulatory Commission Staff.

11 With me today is Mr. Joseph Rutberg, Chief Antitrust
12 Counsel at the NRC Staff.

13 CHAIRMAN FARRAR: Thank you.

14 MR. WHITLER: My name is John Whitler, representing
15 the U.S. Department of Justice.

16 Assisting me today is Mr. Melvin G. Berger.

17 CHAIRMAN FARRAR: Thank you.

18 Mr. Balch, go ahead.

XXXX 19 ORAL ARGUMENT OF S. EASON BALCH, ON BEHALF OF
20 THE ALABAMA POWER COMPANY.

21 MR. BALCH: Gentlemen of the Board, I must say that
22 I do appreciate, on behalf of our client, the Applicant, the
23 opportunity which the Board is giving us to come before you and
24 give you a chance to see us and ask us questions, and give us an
25 opportunity to say what we think might be said in addition to

1 the matters we have undertaken to set forth in our brief.

2 We tried as best we could to focus on the principal
3 factual matters and the principal legal arguments that we would
4 present to the Board in our two briefs; but we, of course, are
5 cognizant of the complexity of this case and the multitude of
6 issues and realize that the Board may well find this opportunity
7 helpful to all parties.

8 I would like to suggest first that the brief of the
9 Department of Justice and Intervenors seems to be arguing that
10 the Appeals Board decision in the consumers' case resolves the
11 liability issues in the case against Applicant.

12 They also rely heavily upon the Appeal Board decision
13 in the consumers' case to support their claim for a more drastic
14 remedy than that prescribed by the hearing tribunal in this
15 case.

16 Counsel for Applicant endeavored in April, in their
17 April '78 brief, to point up many of the significant distinctions
18 between the facts of record, in the consumers' case, and the
19 facts in this case.

20 Today, we hope to use the additional opportunity
21 provided by the Board to put this case in a true perspective,
22 and hopefully to clarify matters that are of decisional
23 significance.

24 This case arose out of an attempt by Applicant to
25 secure a license to operate and construct -- construct and

1 operate two nuclear units, which, without dispute, are needed
2 now and will be needed in the foreseeable future to meet the
3 demands for electric power imposed by the segment of the public
4 which Applicant has a duty to serve.

5 The Board, in the consumers' case, page 6NRC 1100,
6 pointed out that except as is reasonably necessary to achieve
7 the goals of insuring small utilities fair access to nuclear
8 power, and seeing that activities under nuclear license neither
9 create or maintain an anti-competitive situation in the antitrust
10 review under this section, may not be employed to restructure
11 the electric utility industry.

12 We believe the Board is on target with that comment,
13 and we think that that thought and that guideline should be
14 brought forward to the decision aspects of this case.

15 The main thrust put forth by the Applicant's opponents
16 relates to the impact of the Applicant on the bulk power supply
17 market. There was a lot of evidence in the record relating to other
18 aspects, other markets, but the main thrust of the case related
19 to the wholesale -- or as may be complemented by some regional
20 power exchange market.

21 And the case, in the final analysis, focused primarily
22 upon the situation of Alabama Electric Cooperative and its
23 relationship to Alabama Power Company.

24 I realize that we still have with us in this case the
25 contentions by the municipalities; but, as noted in the Consumers'

1 decision, it is is difficult for one or an entity which has no
2 generation,- to become involved in the bulk power wholesale
3 supply market, however you might view that market.

4 We think that the Board below, try as I know it did -- and
5 I have the utmost respect for that Board; they were so patient
6 in the attention they gave to our case -- and I have to say,
7 in my whole legal career, I don't think I have ever been afforded
8 a better opportunity to try to put forth the factual matters
9 and the contentions that we felt like should be urged on behalf
10 of our client.

11 But, try as they might, I think they failed to put
12 into perspective some of the real considerations that are
13 involved in the market situation in the State of Alabama,
14 wherein the Applicant, our client, operates.

15 I think they failed to take proper account of the
16 important history that involves the advent of the Tennessee
17 Valley Authority and its posture in the state even today.

18 I think they fail to take proper persepective of the
19 resource of power resources marketed by Southeastern Power
20 Administration, which are referred to as SEPA.

21 But let me move on into what I think the Board most
22 importantly should focus on as this case rests today, and that
23 has to do with Alabama Electric Cooperative and its relationship
24 with Alabama Power Company, which I still feel appeared to be
25 the central thrust of the whole case.

1 CHAIRMAN FERRAR: Mr. Balch, before you get into that,
2 let me ask you a question.

3 You have mentioned a couple of times so far the
4 regional power exchange market, the market that the Licensing
5 Board found not to exist, and which we found to be relevant
6 market, in Midland.

7 What facts or industry practices are different in
8 Alabama in that respect than they are in the territory that
9 was involved in the consumers' case?

10 The reason I ask you this, if you argue that the
11 retail markets are different, you have different facts in each
12 city, whether it is Cleveland or Consumers Power or Alabama, and
13 you can argue from those different facts that a different result
14 should obtain.

15 But I have a little more difficulty seeing the
16 existence of different facts on this power exchange market. Can
17 you point me to any different facts, or are you just arguing
18 that Midland is wrongly decided?

19 MR. BALCH: Well, I think that Midland would have to
20 be decided differently on the Alabama facts. I am not quarreling
21 with the decision that this Board -- or the Appeal Board, rather
22 -- reached in the Midland case. I could probably argue against
23 some features of it, but I don't think I need to do that here.

24 I think what we have to do is see whether or not the
25 principles that the Board did undertake to adopt in the Midland

1 situation have application in the case here.

2 And with respect to that, I would be pleased to try
3 to point out the differences.

4 One, as the Board recognized there, there is no
5 coordination services market that has any meaning or any applica-
6 tion to entities without generation.

7 So, in the first place, I think we have to recognize
8 that as far as the municipal intervenors are concerned, there
9 is no market you need to try to identify or define as relates
10 to them, because none of the municipal intervenors have
11 generation.

12 And that is a contrast with the situation in the
13 Consumers' case.

14 The Appeal Board, in the Consumers' case, seemed to
15 focus primarily on the distinctions between the obligations and
16 the entitlements under wholesale or a firm power supply
17 arrangement, and the obligations and the entitlements in what
18 they would denominate as a market, a coordination of services
19 market, involving a whole array of power supply inputs services.

20 There are some important distinctions. In the first
21 place, as the witness that was put forth by the opponents to
22 undertake to establish the Regional Power Exchange Market, as it
23 was called in the Alabama case -- or the Coordination Services
24 Market, as called in the Midland case -- was Dr. Wein.

25 Dr. Wein admitted he knew nothing about the situation

1 at Alabama. He made no studies of the transactions. He made
2 no studies of what had actually moved in the way of power
3 exchanges. He made no study of the characteristics of Alabama
4 Electric Cooperative or of Applicant, or any of the other
5 entities.

6 All he had done is looked at a bundle of contracts
7 that had been drawn from the files of the Federal Power
8 Commission and handed to him to look at.

9 He didn't know the essential character of the
10 transactions, but in his ignorance, or lack of information,
11 nevertheless he put forth a notion that the primary market,
12 or the primary resources, or the primary elements of this
13 so-called Regional Power Exchange Market come from the
14 Southern Company Interchange Contract.

15 And he even sort of was bringing in the geographical
16 aspect of that putative market into the southern company pool
17 situation.

18 I think he referred to it as forming the center of
19 gravity for that market.

20 Now, let's look at this Southern Company Interchange
21 Contract. The first thing, an examination and understanding of
22 that contract will lead to the conclusion that the overwhelming
23 magnitude or the overwhelming preponderance of the transactions
24 that take place under that contract are firm power transactions.

25 The respective participants in that arrangement have

1 no right to discontinue the service. The short companies have
2 a contractual entitlement to the services.

3 Yes, the contract only runs for a year at a time in
4 form, but the obligation goes on as long as the respective
5 companies are short or long. If they revise the contract it
6 would be required to make sense out of the arrangement every
7 year to fit it into the changes in loads and changes in
8 resources.

9 But a short company, under that contract, has a full
10 entitlement to the capacity resources dedicated under that
11 contract for the term of the contract.

12 MR. SALZMAN: Mr. Balch, let me see if I understand
13 this correctly. The southern companies -- that is, the four
14 holding companies, the four operating companies -- each of
15 them have independently-owned generating facilities.

16 MR. BALCH: Correct, sir.

17 MR. SALZMAN: But through a service company, they
18 are all operated as if it were one large company?

19 MR. BALCH: Well, I would say the service company
20 has a facility and has a staff that provides a very valuable
21 service in coordinating their operation. Each operates
22 independently. Each operates under its own management, and
23 the service company performs a very sophisticated service,
24 having to do with economic dispatch.

25 MR. SALZMAN: Let me ask this. Not all the generating

1 plants of the Southern Company are equally efficient as baseload
2 operators, are they?

3 MR. BALCH: Absolutely not. They have great diversi-
4 ties in efficiency.

5 MR. SALZMAN: Does one of the services the service
6 company performs see to it that power is drawn -- baseload
7 power from the most efficient power plants and not from the
8 least efficient?

9 MR. BALCH: From the most efficient plants is the
10 objective, and they work hard trying to achieve that, subject
11 to protection of area reliability and subject to conservation
12 of coal stockpiles.

13 For example, in a time of shortage of fuel, as
14 occurred last year, it became necessary for the respective
15 operating companies, as they saw fit, to withhold respective
16 plants from the centralized dispatch.

17 MR. SALZMAN: You say that is subject to a yearly
18 revision.

19 MR. BALCH: The contract is subject to yearly
20 revision, at which time the parties come in and restate and
21 recomputate their firm power entitlements and their firm
22 obligations to supply power to the others.

23 MR. SALZMAN: Well, putting aside the fact that
24 this application is good for one year, how does this distinguish
25 from the normal economy energy transfers that you find in many

1 other regional exchanges.

2 MR. BALCH: Of course, what we call the economy
3 energy transfers, which are just energy transfers, they have
4 no capacity entitlement at all, they do occur, and they are
5 just opportunity transactions that occur. They go on all the
6 time. They are very minor in the overall context of the
7 southern company pool.

8 And, yes, they do take place, and their economy
9 split the savings --

10 MR. SALZMAN: . No, no. My question to you is why --
11 you know, if you step back from this program, why isn't the
12 program that uses the most efficient generating plants, the maximum
13 capacity, plants belonging to different companies, differently
14 regulated -- any different than an independent -- you know,
15 having two independent companies agree to do the same thing
16 with their plants.

17 That is, one with the most efficient plant operates,
18 and the one with the most inefficient plant turns it off, and
19 they split the savings.

20 There's no real difference is there, other than you
21 run your contract for a year?

22 MR. BALCH: If independent companies had the same
23 contract, the effect would be the same.

24 MR. SALZMAN: I'm not talking about the same contract.
25 I'm suggesting there's nothing special about this arrangement

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1 other than that the four companies have agreed to contract to
2 operate together.

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gsh 1 MR. BALCH: The thing that is special about it is
2 that they have an ongoing relationship which is more or less
3 mandated by the Securities and Exchange Commission under the
4 public utility holding --

5 MR. SALZMAN: No, no, Mr. Balch. Does the
6 Securities and Exchange Commission mandate that you do this,
7 or are you required to do this if you wish to be a public
8 utility holding company?

9 MR. BALCH: Well, let's look at that question. Of
10 which comes first --

11 MR. SALZMAN: No. There was no obligation of these
12 four companies was there, to join together and form a public
13 utility holding company? You weren't required to take that
14 step. That was an independent business judgment.

15 MR. BALCH: Well, of course, in the application of
16 the death sentence of the Public Utility Holding Company Act,
17 the Southern Company, as a registered holding company, did
18 arise out of that situation. And I don't know how to answer
19 that question.

20 I suppose if the four operating companies could some way
21 have managed not withstanding the stockholder -- the
22 stockholders' position of Commonwealth and Southern said
23 we want to each go our separate way and not participate in
24 a holding company, I suppose that that could have happened.

25 MR. SALZMAN: Does the Securities and Exchange

gsh 1 Commission require you to serve any particular customer with
2 any amount of energy or to build any particular units, or to
3 run your power lines in any particular manner?

4 MR. BALCH: No, it doesn't.

5 MR. SALZMAN: Does the Securities and Exchange
6 Commission get down to the nuts and bolts of how you operate?

7 MR. BALCH: Well, in the first place, there can be
8 no profits among affiliates.

9 MR. SALZMAN: No, no. I'm talking about how you
10 operate, generate, transmit, and shift your electricity about.
11 That's not controlled by SEC. In fact, Mr. Balch, in the
12 South Texas case, wasn't it patently obvious that the SEC
13 didn't even know how the South Texas Company was operating?
14 Here is this statute which supposedly requires all these
15 companies to operate as a unit, and in fact, the one in Texas
16 wasn't hooked up to the others.

17 MR. BALCH: I don't know what the SEC knew about the
18 Texas situation. If you have made some investigations,
19 obviously, you may know. I do not know.

20 I do know that in the case of the Southern Company,
21 there was a very thorough-going investigation of the physical
22 interconnections between the two parties, the methods that
23 they had adopted to engage in joint planning, to engage in
24 coordination of their load dispatching, to engage in their —

25 MR. SALZMAN: For what purpose?

gsh

1 MR. BALCH: — different capacity transaction.
2 All other exchanges?

3 For what purpose?

4 MR. BALCH: First, if they had not done that, they
5 could not admit the test under the Holding Company Act to
6 form holding companies --

7 MR. SALZMAN: And this investigation was performed when,
8 sir? Last year?

9 MR. BALCH: Sir?

10 MR. SALZMAN: The investigation was last year, sir?

11 MR. BALCH: The investigation actually went on from
12 the late '30s until 1947, when the Securities and Exchange
13 Commission issued its release approving the formation of
14 the Southern Company system.

15 MR. SALZMAN: Since 1947, they have investigated
16 you thoroughly. Every year since '47?

17 MR. BALCH: I didn't say that.

18 MR. SALZMAN: In other words, they haven't
19 investigated you for 20 years.

20 MR. BALCH: Every year. Every year there is a report
21 one or more reports to the Securities and Exchange Commission,
22 setting forth the method in which the companies are
23 interrelated and work together.

24 This happens through the registration of the
25 securities.

gsh

1 MR. SALZMAN: What I'm driving at here is that for
2 the purposes of the majority of monopolization, you would
3 be protected, I would think, if you were acting the way
4 you were in specific manners by the requirement of a
5 Government agency.

6 I assume that that may not be entirely so. But it
7 seems to me that your operations, your day-to-day operations,
8 how you coordinate the prices you charge, who you deal with
9 and who you won't deal with, are not controlled in the first
10 instance, by the SEC. They are business judgments. But you
11 merely report to the SEC.

12 MR. BALCH: No. But I would say if the operating
13 companies in the Southern Company System failed or ceased
14 dealing with one another in an interconnected operation, and
15 participation in the type of planning and power exchanges
16 and coordinated planning and operation, if they ceased
17 doing that, I think that a serious question would be raised
18 as to whether or not they should continue to be recognized
19 as a holding company.

20 MR. SALZMAN: I think you're perfectly right, Mr.
21 Balch. You may be absolutely right, Mr. Balch. The question
22 is whether because you must report your business activities
23 and how you operate to the SEC and to their satisfaction
24 immunizes you from anti-trust liabilities if those business
25 operations, in fact, manifest an attempt to monopolize the

gsh 1 market in one state or another. And as far as I can see,
2 Mr. Balch, under the cited cases, the answer is clearly they
3 don't.

4 MR. BALCH: I didn't know I had taken that position,
5 Mr. Saltzman. What I am saying is -- I thought your question
6 was --

7 MR. SALTZMAN: My question goes to the argument you
8 raised in your brief. One of the big points you make is that
9 you are pervasively regulated. And one of the pervasive
10 regulators is the SEC.

11 I find it difficult to follow that.

12 MR. BALCH: Well, Alabama Power Company is, indeed,
13 pervasively regulated.

14 MR. SALTZMAN: Is it more regulated than Consumer
15 Power Company?

16 MR. BALCH: Yes.

17 MR. SALTZMAN: In what way, sir?

18 MR. BALCH: Well, the record in this case shows
19 more regulation than was apparently found by the board in --
20 the appeal board in the Consumers case. In the first place,
21 Consumers is not subject to the SEC under the Holding Company
22 Act and the whole body of the Holding Company Act doesn't
23 apply.

24 The next thing, the record in this case is crystal
25 clear that Alabama Power Company can't change a rate, can't

gsh 1 merge with anybody, can't acquire another system, can't
2 issue any securities. and can't abandon its service. Can't
3 do a number of other things. It can't enter into a contract
4 with another wholesale supplier. It can't enter into any
5 arrangements having to do with territorial allocations without
6 the approval of the Alabama Public Service Commission.

7 MR. SALTZMAN: Consumers Power, too. They couldn't
8 do that, either.

9 MR. BALCH: I don't know to what extent that was shown
10 in Consumers. But I know in this case the record is replete,
11 and all you have to do is look and see what has been happening
12 in recent —

13 MR. SALTZMAN: Mr. Balch, in deciding whether you
14 could enter into any contract, abandon any territory, or cease
15 to serve any customer, does the Alabama Public Service
16 Commission decide or take into consideration federal
17 anti-trust aspects of that action?

18 MR. BALCH: I can't answer that.

19 MR. SALTZMAN: Isn't there a decision of the Alabama
20 Public Service Commission that says it does not? It's quoted
21 in the brief of your opponents>

22 MR. BALCH: There was a quote from some case where the
23 Alabama Public Service Commission at one time says it doesn't
24 sit as an anti-trust tribunal. And I never suggested that it
25 sits as an anti-trust tribunal. It is certainly not an

1 anti-trust tribunal. It is not a federal court. It is not
2 an agency such as the agencies within this commission. But
3 whether it considers anti-competitive matters and competitive
4 matters, the answer is it has and does and will.

5 And the record in this case is replete.

6 MR. SALTZMAN: Does that insulate you from any
7 anti-trust liability?

8 MR. BALCH: I don't believe we are contending that
9 Applicant is immune from anti-trust liability. If the
10 board has the impression that we are contending that, I would
11 like to state here and now we are not contending that.

12 What we are saying is the fact of the regulation,
13 the character of the regulation, the magnitude of the
14 regulation makes a great difference in the way you should look
15 at Applicant in undertaking to apply the anti-trust laws.

16 In the first place, I'll go to the very matter of
17 monopoly power itself. And this board pointed out in
18 the Consumers case, relying upon various settled law that in
19 order to have monopoly power, there must be a power to control
20 prices and, as otherwise explained, to extract monopoly
21 profits. Or it must have power to exclude competitors.

22 We have demonstrated in the record in this case,
23 by both a law witness by reference to law, by description of
24 what has happened over the years in the administration of
25 the laws of the State of Alabama that, indeed, Alabama Power

gsh

1 Company has no control over its prices.

2 MR. SALTZMAN: Who has?

3 MR. BALCH: The Alabama Public Service Commission
4 if it's a retail rate. If it's a wholesale rate, it is
5 controlled by now the Federal —

6 MR. SALTZMAN: Isn't that true about every public
7 utility commission?

8 MR. BALCH: I don't know about every public utility.
9 Not every public utility as to Alabama Public Service
10 Commission. Only the Alabama Public Service Commission, it
11 has authority for only the utilities operating in the State of
12 Alabama.

13 MR. SALZMAN: Didn't the Michigan Public Service
14 Commission have authority over the retail rates in Consumers?

15 MR. BALCH: I assume it did have some authority.

16 MR. SALTZMAN: You think that insulates you?

17 You don't suggest the rate, make up the
18 rate yourself?

19 MR. BALCH: I'm suggesting to the effect that this
20 board finds by a surrogate method of looking at market shares
21 or however. If it finds that Alabama Power Company has the
22 control over its rates and it can set its own rates and it
23 has the power to do that, it is a finding that runs contrary
24 to the overwhelming evidence and law in our case.

25 MR. SHARFMAN: Mr. Balch, may I ask you a question

gsh

1 on that?

2 As I recall finding of the licensing board, it
3 found that just about every time Alabama Electric Cooperative
4 wanted to build its own generating plants, the Alabama Power
5 Company went ahead and lowered its wholesale rate significantly
6 so as to discourage Alabama Electric Cooperative from building
7 the plant.

8 And that suggests to me that the company did have
9 the kind of monopoly power that we are now in the other
10 cases talking about.

11 MR. BALCH: In the first place, I don't believe the
12 board found that. I realize that you will find that argued in
13 briefs on the other side.

14 I think what the board did find, that in the
15 occasions referred to by -- it was mainly Alabama Electric
16 Coop, but also, to an extent, by the Department of Justice,
17 that on the occasions when Alabama Power Company reduced its
18 rates, it was as a product of negotiation of being, in effect,
19 ratcheted down by the Rural Electrification Administration.
20 And it was not done for the purpose of preventing Alabama
21 Electric Cooperative from building any generation.

22 The findings are clear on that from the board that
23 didn't find that.

24 MR. SHARFMAN: I understand. The ultimate finding was
25 that they didn't find the purpose. But what I am saying is

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1 that when the crunch came and you were pressed to do it,
2 A, you could do it, and B, it had the effect on these two
3 occasions of discouraging AEC from building generator
4 capacity.

5 MR. BALCH: I don't think there's any finding to that
6 effect from the board. I submit there is no finding to that
7 effect. The board found to the contrary.

8 If you're talking about the couse rate --

9 MR. SHARFMAN: I'm not talking about the couse rate.
10 I'm talking about those first two situations that were
11 mentioned.

12 MR. BALCH: Well, the first situation, the rate
13 increase was put into effect before Alabama Electric
14 Coop was even created as a corporation. That was the first
15 one.

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1 CHAIRMAN FARRAR: You say that as though it really
2 makes a difference. I mean the 30 days before it formally
3 came into existence, the rate was changed, and that means
4 that there could in no way be any connection between the two.

5 MR. BALCH: I'm not just saying there was no
6 evidence. There was a connection. You don't find any
7 evidence in the record. And I don't know of any.

8 MR. SALTZMAN: You don't think we can draw something
9 from that coincidence?

10 MR. BALCH: I don't know.

11 CHAIRMAN FARRAR: I take it your executives -- that
12 this thing 30 days later didn't catch them all by surprise?

13 MR. BALCH: All I'm saying is that I think this
14 board should recognize the evidence in this case shows that,
15 generally, over the whole period, from the '40s on down to
16 1965, all the movements were downward in rates. The company
17 was enjoying economies of scale. Improvements were being made
18 in the technology, and rates were going down.

19 And Alabama Power Company, over the years, was
20 involved in a negotiating relationship, not only with
21 Alabama Electric Cooperative, but perhaps in a sense, more
22 importantly, with representatives of the Rural
23 Electrification Administration, which was in a constant --
24 engaged in a constant endeavor to get the rates down.

25 MR. SHARFMAN: I understand that, Mr. Balch. But the

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1 peculiar timing of it and the effect that it had on Alabama
2 Electric Cooperative, suggests to me that your client had,
3 A, the power to control prices, and B, the power to split
4 competition.

5 MR. BALCH: I don't know which one you are talking
6 about, Mr. Sharfman. If you could be more specific and tell
7 me which occasion you're talking about.

8 MR. SHARFMAN: I left my notes in my office.

9 MR. BALCH: I will try to help you. If you're talking
10 about the 1947 episode, I think you will find the record
11 shows very clearly, very clearly that it was after the case
12 had been determined adverse to the position of Alabama
13 Electric Cooperative before the director of finance.

14 It had been denied approval of the loan it was
15 seeking to have approved that the company put into effect the
16 rate reduction.

17 I don't see how you can say that it was done to
18 obviate an REA loan.

19 MR. SHARFMAN: I didn't say it was done to obviate
20 an REA loan.

21 CHAIRMAN FARRAR: His original question was just
22 that the timing made it look like they did have the power
23 in effect to change their rates when they felt like it.

24 MR. BALCH: Well, they file rates. I mean, I don't
25 make any — there's no question about it. Alabama Power

7sh 1 Company, in each of those situations, voluntarily filed the
2 rates. The rates would not go into effect without approval
3 of the Alabama Public Service Commission.

4 MR. SALTZMAN: The Alabama Public Service Commission
5 didn't order you to lower your rates?

6 MR. BALCH: Well, in a sense it did on some of the
7 occasions, back when Gordon Persons who had --

8 MR. SALTZMAN: Realistically?

9 MR. BALCH: Realistically, it was the influence of
10 Gordon Persons and the heavy influence of Gordon Persons
11 that probably produced the timing of some of those rate
12 decreases. No question about that.

13 Gordon Persons was a very strong political figure
14 in the State of Alabama. He had an engineering company -- and
15 this is all on the record -- which had built a number of
16 lines for the electric cooperatives. He had been director
17 of the rural electrification in the State of Alabama when
18 it was an administrative agency back in 1935 and he had
19 some continuing role.

20 He was very friendly to the cooperatives. He was
21 the one who coerced the couda rate. And yes, the record
22 contains correspondence which shows that Governor Persons was
23 saying, you've got to do something about getting the rates
24 down.

25 So I couldn't stand here --

7sh 1 MR. SALTZMAN: Who decided whether you were, in fact,
2 going to put them down or not? You could not say, Governor,
3 we're not going to do it. It's unjustified?

4 MR. BALCH: I suppose we could have said that, but
5 I just stated, I think there was some justification for
6 some of the rate changes because costs were going down. The
7 company was decreasing its rates generally.

8 MR. SALTZMAN: Well, Mr. Balch, my point is this
9 business decisions -- particularly business decisions of
10 regulated utilities, are made in the consideration of
11 enormous numbers of things. And they include political
12 pressures from those who run the state government, can change
13 the state laws and make them less favorable to the company.

14 But in the long run, isn't it true that the rates
15 that you're going to charge and the rates that you do place
16 into effect are initiated by the company? And you get an
17 approval from the regulated utility.

18 MR. BALCH: The record in this case is replete of
19 repeated attempts by Alabama Power Company to put into effect
20 rates which it was denied. And all you have to do is look
21 at the record, at what is going on down in the State of
22 Alabama today.

23 The record in the Public Service Commission
24 proceedings down there show at a time when Alabama Power
25 Company can't even issue preferred stock, and the record shows

7sh 1 there were other times, couldn't even issue a bond because
2 it didn't have the coverage requirements.

3 In the present case, return on equity is down
4 below 4 percent when the prime rate is approaching 12 percent.
5 And still, Alabama Power Company can't put into effect its
6 rates.

7 In light of that — and it's a matter of public
8 notice or public knowledge that Alabama Power Company has had
9 to shut down the construction of Farley 2 — I'm sure that
10 this board will take judicial notice of that because it's
11 a matter that has been brought clearly to the attention of
12 the Nuclear Regulatory Commission.

13 The second unit is 90 percent complete, but has
14 been shut down. The construction forces have been laid off.
15 Miller 2 has been shut down. Harris Hydroproject, and the
16 company is in a distressed financial circumstance.

17 It is having a problem meeting its cash flow.

18 MR. SHARFMAN: Why is that?

19 MR. BALCH: Because it does not have the authority
20 to put into effect rates that would enable it to secure
21 sufficient revenues to make the company sufficiently strong
22 to conduct its operations and carry on its construction
23 program.

24 MR. SALTZMAN: I suppose that's not the judgment of
25 the Alabama Public Service Commission.

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1 MR. BALCH: Well, the Alabama Public Service
2 Commission said yesterday in an order that Alabama Power
3 Company is in distressed circumstances. It was approaching an
4 emergency rate relief request and it says, Alabama Power
5 Company is in distressed circumstances.

6 MR. SALTZMAN: I take it the Public Service
7 Commission will let you raise your rates?

8 MR. BALCH: The company is seeking a 33 percent
9 increase and it granted a 9-1/2 percent increase on an
10 emergency basis the day before yesterday.

11 The order came out yesterday. And the order is
12 saying the rationale for that is that it's within the
13 President's guidelines. The 9-1/2 percent granted yesterday
14 will not enable the company to restore its construction
15 program. There's no question about it. This is fact; it's
16 not fiction. It's not something I am just coming up here and
17 saying.

18 It's true. And the record in this case is replete
19 with testimony from various witnesses, including Mr. Farley,
20 the president, showing where the company has sought rate
21 increases at a certain level and has been denied those
22 increases to the detriment of the company's opportunity to
23 issue bonds and issue preferred stock and continue
24 financing.

25 And any conclusion by this board to the effect that

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1 Alabama Power Company has the unfettered authority or has
2 the control of increasing its rates, is completely unfounded.

3 CHAIRMAN FARRAR: I think the question arose in terms
4 of the power years ago to decrease their rates when it
5 suited them.

6 MR. SHARFMAN: When it served to exclude competition.
7 I was referring to the 1941 and '46 rate reductions
8 discussed on pages 908 through 911.

9 MR. BALCH: But the board below held to the contrary.

10 MR. SHARFMAN: I know they did. I was suggesting to
11 you that maybe the board below was in error.

12 MR. BALCH: I am suggesting to you that they were
13 not in error and there's no question about it that they
14 decrease came about from ongoing negotiations that were taking
15 place between Alabama Power Company and AEC and the REA
16 administration representatives. And those negotiations were
17 going on all the time and the rates generally were being
18 decreased. The retail rates were being decreased. Up until
19 1965, I think, the record shows Alabama Power Company had
20 effected by its filings -- some they were called upon to do,
21 some they initiated, over 300 and something rate decreases.

22 Each one of them had to be approved by the Alabama
23 Public Service Commission.

24 MR. SALTZMAN: Your argument also goes to wholesale
25 rates regulated by the Federal Power Commission?

7sh 1 MR. BALCH: Absolutely, sir. And Alabama Power
2 Company has not been able to put into effect rates that it
3 has undertaken to put into effect by filings with the Federal
4 Power Commission without going through lengthy proceedings,
5 hearings and participation. And I don't know of a single
6 one that was granted as filed.

7 There has been some reduction, I believe, in all
8 of them. Some of them resulted in settlements.

9 MR. SALIZMAN: I take it your position, it has to
10 be the decision -- the City of Mishawaka case handed down
11 recently is wrong.

12 MR. BALCH: I'm not saying it's wrong. It doesn't
13 fit the facts in this case.

14 MR. SALIZMAN: The argument was their rates were
15 all approved.

16 MR. BALCH: There was no determination in the
17 City of Mishawaka case that I know about that says that
18 Alabama Power Company can put into effect its wholesale
19 rates without the approval by the --

20 MR. SALIZMAN: You missed my point, Mr. Balch.
21 The Federal Power Commission also set the wholesale
22 rates, or required that you had to have the commission's
23 approval of the wholesale rates of the utility in that case,
24 too. But that didn't save the utility from being found to
25 violate the anti-trust law, or from being found to have

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1 monopoly power in the wholesale market.

2 MR. BALCH: I haven't suggested that regulation by
3 FERC constitutes an immunity constitutes an immunity from
4 the anti-trust law.

5 MR. SALTZMAN: You're suggesting the same in both
6 cases.

7 MR. BALCH: No. I am suggesting that if there is
8 a federal agency or a state agency which has the ultimate
9 control over prices, that Alabama Power Company cannot, as
10 a matter of definition, have the power to control its
11 prices.

12 MR. SALTZMAN: You'll have to take one more step
13 beyond it, because if what you say is true, then Alabama
14 Power Company cannot have monopoly power and it cannot be
15 found in violation of anti-trust laws on the charge of
16 Section 2 of the Sherman Act. And you know as well as I
17 do that there are any number of companies that holds to the
18 contrary.

19 MR. SHARFMAN: Otter Tail, specifically, is very much
20 a point on that.

21 MR. BALCH: A lot of difference between Otter Tail --
22 I realize that I'm getting off on what I intended to try to
23 present to you, gentlemen, this morning, but I understand your
24 interest and concern.

25 And all I will say is on the facts of this case,

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1 there is no question about it, but Alabama Power Company
2 cannot change its rates without the approval, if it be a
3 retail rate, of the Alabama Public Service Commission.

4 MR. SHARFMAN: Sir, that's absolutely clear, but that
5 was true in the case of Otter Tail Power Company, as well as
6 in the Supreme Court, how they violated Section 2 of the
7 Sherman Act.

8 MR. BALCH: There are a lot of differences in the
9 Otter Tail. Minnesota didn't even have rate regulation. That
10 was the main state in which Otter Tail operated and --

11 MR. SALZMAN: Also South Dakota did.

12 MR. BALCH: I say the main state, and that's where
13 Elbow Village, the case came up in Otter Tail, which is in
14 Minnesota.

15 I would say that that's a distinction. Alabama
16 Power Company didn't operate any place where it's rates are
17 not subject to regulation.

18 MR. SALZMAN: How about Cantor. The electric utility
19 lightbulb rates in Cantor could not be changed.

20 MR. BALCH: That wasn't a utility service we were
21 talking about.

22 MR. SALZMAN: You're arguing the fact that their
23 control by a government agency means you can't be found to
24 have monopoly power. But the contrary was held in Cantor
25 There was no doubt, was there, that the rates of the Detroit

gsh 1 Edison Company could not be changed without the Commission?

2 MR. BALCH: I understand what was said in the
3 Cantor case, it dealt with the sale of lightbulbs, not with
4 utility services. It didn't deal with the sale of
5 electricity, which is a matter affecting the public interest,
6 that the Alabama Public Service Commission has been created
7 to regulate under state law.

8 I don't know how to answer the question you are
9 putting any further than I have. I just say the record
10 shows that Alabama Power Company can't change its rates
11 without approval of the Alabama Public Service Commission.

12 CHAIRMAN FARRAR: Okay. If that were to establish
13 that you don't, in fact, have the power to control prices,
14 that still doesn't get you off the hook. Right? There are
15 other ways that you should exclude competition.

16 MR. BALCH: That's right. We say we can't exclude
17 competitors. We can't exclude the municipal operators. They
18 have been operating in Alabama for — since the 1920s. The
19 cooperatives have sprung up and come into being. There are
20 30 or something of them in the state.

21 Alabama Electric Cooperative, which started out in
22 1944 taking over a very small property, operating in, I
23 think, five counties down in Southeast Alabama from old
24 Alabama Water Service Company. They had about 8000 megawatts
25 of generation. They had a peak load of about 10,000 kilowatts

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1 and they operated with about 150 miles of lines. They have
2 grown and expanded into nine additional counties in Alabama,
3 plus two counties into Florida they have expanded --

4 CHAIRMAN FARRAR: That doesn't mean you have been
5 unsuccessful in excluding them from expanding in other places,
6 does it?

7 MR. BALCH: I think we have been very successful
8 in helping them expand, if I might put it that way. We have
9 supported them, coordinated with them since 1944.

10 As I said, they had only 8000 kilowatts of capacity
11 the first year they were in operation, two little hydro units
12 and some sort of diesel, a steam capacity. And they didn't
13 have enough capacity to serve their loads. And Alabama
14 Power Company supplied the deficiency power, supplied it
15 readily upon request upon approval of the Alabama Public
16 Service Commission and, incidentally, upon approval of REA
17 too from Alabama Electric standpoint.

18 They have moved down the pike since then of every
19 time Alabama Electric Cooperative made a move in its need for
20 delivery points, interconnection points, as it added new
21 generation, they added more than double their capacity in
22 1955. They again doubled it in 1959. In the early '60s they
23 picked up varying amounts of capacity, varying from 22,000
24 to 27,000 from Southeastern Power Administration.

25 CHAIRMAN FARRAR: You're not quarreling with the

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1 licensing board's findings in the upper 90 percent about
2 your control of the market, are you?

3 MR. BALCH: Yes, we're quarreling with it, yes.
4 Which market are you talking about? You're talking about
5 the wholesale market?

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1 If you are talking about the wholesale market, we
2 certainly don't have any control over the portion of the market
3 wrapped up in 30- and 40-year contracts that Alabama Electric
4 Co-op entered into with the municipalities which are its
5 members, and with the distribution cooperatives which are its
6 members. Those members are all committed for 35 years to
7 take their power from Alabama Electric Cooperative. And yet
8 the Board imputed those markets to Alabama Power Company.

9 MR. SALTZMAN: Mr. Balch, does Alabama have
10 municipal franchises? Does your company get a franchise to
11 serve a municipality for a fixed number of years?

12 MR. BALCH: Yes, sir. And except for about 9 per-
13 cent of the loads, all of them are under perpetual franchises.
14 And of the 9 percent, it involved the cities of Tuscaloosa,
15 and the City of Selma, the two largest cities that were under
16 limited-term franchises, and both of those cities have issued
17 new franchises that run into around 1906 or 1907 -- I mean,
18 2006 to 2007.

19 MR. SALTZMAN: How does the -- Why doesn't that
20 long-term franchise that you've got to serve a city compare
21 roughly to Alabama Electric Power Company's -- I mean
22 cooperatives' 30-year service contract?

23 MR. BALCH: They are two different things. The
24 franchise is a right to use the city's streets, and the
25 obligation to serve the inhabitants of the city in exchange

1 for consideration of the use of the streets. There is no
2 contractual obligation on the franchise that puts anybody to
3 the obligation to buy power from anybody else.

4 MR. SALTZMAN: It isn't an exclusive franchise? It
5 doesn't keep anybody else out?

6 MR. BALCH: They're not exclusive. In Alabama,
7 no municipality under the constitution of 1901 can issue an
8 exclusive franchise. All are non-exclusive.

9 MR. SALTZMAN: Can any of those cities condemn for
10 fair market price?

11 MR. BALCH: No, sir; none of them can.

12 MR. SALTZMAN: That gives you a certain advantage,
13 doesn't it?

14 MR. BALCH: I would say the cities cannot condemn
15 Alabama Power Company's properties, because of course if it
16 should be caught in a position of a franchise having expired,
17 the company wouldn't have any right to operate on the
18 streets, and I don't know how you'd work out that situation.

19 MR. SALTZMAN: If the franchise expires, could the
20 municipality replace you?

21 MR. BALCH: I suppose it could be done.

22 MR. SALTZMAN: Isn't there a potential for competi-
23 tion from those municipalities?

24 MR. BALCH: The record in that case is very clear.

25 One -- as I have just said, the record shows that the

1 overwhelming number and magnitude of the franchises are
2 unlimited as to duration.

3 As to the likelihood of municipalities in that
4 context going into the power supply business was addressed by
5 Mr. St. John and the fact witness put forth by the Department
6 of Justice, and he also is the main functionary of MEUA, and
7 he was asked questions while on the stand: What is the likeli-
8 hood of Gadston going into the power supply business, Alabama
9 Power Company having an unlimited franchise in Gadston in
10 competition with Alabama Power Company?

11 He said, "Very nil, very small."

12 MR. SALTZMAN: Doesn't it suggest the possibility
13 of monopoly power to you?

14 MR. BALCH: But it suggests that there is a natural
15 monopoly there, yes. There is no question about the natural
16 monopoly characteristics of local distribution and operation
17 in a city like Gadston. But he said, the same thing as to
18 Gadston, he said it as to Birmingham, he said it as to Mobile,
19 and he then was asked the question: What about the other
20 cities in the state? Would the answer be the same?

21 And he said, "yes."

22 MR. SALTZMAN: So you are the possessor of a
23 natural monopoly, then. I'm not asking you whether you
24 monopolize under the law -- violate the law. I am asking whether
25 you are a natural monopoly power.

1 MR. BALCH: I would say the Alabama Power Company
2 and the cities in which it operates does enjoy something, and
3 I believe any of the writers or the thinkers about monopoly
4 would say it is a natural monopoly.

5 MR. SALTZMAN: And then the question is only
6 whether -- if that is the case -- the question is whether or
7 not there is any potential competition to replace you.

8 MR. BALCH: And the record, in that case, is that
9 there is practically none.

10 MR. SALTZMAN: And then of course the question is
11 whether you, by your practices, you foreclose the potential
12 competition.

13 MR. BALCH: I don't think it is our practice.

14 MR. SALTZMAN: I am asking you -- that's the
15 question. The answer is, "I don't know."

16 MR. BALCH: Of course the practice has been, as was
17 laid down in Mr. Farley's testimony, to enter city after city
18 and undertake to provide electric service in accordance with
19 the requirements of the state law and in accordance with the
20 charter of Alabama Power Company.

21 MR. SALTZMAN: Alabama could not refuse to enter
22 any of these cities?

23 MR. BALCH: No, not if there was a request for
24 service and they held themselves out to serve, no, they
25 couldn't. They couldn't refuse. If they did, they would be

1 subject to an order directing them to serve.

2 MR. SALTZMAN: And every city in which Alabama Power
3 moved in was always preceded by a request from a municipal
4 authority or appropriate authorities in Alabama to step in?
5 There was no attempt to initiate service?

6 MR. BALCH: In the first place, they had to get a
7 franchise. They couldn't go in without a franchise if it was
8 an incorporated area.

9 If it was a question of --

10 MR. SALTZMAN: And the record is clear that each
11 of these people asked Alabama Power specifically to come in
12 first? Alabama didn't come in and ask for a franchise?

13 MR. BALCH: I don't think the record necessarily
14 says that, and I don't think I have asserted that, either.

15 MR. SALTZMAN: Well, you see, one of the problems in
16 monopolization cases is that when a company which has monopoly
17 power takes every opportunity to expand its market, and
18 thereby precludes the formation of any competitors, that
19 inference is permissible to be drawn from that that the
20 company is monopolizing according to Section 2.

21 MR. BALCH: Of course that idea, that concept came
22 out of the Alcoa case. And if you will read the Alcoa case
23 very carefully --

24 MR. SALTZMAN: I have.

25 MR. BALCH: -- you will see they refer to the situation

1 of a natural monopoly. They didn't say "Alabama Power Company,"
2 and they didn't even say "electric utility industry," but they
3 did say the matter of a natural monopoly.

4 And I will submit to this Board that the record in
5 this case is replete with evidence, and it is without dispute
6 that Alabama Power Company has a duty to serve customers
7 within the areas in which it holds itself out to serve upon
8 request on a nondiscriminatory basis, and at rates prescribed
9 by the Alabama Public Service Commission, if they be retail
10 customers.

11 Alabama Power Company has the same obligation,
12 unlike an Otter Tail, apparently, to serve municipal distri-
13 butors upon request, also. And the facts in our case are
14 clear on that, and Alabama Power Company has recognized that
15 duty.

16 MR. SHARFMAN: That duty arises under state law?

17 MR. BALCH: Yes, sir.

18 MR. SHARFMAN: Let me ask you this: Are there any
19 municipalities that generate their own power in Alabama in
20 your area?

21 MR. BALCH: None.

22 MR. SHARMAN: Not a single one?

23 MR. BALCH: Not a single one.

24 CHAIRMAN FARRAR: Mr. Balch, let me interrupt for a
25 second. We are going to try to keep to the time limits. We

1 have found in the past that these arguments could go all day.

2 MR. BALCH: I realize that I am getting off of
3 what I wanted to present to the Board. I will have to say
4 that.

5 CHAIRMAN FARRAR: They reach a point of diminishing
6 returns.

7 I have got several questions which I can pose to
8 you, but I don't know what your arrangement with Mr. Benbow
9 is. They might use up the remaining 10 minutes. I don't
10 know if you want to handle them, or turn them over to him.
11 Suit yourself.

12 MR. BALCH: I had some matters that I wanted to
13 tell this Board about.

14 MR. SHARFMAN: I would like to hear them, for one.
15 Whatever you feel is important, I would like to hear.

16 MR. BALCH: I would like to tell this Board about
17 the relationship between Alabama Electric Cooperative and
18 Alabama Power Company. I would like to tell the Board that
19 the record shows that Alabama Power Company has had a rela-
20 tionship with Alabama Electric Cooperative since 1944. It
21 has met every need that Alabama Electric Cooperative had for
22 support power.

23 It has backed off as Alabama Electric Cooperative
24 sought other sources of generation, including the source it
25 got from Southeastern Power Administration. It has backed off

1 or come forward, as the case may be, depending upon what the
2 requirements or needs were of Alabama Electric Cooperative.

3 It has supplied a different additional interconnec-
4 tion point as Alabama Electric Cooperative needed them, and
5 Alabama Electric Cooperative has proceeded to grow from the
6 small outfit to the one that it was when it acquired the
7 properties from Alabama Water Service Company, to the point
8 now that it's on the threshold of having not 8000, but 400- or
9 600-- between 600- and 650,000 kilowatts of capacity, from
10 having a mere hundred miles of line to over a thousand, and
11 they're still building them.

12 Alabama Power Company has entered into a very
13 sophisticated and a very favorable interconnection agreement
14 in 1972 as a product of long negotiations that had a lot of
15 problems involved in it, but it provided Alabama Electric
16 Cooperative everything that it could identify that it needed;
17 it provided such firm power it needed; it provided such
18 emergency power as it needed; it provided such maintenance
19 power as it needed; it entered into a very favorable reserve-
20 sharing arrangement which, albeit even though it was
21 criticized, the Board found it was not anticompetitive, and as
22 a matter of fact I think Alabama Electric Cooperative has
23 pretty well conceded that the arrangement on reserve sharing
24 was very favorable to Alabama Electric Cooperative. It was
25 better than the so-called "equal sharing of reserves" that

1 might have put, I think at a time when Alabama Power Company's
2 reserve obligation in the Southern Company Pool was running
3 over 20 percent, the magnitude of reserves required to be
4 carried by Alabama Electric Cooperative under that agreement,
5 including the protective capacity was only around 17 percent.

6 Alabama Electric Cooperative has been able to pick
7 up additional SEPA capacity. It has been able to go ahead and
8 stagger construction in the sense that it relied upon firm
9 power from Alabama Power Company. While it sought and obtained
10 an REA loan to build an additional 20 or 30 megawatt units
11 down at its Tombigbee Plant.

12 The evidence shows that the estimates of those
13 plants are going to cost AEC less than Alabama Power Company's
14 estimates of the steam generation it's building in the same
15 time frame.

16 Alabama Electric Cooperative has gotten itself in
17 a position, with its support from Alabama Power Company, so
18 that its costs are lower than Alabama Power Company, and its
19 prices are lower than Alabama Power Company, and that is
20 without dispute.

21 And Alabama Power Company has, unlike the situation
22 in the Consumer's case, was engaged in coordinating with other
23 entities. It has coordinated with Southeastern Power
24 Administration. It has provided wheeling services. It first
25 offered, volunteered to provide wheeling service to the

1 municipal distributors in Alabama in 1959. And then in 1967,
2 or '68, when SEPA first determined what it was going to do
3 about allocating the output of additional projects, some
4 constructed in Georgia, some constructed in Alabama, to be
5 marketed in the State of Alabama, Alabama Power Company
6 quickly engaged in negotiations and responded to the overtures
7 or requests from SEPA and provided the firming up services,
8 the wheeling services to deliver the power from the core
9 projects to the delivery points specified by Southeastern
10 Power Administration.

11 That is a very sophisticated wheeling arrangement,
12 and is unlike Consumers where it found that the small systems
13 did not have access to any -- assuming there are some outside,
14 external utilities that may have some power supply arrangements
15 that would be attractive to the small systems in Alabama,
16 unlike the situation in Consumers where they found -- and this
17 Board approved, or maybe it was an initial finding, I've
18 forgotten which -- that the small systems couldn't get out to
19 the other systems except through the use of Consumers system.

20 That is not true in Alabama with respect to
21 Alabama Electric Cooperative. It is already connected with
22 Georgia Power Company at the Walter F. George bus. There is no
23 way that Alabama Power Company could be of any assistance with
24 respect to Duke, or South Carolina Electric and Gas, or
25 Savannah Electric, or Carolina Power and Light, or Florida

1 Power Corporation, if you went eastward, without going through
2 the system of Georgia Power Company.

3 Alabama Electric Cooperative already has a tie on
4 the Georgia bus with Georgia Power Company. It has access.
5 It doesn't need Alabama Power Company. It has 215 kv lines
6 coming into that interconnection point, and Georgia has lines
7 emanating out there from -- over which Alabama Electric
8 Cooperative could have access to anybody it could negotiate
9 an arrangement with.

10 Going southward, Alabama Electric Cooperative has
11 115 kv lines. They're building another one down into northwest
12 Florida. They traverse, go under, or are close to the
13 transmission network of Gulf Power Company, and Alabama Power
14 Company couldn't do anymore than carry it to the state line.

15 Looking westward, Alabama Electric Cooperative
16 System comes within about 20 or 25 miles of the state line,
17 and only as admitted by Mr. Mabin some 30 miles from the
18 entities over in Mississippi which have high voltage trans-
19 mission lines.

20 Going northward, Alabama Power Company has offered
21 to negotiate with Alabama Electric Cooperative with reference
22 to the transfer of any excess power -- and they will have
23 excess power in the new units they are undertaking to bring on
24 line -- and the parties are right on the threshold of filing
25 an agreement with FERC to get the rates approved, or cleared

1 with whatever approval that FERC would see fit to go into, and
2 Alabama Electric Cooperative does have access. It is not
3 hemmed in. It is entirely different from the Consumer's case.

4 But more importantly, in this case there is not one
5 scintilla of evidence that Alabama Electric Cooperative ever
6 identified, or ever sought a connection with Duke, TVA,
7 South Carolina Electric & Gas, Savannah Electric, Georgia
8 Power Company, Florida Power Corporation, Florida Power & Light,
9 Jacksonville Authority, Gulf Power Company, Oglethorpe
10 Electric Membership Corporation, South Mississippi Power
11 Association, or any of the companies in the mid-South, or any
12 place else in the university, that Alabama Power Company
13 denied them an opportunity to take advantage of.

14 In fact, the witnesses who testified in this case,
15 Mr. Rogers, said it was fantasy to think of Dothan getting out
16 to the outside. Mr. Spring said he couldn't conceive of
17 anything; and Mr. Porter didn't know of anything.

18 Mr. Lowman said there was never any need for it.
19 I asked him about why he negotiated with Oglethorpe, and he
20 said he didn't see any need for it. I asked him, did he ever
21 try to get any power from Georgia Power Company, through
22 its system. He said he didn't see any need for it.

23 And that is the manager of Alabama Electric
24 Cooperative. And we submit that the evidence in this case is
25 clear: that Alabama Power Company has acted responsibly with

1 Alabama Electric Cooperative. It has provided, under that
2 1972 Agreement, such an array of favorable resources, inputs
3 if you will, whatever you want to call them, that Alabama
4 Electric Cooperative practically cut down -- shut down -- I
5 think it reduced the operation of its newest unit to around
6 20 or 30 percent loading, instead of the loading that would
7 be anticipated with the newest unit which I am sure would be
8 something on the magnitude of 60 percent, in order to take
9 advantage of the very low priced power they had from Alabama
10 Power Company under that '72 Agreement.

11 CHAIRMAN FARRAR: Let me ask you about that '72
12 Agreement. What's the term?

13 MR. BALCH: 10 years. It runs for 10 years. And
14 under that agreement, Alabama Power Company, and Alabama
15 Electric Cooperative, have arranged for additional points of
16 interconnection.

17 They have arranged for the sale of the OPP substation,
18 which was originally owned by Alabama Power Company; Alabama
19 Electric Cooperative has been able to acquire that. The two
20 parties have gotten together on a 230-kv line coming out of
21 the Tombigbee Plant.

22 Of course the evidence is clear in the case that
23 the Tombigbee Plant, being all the way across the state from
24 the main load center of Alabama Electric Cooperative, was on
25 a very thin line, that 110- 115-kv line that stretched all the

1 way across the state with the major portion of the load over
2 on the eastern side of the state. And the evidence shows
3 that the power, the energy of the flows actually in an
4 interconnected situation at that plant would flow into Alabama
5 Power Company's system.

6 And Alabama Electric Cooperative sought a joint
7 study with Alabama Power Company to determine what should be
8 done about additional transmission coming out of the Tombigbee
9 plant going eastward. And of course the facts show that
10 Alabama Power Company was in the process of designing and
11 constructing 230-kv line coming out of the Barry Steam Plant,
12 up through MacIntosh, to go to Belville and go northward to
13 Montgomery. And Alabama Electric Cooperative had a need to
14 get a 230-kv line down to the OPP substation which is in the
15 heart of the load center, and under that interconnection
16 agreement the two parties made the studies, they got together
17 to the end that Alabama Power Company is constructing and owning
18 the segment of the line from the Tombigbee Plant to a point
19 near Belville, back in the center of the state.

20 Alabama Electric Cooperative will own the balance
21 of that line running down to the OPP substation, and the two
22 parties will make joint use of it. And there's not even been
23 end #4 any wheeling charge, or any transmission service charge.

24 CHAIRMAN FARRAR: Okay, but in your brief, talking
25 about ownership of the Farley Plant, you make a big point

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1 about how you can't possibly work with these people.

2 How does what you just said stack up with that?

3 And how does it stack up with the situation, for example, in
4 New England where some of the people were at loggerheads for
5 years and years, but they seem to be getting along reasonably
6 well with joint ownership of plants?

7 MR. BALCH: Well, Mr. Farrar, I can't speak to the
8 New England situation. I don't know the facts. I know the
9 facts pretty well --

10 CHAIRMAN FARRAR: The New England situation is
11 that some of those plants are owned by 20 different companies,
12 and I assume they -- or have not historically all been best
13 friends.

14 MR. BALCH: Well, I do know, if we had a joint
15 ownership arrangement with either AEC or the municipalities
16 in the case of the Farley Plant, it would now be just a
17 disastrous situation, in that Alabama Power Company, even
18 though it has got about \$500 million in the plant, has to shut
19 it down because it can't pay the tradesmen and the materials
20 men, and the manufacturers who are supplying equipment.

21 It has just shut the project down. I don't know
22 how we would ever work out of the obligation that we might
23 have to anybody who is a joint owner if we were joint owning
24 with them at this time.

25 CHAIRMAN FARRAR: Well, Consumer's Power seemed

1 to be happy a year or so ago to get the chance to get these
2 other people to come in and help bail them out.

3 So what you just said doesn't seem --

4 MR. SHARFMAN: In other words, they contributed
5 capital.

6 MR. BALCH: I understand what you're saying, but
7 had AEC and had MEUA both been permitted to buy their pro rata
8 share of the Farley Plant, it wouldn't be enough capital to
9 help Alabama Power Company out of the dilemma it finds itself
10 in today. I will just say that.

11 But moving on, you asked about: Can you work with
12 AEC? Well, history shows that Alabama Power Company can and
13 has. There have been difficulties --

14 CHAIRMAN FARRAR: But your brief says, "We absolutely
15 cannot give them ownership because" -- Then, you know, "we
16 couldn't get together on operating this thing."

17 Now in Midland, they tend to have one company who
18 owns --

19 MR. BALCH: I don't know that the brief really says
20 that about Alabama Electric Co-op. I think the brief does
21 say that since it was the position of MEUA that it must have
22 joint control, or have an effective participation in the very
23 operation of the plant, and Alabama Power Company didn't see
24 how it could subject itself to having these limited municipi-
25 palities which would be some 3 or 4 percent on the load ratio

1 basis of the plant, have an effective voice and control over
2 the loading, the timing of change of fuel, and all the other
3 very expensive --

4 CHAIRMAN FARRAR: What I have suggested, I think
5 they worked that out somehow in New England.

6 MR. BALCH: I don't know. It never was worked out
7 in Alabama, because we asked MEUA to submit in writing a
8 proposal to do that, and they never did submit it. So it
9 hasn't been worked out with the municipalities.

10 And as far as Alabama Electric Cooperative, I think
11 what Mr. Miller said in evidence is that he didn't know of
12 anything -- any capability that anybody in Alabama Electric
13 Cooperative would have to offer to the situation.

14 And I think he pointed out some of the difficulties
15 we had had in working with Alabama Electric Cooperative. I
16 don't believe we have had a single filing with FERC that we
17 didn't have some kind of a problem with it.

18 We ended up with lawsuits over several of the
19 filings. The fuss about the application of the fuel clause,
20 they fussed about it. We sold them the OPP substation, and
21 they fussed about the commencement of the date of the charges
22 that were to be paid in connection with that substation before
23 it was sold to them.

24 MR. SALTZMAN: What a terrible group of people they
25 must be. Your company describes -- they are just a splendid

1 operation doing everything you possibly can to help them, and
2 yet somehow or other they misunderstand your motives; they
3 don't understand why you brought all these suits against them,
4 the REA people, they sue you all the time.

5 It is a difficult picture that you paint, sir.

6 MR. BALCH: Well, they have sued us a lot. They
7 brought a complaint proceeding before the Federal Power Com-
8 mission in 1965 to undertake to get that Commission to order
9 Alabama Power Company not to serve either the cities of
10 Troy, or Luverne, which both had sought service from Alabama
11 Power Company, and Alabama Public Service Commission determined
12 it was in the public interest for Alabama Power Company to
13 serve them.

14 And in that same proceeding, they brought up a
15 complaint about the level of rates from Alabama Power Company,
16 and their rate was running about 6 mils, and the return figures
17 were around -- the highest was around 5 percent, and the next
18 one was a lower than 5 percent, and the next one was then the
19 4 percent level, all of them appreciably under 6 percent.

20 And they contended, one, that on a cost-of-service
21 consideration, the rates from Alabama Power Company ought to
22 be lower. They abandoned that about halfway through the
23 proceeding with their expert witness, Mr. Van Sceyack, saying
24 to the Commission, or to the Presiding Examiner, on cost-of-
25 service considerations, "I can't recommend any lowering of the

1 rate."

2 On the other grounds of the complaint about the
3 rate level, it was on the ground of being an REA borrower, or
4 to have a special preferential rate treatment, and the
5 Commission rejected that, just as it rejected their plea for
6 discontinuance of service for Troy and Luverne.

7 That was a proceeding that was instituted by Alabama
8 Electric Cooperative. It went on for 40 days, as long as the
9 big flood, 40 hearing days. And then, Alabama Electric
10 Cooperative filed a proceeding before the Securities and
11 Exchange Commission, trying to block Alabama Power Company
12 from obtaining securities approval so it could go forward with
13 its construction program.

14 There are just a multitude of lawsuits.

15 MR. SALTZMAN: Did they prevail?

16 MR. BALCH: No, they did not prevail.

17 MR. SALTZMAN: Were you not involved in Gulf States?

18 MR. BALCH: I wasn't involved in Gulf States.

19 MR. SALTZMAN: Gulf States against -- I guess the
20 FTC?

21 MR. BALCH: I've never been involved in Gulf States.

22 MR. SALTZMAN: Gulf States is one of your affiliated
23 powers?

24 MR. BALCH: No, Gulf Power. Gulf States Utilities
25 is a company down in Louisiana.

1 MR. SALTZMAN: That's right.

2 CHAIRMAN FARRAR: Mr. Balch, let me get back to
3 this 1972 Agreement which you say expires in '82. What sort
4 of notice provisions does it have to prevent it? Do you
5 have to give -- or can either side just decide not to renew?

6 MR. BALCH: I think there is a 4-1/2 year notice
7 in changes of certain of the obligations, and they have given
8 the notice to cut back on the obligation to purchase firm
9 capacity. And of course that affected the obligation of
10 Alabama Power Company to supply firm capacity.

11 That has already taken place. And Alabama Electric
12 Cooperative has moved into the position of being long, as
13 engineers would say. They have more capacity than their
14 current loads call for.

15 I have no idea that that agreement would ever be
16 terminated, unless for some reason Alabama Electric Co-op would
17 want it terminated.

18 I think they need the agreement. I think the
19 multiple interconnections are valuable to Alabama Electric
20 Cooperative.

21 CHAIRMAN FARRAR: Okay, you are anticipating my
22 question, and you didn't anticipate it correctly.

23 MR. BALCH: I'll shut up and let you ask. I'm
24 sorry.

25 (Laughter.)

1 CHAIRMAN FARRAR: All these things that you have
2 told us, the good things you are going for the cooperatives,
3 seem to be under this 1972 agreement. And of course this
4 proceeding, I believe the staff's letter to the Attorney
5 General was in 1971.

6 To what extent does that require that we perhaps
7 not, you know, give as much weight to your change of heart as
8 we might if this litigation had not been going on?

9 Or, put another way: To what extent can we say,
10 well, everything is just shaping up fine now, and so the need
11 for a remedy from us is, you know, not as drastic as it may
12 have appeared in the past?

13 MR. BALCH: I would say, unless this Board sees
14 fit -- and I would be amazed if it made any such "see" as
15 that -- to rely wholly upon the unsupported contentions
16 in briefs, it should not make any such determination.

17 Because the facts of record clearly show why, and
18 what happened during those long negotiations that led up to
19 the interconnection agreement in 19-- early in 1972, which was
20 of course before this proceeding was ever actually instituted.

21 Now it is true that, in the course of the proceeding
22 Alabama Electric Cooperative had changed its position, whereas
23 it said in the early days of the endeavor of Alabama Power
24 Company to build the Farley Plant and to get a certificate of
25 convenience and necessity from the Alabama

1 Commission, AEC said, "We have no interest in participation
2 in the Farley Plant," they did change their position either in
3 February or March of 1971, just a matter of weeks before the
4 time would run out on filing some sort of information or
5 complaint with the Atomic Energy Commission under the statute,
6 and they asked for a meeting.

7 Alabama Power Company had the meeting with them.
8 They had nothing definitive in mind. They just wanted to
9 participate, sort of like some of the clients who have come
10 into my office over the years.

11 I haven't had many of them, but I have had a few
12 come in, they didn't know what they wanted, but they want it
13 right now, and that was sort of the way it was with Alabama
14 Electric Co-op.

15 They didn't know what they wanted, but they wanted
16 some kind of participation. And the day after the meeting,
17 they filed a letter with the Atomic Energy Commission and
18 said, "We have requested participation in Farley Units from
19 Alabama Power Company, they haven't yet been granted" -- they
20 didn't say they wouldn't be, but they say they haven't yet
21 been granted, and that's the first thing Alabama Electric
22 Cooperative did to let us know that they wanted some kind of
23 participation.

24 Then as we moved --

25 CHAIRMAN FARRAR: Okay, speaking on that score, from

1 what I have reviewed, it looks like Mr. Farley doesn't say
2 "yes" or "no," either.

3 MR. BALCH: Mr. Farley --

4 CHAIRMAN FARRAR: Wait a minute. Let me finish.

5 When we talk about whether there has really been a
6 request or a denial of ownership access to these plants,
7 Mr. Farley never says "no," and you make a point of that in
8 your briefs, that he has never turned them down, but he has
9 never -- he or someone else did say, "Sure, we would sell it
10 to them if we were put under a direct order to do so."

11 But isn't, in this context, the failure to say
12 "yes" the equivalent of saying "no"?

13 MR. BALCH: No, I don't think it is. I think
14 Alabama Power Company has manifested from an early date, after
15 it learned of Alabama Electric Cooperative's interest in the
16 Farley Plant, to negotiate with them on a unit-power basis,
17 because it thought that was a fair way to do it, and an
18 appropriate way to do it, to make sure --

19 CHAIRMAN FARRAR: I am not asking about unit power.
20 I am asking about ownership.

21 MR. BALCH: Well, Alabama Power Company, on the
22 record, Mr. Farley has advanced a number of good reasons why,
23 from Alabama Power Company's point of view, it should not
24 enter into an ownership arrangement with Alabama Electric.

25 CHAIRMAN FARRAR: Okay, so he says "no."

1 MR. BALCH: He says it should not. He didn't say
2 they wouldn't.

3 CHAIRMAN FARRAR: Well, everytime they ask him,
4 he gives a dozen reasons why he can't really do that.

5 MR. BALCH: Right. And they're good, honest
6 reasons.

7 CHAIRMAN FARRAR: We're not disputing that.

8 MR. BALCH: Under the rule-of-reason type of
9 analysis, they're good reasons.

10 CHAIRMAN FARRAR: I'm not as sophisticated as
11 everybody else in the room, but somehow that sounds to me like
12 he is saying "no."

13 MR. BALCH: He hasn't said "no."

14 CHAIRMAN FARRAR: You just told me he has given
15 them a dozen excellent reasons why he can't do it.

16 MR. BALCH: That's right.

17 CHAIRMAN FARRAR: And he has said --

18 MR. BALCH: They are still good reasons, and the
19 last one he gave, he said: If he were involved in a joint
20 participation on a joint ownership arrangement with Alabama
21 Electric Cooperative, or anybody for that matter, and it became
22 necessary to shut down the construction, he didn't know how
23 he would get out of the legal snarl that would result.

24 CHAIRMAN FARRAR: That could be a very good reason.

25 MR. BALCH: That's one he advanced, and that reason

1 is present today, and you had better believe it. It is
2 present today.

3 CHAIRMAN FARRAR: That is what I am saying.

4 MR. BALCH: It is a darn good reason. It is a
5 very good reason. And today, it is the overpowering reason.
6 And I would think, from Alabama Electric Cooperative's point
7 of view, they wouldn't want to have a part of a \$500 million
8 plant that is sitting down there in mothballs and resting, or
9 whatever happens to a nuclear plant, and you know what could
10 happen.

11 CHAIRMAN FARRAR: But they're so foolish as to
12 ask. They want a piece of this white elephant, that he's
13 still going to say "no"? He's got all these reasons? Is that
14 right?

15 MR. BALCH: He's got good reasons, and he's
16 advanced --

17 CHAIRMAN FARRAR: I almost hear it, but you don't
18 quite answer the question.

19 He's going to say "no," isn't he?

20 MR. BALCH: I don't know what he's going to say.
21 He hasn't said "no," and he said on the stand he would not
22 say "no."

23 MR. SALTZMAN: He wouldn't say "yes."

24 MR. BALCH: He said "no" to the propositions that
25 have been put forth, and the propositions that have been put

1 forth until we got into the remedy phase, now, were coupled
2 with a whole host of other demands which I believe the
3 spokesman for Alabama Electric Cooperative said -- and this
4 is the bottom of the line -- it went far beyond the participa-
5 tion in any Farley Units. It had to do with the general
6 free-wheeling, common carrier wheeling type of arrangement.

7 It had to do with participation, and the ownership
8 of transmission lines. It had to do with a whole host of
9 other services that, really, I don't know how you would
10 evaluate them; they were so general, and so vague.

11 MR. SALTZMAN: Mr. Balch, did Mr. Farley or anyone
12 else from the Alabama Electric Company --

13 MR. BALCH: Power Company, you mean?

14 MR. SALTZMAN: Power Company, I'm sorry.

15 -- put forward any conditions at all at any time
16 under which they would consider ownership?

17 MR. BALCH: Yes, I think Mr. Farley, if you have
18 looked through it, he has put through these thoughts: that if
19 he could come up with an arrangement that would not create
20 any problems for Alabama Power Company from an operational
21 ownership standpoint, it wouldn't put any undue burdens on it,
22 if he could come up with an arrangement that wouldn't be unfair
23 to the other customers of Alabama Power Company, that he
24 would be willing to do it.

25 CHAIRMAN FARRAR: I can understand why he would

1 feel that way. Has he ever written down on a piece of paper:
2 Here is how we could do it? And satisfy me that I am not
3 unfairly burdening my own customers?

4 Or has he just said to them: This is the goal you
5 have to meet, and you come up with this proposal?

6 Has he ever advanced a proposal?

7 MR. BALCH: I don't think he has advanced it.

8 MR. SALTZMAN: Sort of a prenuptial agreement. Has
9 he ever suggested a prenuptial agreement?

10 (Laughter.)

11 MR. SALTZMAN: Under those conditions, I doubt that
12 many people would ever get married.

13 MR. BALCH: Well, I got married, and I had no
14 prenuptial agreement.

15 (Laughter.)

16 MR. BALCH: I have been married for 37 years. I
17 have got 4 children and 4 grandchildren, and I never had an
18 agreement with my wife, except when I stood up at the altar.

19 MR. SALTZMAN: You've never had any disagreements
20 with her, either.

21 MR. BALCH: I have plenty of them.

22 (Laughter.)

23 MR. BALCH: But we're still married, and happily so,
24 I am proud to say.

25 CHAIRMAN FARRAR: Mr. Balch, let me ask you one

1 last question.

2 You have, under this 1972 Agreement, painted a
3 picture for me of the overall services you are performing for
4 the Cooperative.

5 In reading the Licensing Board's decision, when I
6 read each little section of it, it seems to make sense. You
7 know, there's a reason why each of these things you are
8 accused of doing doesn't quite amount to a situation incon-
9 sistent with the antitrust laws, or it is not quite anticompetitive

10 But I never see that the Licensing Board stood back
11 and looked at the overall picture: What do these 10, 12, or
12 15 things amount to as a whole, even if each one of them
13 standing in isolation doesn't quite add up against you, the
14 whole picture.

15 What do you do? Am I right in looking at it that
16 way?

17 MR. BALCH: The Board identified only 5.

18 The first in point of time was --

19 CHAIRMAN FARRAR: Never mind. I know the five. But
20 there were 10 others, 10, 15 others, whatever.

21 MR. BALCH: On which they found against the conten-
22 tions either factually or legally, most of them.

23 CHAIRMAN FARRAR: Right.

24 Now what I am saying is, each one of them -- I am
25 just giving you how it looks to me on my first few readings of

1 this before perhaps studying it as carefully as I'll have to.

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2 But it looks to me, you know, like their decision

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3 is rational on each one of those taken in isolation.

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1 MR. BALCH: Yes, sir.

2 CHAIRMAN FARRAR: But it doesn't look that way
3 to me if I stand back and look at all of them as a whole.
4 Now, am I wrong in getting that feeling, that flavor about the
5 case?

6 MR. BALCH: I would say if this board were to
7 undertake to identify a situation or identify something
8 by looking at the smoke or looking at the clouds without
9 going in and trying to find out what was there, it wouldn't
10 be acting in a prudent way. I think you have got to look
11 at each situation and see what it is, see what it amounts
12 to.

13 CHAIRMAN FARRAR: But can you look at it in
14 isolation?

15 MR. BALCH: I think you have to first identify it,
16 look at it, examine it, and understand it in isolation.

17 CHAIRMAN FARRAR: Okay, but then aren't you required
18 when you're finished looking at them, each in isolation,
19 and, you know, getting as knowledgeable as you can about
20 the facts of each one, to look at them all as a whole?

21 MR. BALCH: If you are asking me if you're supposed
22 to take a number of charges unsupported and convert them into
23 something you ought to credit, I don't know how to answer that,
24 except to say I don't think you ought to do it, because I
25 think it would be contrary to facts and contrary to law.

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1 CHAIRMAN FARRAR: You are assuming of course
2 when you say it that way that each one of them adds up to
3 zero. But assuming each one of them doesn't quite add
4 up to one --

5 MR. BALCH: I Don't know which ones your're
6 talking about, Mr. Farrar. If you're talking about the
7 Dothan generator, they say that was specious and it should
8 never have been brought up. They're amazed at the Department
9 of Justice, bringing that one up. Maybe if you could tell me
10 that's what you're talking about, I'll try to speak to it.

11 CHAIRMAN FARRAR: I think I tried to say what I
12 was talking about was the overall picture, that if I look
13 at the five that the board found were violations and look at
14 their whole tenor -- remember each one of these the board
15 did not find that absolutely, there was nothing
16 there.

17 Some, it did, a couple of charges that said were
18 frivolous and waste of the board's time, but by and large
19 it looked like there was something there, but it wasn't quite
20 anti-competitive.

21 MR. BALCH: Of course it found the '72 agreement
22 was not anti-competitive. They found the '72 agreement was
23 a reasonable agreement, and the record shows AEC never
24 sought any service it needed that it didn't get under that
25 agreement.

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1 CHAIRMAN FARRAR: Wait a minute. Maybe I'm not
2 making the question clear. I'm just asking you not to
3 go through each one, but isn't there a necessity for us --

4 MR. BALCH: You are asking me if the board should
5 have found against Alabama Power Company on a multitude
6 of charges that went beyond the five incidents, and my answer
7 to you is no, they should not have found against us; they
8 should have found as they did, that the charges were unsupported.
9 That's right, sir.

10 CHAIRMAN FARRAR: And you are satisfied that they
11 looked at the big picture as well?

12 MR. BALCH: I think they looked at those charges
13 and found whether or not there was any evidence in the
14 record to support them. And they found there was no evidence
15 to support them, and I think they, in that respect, came
16 out with the correct decision, and I don't see how I could --
17 how you could expect me to stand up here and say no, they should
18 have found charges en masse against Alabama Power Company,
19 which looked at individual unsupported by the evidence.

20 CHAIRMAN FARRAR: I really didn't expect you to
21 say that. All I was looking for was whether you thought they
22 had looked at them in terms of the big picture, and maybe your
23 argument is they don't have to look at them as a big picture.
24 But I thought the law was still --

25 MR. BALCH: I agree with the rationale, but I

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1 understand that the board in Consumers that there is the
2 matter of looking at the situation. In other words, after
3 you look at the charges and look at the claims and look at
4 the events or occurrences and decide what has happened, you
5 know, what are the facts; then after you make that
6 determination, then you have to look at those as a situation,
7 not as an isolated instance.

8 I think you have to look at them in a situation
9 and see if that situation --

10 CHAIRMAN FARRAR: Okay, we're in agreement on that;
11 did the licensing board do that?

12 MR. BALCH: I think they did. Otherwise -- and
13 I think they were wrong on the facts of this case. I think
14 they said that these five incidents are long since passed.
15 The 4.2 thing has been cleared up by contract. The failure
16 or withholding or however you want to express it of
17 coordination leading up to the '72 agreement is behind us
18 because the '72 agreement is entered into.

19 The Ft. Rucker incident occurred in 1963 or '64, and
20 Alabama Power Company, as they note, has long since manifested
21 it with supply power, notwithstanding the fact that there
22 may be a use of it for some competitive situation.

23 As far as the SERC episode, that grew out of the
24 northeast blackout of 1965 in an effort to organize these
25 reliability councils. That has long since been done and over

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1 with.

2 And I think the board made it clear there wasn't
3 any indication that any of those, taking them individually,
4 would present any problem that would require any relief.
5 But they bundled them together and said, looking at them as
6 a group, they do constitute a pattern of conduct which we
7 think requires licensing conditions. That's exactly what the
8 board did.

9 Now, all I am saying -- I am disagreeing with
10 the board because I don't think there is any pattern shown
11 by those five so-called inconsistencies at all. I don't
12 think there's any pattern.

13 CHAIRMAN FARRAR: I think you have answered the
14 question I had. You have been up for an hour and a half of
15 your 60 minutes.

16 MR. BALCH: Well, if you want me to sit down, I'll
17 sit down. I did have some other things I wanted to bring
18 to the attention of the board. Of course, I have enjoyed
19 my dialogue with the board, but that's mostly what it's been.

20 CHAIRMAN FARRAR: Of course that's the purpose
21 for oral argument.

22 MR. BALCH: Certainly, you gentlemen should have
23 your questions answered; if you want me to sit down, I'll
24 sit down.

25 CHAIRMAN FARRAR: Well, I'm also concerned about

1 our reporter. When you and I get talking we tend to talk
2 somewhat faster --

3 MR. BALCH: I'm sorry.

4 CHAIRMAN FARRAR: No, no, no -- than other people
5 do. So we may have doubled her work here. Why don't we
6 take a break and come back in 10 minutes, after which
7 Mr. Benbow will have a change later on this morning, this
8 afternoon or this evening or as the case may be.

9 (Laughter.)

10 MR. BALCH: I appreciate the opportunity, and I
11 did my best to answer questions. If I've been inadequate,
12 I'm sorry.

13 MR. SALTZMAN: Above and beyond your duty.

14 CHAIRMAN FARRAR: Okay, we'll come back at 10
15 after.

16 (Brief recess.)

17 CHAIRMAN FARRAR: Be seated, please.

18 During the break we thought about this, and even
19 though Mr. Balch or Mr. Benbow, you indicated at the
20 beginning that you hadn't necessarily split up the subject
21 matter, we would like to avoid a situation in which,
22 Mr. Benbow, you felt it necessary to make some of your
23 affirmative points this afternoon after everyone else has
24 been heard.

25 Would it suit you to have maybe 10 or 15 minutes

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1 now to highlight any points that you would like to cover that
2 Mr. Balch may not have had time to touch on?

3 MR. BENBOW: Well, whatever time you are willing
4 to allow me is very generous, indeed, under the circumstances.
5 Please feel free to cut me off at any point, and I will
6 utilize any such time as you allow me; not to repeat
7 points that Mr. Balch has already covered adequately, but
8 to try to address myself to a few additional points or perhaps
9 to amplify on some of the questions.

10 MR. SALTZMAN: Our point is, your affirmative
11 arguments have to be made before the other people respond,
12 not to rebutt. And I'm not sure Mr. Balch covered
13 everything you had in mind. It's our fault rather than his.

14 CHAIRMAN FARRAR: I will leave it pretty much
15 to your judgment to organize yourself and try to get it
16 done in a reasonable time.

17 Before you start, we also talked about in light
18 of the nature of Mr. Balch's argument that it might be
19 more helpful for us after you have finished, Mr. Benbow,
20 i: we heard from the cooperatives and the municipals first,
21 rather than the department and the staff. But we
22 won't force that on you, if that would throw you out of
23 kilter.

24 Mr. Mac Guinness, is that all right?

25 MR. MAC GUINNESS: That's agreeable with us.

david8

1 CHAIRMAN FARRAR: Any problems with the government
2 table?

3 MR. WHITLER: No, your Honor.

4 CHAIRMAN FARRAR: Okay, that would help us. So
5 if you two would be prepared to go first after Mr. Benbow;
6 thank you.

7 ORAL ARGUMENT ON BEHALF OF APPLICANT

8 ALABAMA POWER COMPANY

9 BY MR. BENBOW:

10 I would approach it this way, gentlemen. You
11 have below extremely sophisticated and careful findings
12 by a mature and full licensing board which lived with this
13 situation for a period of years through the witnesses,
14 determined in many cases their credibility, studied the
15 documents at length, issued interim opinions.

16 Now, under those circumstances, it seems to me
17 almost incredible for you gentlemen to suggest that you
18 will second guess minor inferences in areas where the board
19 after careful study found neither as individual incidents
20 nor as a group of incidents any further negative findings
21 against applicant were justified under the circumstances.

22 MR. SALTZMAN: I take it then your argument of
23 course cuts both ways. We should affirm?

24 MR. BENBOW: You should affirm in large part; you
25 should certainly affirm with respect to no further findings of

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1 inconsistent behavior and no more onerous license conditions
2 than those which have already been imposed upon applicant.

3 You should not, it seems to me, in that context
4 proceed to a mechanical application of your Consumers
5 Power decision or of the appeal board's Consumer's Power
6 decision, which we do not argue about as to its findings in
7 that factual context.

8 What we are saying to you and saying both as a
9 matter of fact and law is that although in each case
10 there was an individual, privately owned, investor
11 owned company applying for a nuclear regulatory plant,
12 from that point forward, these cases diverge almost completely,
13 and they diverge not only in terms of what the factual
14 situations are, but the current state of the law with
15 respect to that, both state and federal.

16 They also diverge in the way the cases were
17 tried to this Commission. You have a much fuller record in
18 the Alabama Power case and a much more careful scrutiny
19 made of the evidence as it pertains to Alabama. And it would
20 be a mistake not only to blindly apply the Consumer's
21 rationale here, but to think that Otter Tail, Cantor,
22 Mishawaka or any combination thereof compels a result adverse
23 to the applicant here.

24 MR. SALTZMAN: Mr. Benbow, I have a question, and
25 I think it's quite consistent with the position you take, but

1 it does concern me. Even accepting the facts as they are,
2 isn't it a strong, certainly a possibility, that in deciding
3 that there was no coordination of services market, that the
4 board below applied the wrong test and misread the holdings
5 of the Philadelphia National Bank?

6 If I thought the board's decision rested in no
7 small part upon the finding that these services were not
8 interchangeable -- but that's not required, as I understand
9 the law.

10 MR. BENBOW: Dr. Elzinga, who was a member of that
11 panel, as you know, is one of the nation's leading scholars on
12 the subject --

13 MR. SALTZMAN: He's not a lawyer.

14 MR. BENBOW: -- of the relevant market. He had
15 with him as chairman of the board, who is distinguished and
16 capable here in the Washington area, and a further lawyer
17 who has been one of those most active in the decisions of the
18 Commission.

19 This was a well balanced and expert board.

20 CHAIRMAN FARRAR: Mr. Benbow, I'll concede that's
21 one of the best boards that's ever been put together, but
22 somehow when I read their decision on coordination services
23 and I read our decision in Midland on coordination services,
24 they look different without a whole lot of different facts
25 being involved.

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1 MR. BENBOW: Well, you will have to, Mr. Chairman,
2 pursue the analysis in our two briefs as to those differences
3 and compare it with your findings of law and fact in the
4 Consumers case and review the different quality and
5 character of the witnesses which were presented in the
6 two cases, and the knowledge of those two -- of those
7 witnesses.

8 MR. SALTZMAN: Mr. Benbow -- Mr. Benbow, what is
9 your answer to the question whether the interchangeable
10 character of these bundle of services is required before you
11 can have a market?

12 Is that correctly decided by the licensing board,
13 or is that a misreading of the case?

14 MR. BENBOW: I do not believe that the licensing
15 board is inconsistent with your Consumer's opinion, and I
16 do not think --

17 MR. SALTZMAN: Consumer's opinion isn't original.
18 Nobody here pretended it was original. This was our reading of
19 what we thought the Philadelphia National Bank case required.
20 But you have a bundle of services argument being made and
21 rejected on the legal ground that they're not interchangeable.
22 But certainly the services in the Hughes Tool case were not
23 interchangeable. And the services in the Philadelphia
24 National Bank case were not interchangeable. That means they
25 applied their own legal standard.

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MR. BENBOW: No, they did not. And while there is assertion here of a bundle of services, they are not the same kind of meaningful bundle of services that were recognized in the Philadelphia Bank case.

MR. SHARFMAN: and why not?

MR. BENBOW: Why not? Because, for example, there is no market, no series of co-transactions, no ongoing relationships of the type mentioned that are sold as a bundle of services. This isn't like a central fire alarm system where that was sold in competition with the services separately.

MR. SHARFMAN: But Mr. Benbow, as I understood Mr. Balch this morning, the service company, or whatever it's called --

MR. BENBOW: Southern Services, for our purposes.

MR. SHARFMAN: The service company, it seems to me, is in the business of providing these various kinds of coordination services, and it does it in a coordinated, sophisticated, computerized, centralized way.

MR. BENBOW: All true, but it doesn't --

MR. SHARFMAN: Doesn't that imply if you want to get these kinds of services you really do have to consider them in the big picture. You have to consider them together, and you have to buy them in a coordinated and integrated way.

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1 MR. BENBOW: Not so, Mr. Sharman. I mean, the
2 factual description is accurate. The conclusions you draw
3 from it are inaccurate. Because of the existence of the
4 Southern Company system in these states, a perfectly legal,
5 as you gentlemen recognize, legal and appropriate means of
6 organization of business enterprise in the states of Alabama,
7 Georgia, parts of Florida, and Mississippi; in that
8 coordination arrangement, perhaps unlike Michigan and Ohio
9 and Canada and Chicago, there hasn't grown up the kind of
10 marketing that one could recognize as a coordinating services
11 market, given the presence of TVA in the area, maybe another
12 even more inhibiting factor in that regard.

13 But for whatever reasons, this was a sophisticated,
14 economic and legal board looking at this data and deciding
15 that our opponents had failed in undertaking to show a market
16 of those realistic characteristics which all of the
17 courts, including the Supreme Court, has repeatedly said
18 you must look at: commercial realities; patterns of trade
19 says Judge Wizansky, whom you appropriately cite frequently
20 in the Consumer's case. And the others -- all of those
21 judges say, what's really happening in the particular market
22 area.

23 When you do that in Alabama, you don't find any
24 regional power exchange coordinating services market.

25 CHAIRMAN FARRAR: All right, Mr. Benbow, that's a

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good argumetn you made. Is that the basis the licensing board pout its decision on?

MR. BENBOW: Yes, what you're reading, I'm afraid, is just the paragraph or two which they devote to that market itself. Read the whole proceeding analysis as to how one determines relevant markets generally. And you notice there is a specific sentence in the licensing board's decision on liability which says: since we have analyzed relevant markets as a group in this area at length and given you the economic and legal principles which underlie them, we can fortunately be extraordinarily brief in our treatment of those markets, particularly the ones which we reject.

But the wealth of knowledge and learning which goes into that conclusion is fully substantiated by this record.

MR. SALTZMAN: I'd like to mine that wealth a little bit. In looking at the existence vel non of a coordinated services market, do we look at the individual operating companies of the Southern Company separately, or must we look at them as an entity; for whichever you choose why? It sounds like law school

MR. BENBOW: It sounds like a good question and clearly for certain purposes, one must look at them independently and in the main here, one should approach this as an application by Alabama Power Company which clearly

1 has very distinctive policies from the group as a whole
2 and from the individual members of the group.

3 But in looking at Alabama Power Company as that
4 individual entity as part of a group of market facts, both
5 factual and legal, you must take into account that it is, has
6 been a part of the Southern Company pool.

7 MR. SLATZMAN: Let me interrupt you right here.
8 Suppose we had four separate companies with the exception --
9 and no holding company -- and I think it's quite clear from
10 the record that those four separate companies do engage in
11 what is common in the electrical industry of coordination --

12 MR. BENBOW: It's not quite as common as you
13 gentlemen think, but let's say it occurs in some places. Maybe
14 it occurs in Michigan.

15 MR. SALTZMAN: Well, the Federal Power Commission
16 suggests that it's very common.

17 MR. BENBOW: Well, the Federal Power Commission --

18 MR. SALTZMAN: Don't fight the problem, Mr. Benbow.

19 MR. BENBOW: I'm not. I want to make it clear
20 that the premises leading to the question --

21 MR. SALTZMAN: You have not really made it clear.
22 My point is this: let us assume these are four separate
23 companies and let us assume they do engage in coordination
24 transactions. Do you think under those circumstances one could
25 find a coordination service market?

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1 MR. BENBOW: It's a wholly different question,
2 and it would seem to me on the Alabama facts probably not.
3 But you would want to look at these relationships differently
4 if they were not taking place under the holding company act
5 and if, as apparently was the case in Michigan, Consumer
6 saw fit to enter into largely voluntary relationships with
7 other large investor owned -- and other utilities, according
8 to your findings; but did not engage in the same kinds of
9 coordinating relationships with small systems. That did
10 not happen in Alabama.

11 MR. SHARFMAN: May I follow up? I think I started
12 this. As I understood your answer to my question, you seemed
13 to suggest to me that you are saying well, maybe the
14 services company does treat the various coordination services
15 as a bundle, but we have to look at commercial realities,
16 and there really isn't a market.

17 I think you said that. That suggests to me that
18 you are relying on the fact that they are all part of a
19 holding company family of companies and we really weren't
20 dealing with independent entities and not relying on the
21 fact that as a functional matter the various coordination
22 services aren't dealt with together.

23 Now, is that really your position because I want
24 to make sure I understand it clearly?

25 MR. BENBOW: I'm not sure I have all of your

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1 question, but I think I do, Mr. Sharfman. If I go wrong,
2 please correct me if I'm misinterpreting you.

3 My response would be that the public utility
4 holding company act. -- once you do qualify under it,
5 Mr. Saltzman, mandates that you operate on an integrated one-
6 system basis. That means that if Alabama Power Company
7 is to live up to the mandates of the Public Utility Holding
8 Company Act, which it attempts to do, it must seek to engage
9 in the widest possible range of service interchanges with
10 the other members of the holding company group.

11 It is, therefore, a matter of law that that take
12 place. And it does take place. What has happened, though,
13 contemporaneously with that, is that Alabama Electric
14 Cooperative, both derivatively because of any benefits
15 Alabama may derive, but without the burdens, and also by
16 a pattern of direct negotiation and very successful
17 negotiation with Alabama Power Company, has managed to
18 accomplish the benefits of that pool without assuming its
19 burdens.

20 And thus, as Mr. Balch was summarizing at the
21 end, finds itself operating with power that costs markedly
22 less than the power that Alabama Power Company generates. It
23 costs lower than Alabama Power Company can generate and sell
24 at prices less than Alabama Power Company can. So in effect,
25 AEC has become a proxy member of the Southern Company pool to

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1 the extent it gets benefits but resists mightily, as it is
2 free to do, as an independent entity whenever Alabama
3 says, but gee, maybe your reserve sharing burdens should be
4 as high as ours are under the Southern Company pool.

5 Heck, no, we'd rather stick with our 15 percent
6 reserves and our protective capacity which together only
7 equals 17, and you are committed to more under the
8 Southern Company pool.

9 So why should we take on those unfortunate
10 burdens?

11 MR. SHARFMAN. Mr. Saltzman, if I just may, maybe
12 I loss you. I understand what you're saying, but I'm
13 still not sure if you gave a clear answer to what I had in
14 mind, and that was: is the reason we shouldn't find that
15 there is a coordination services market -- is the reason
16 that in effect we have one integrated electric company here
17 and therefore they are not dealing with anyone, and therefore
18 there is no market; is that really what you're saying?

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1 MR. BENBOW: I am saying the Supreme Court requires
2 you to analyze the real facts of any market situation you look
3 at. When you look at this market, you find TVA, who coordi-
4 nates with no one, as the predominant power entity in Alabama
5 and in the Southeast. Adjacent to that, you find Alabama
6 Power Company, which sells throughout the state and is in an
7 affiliated group under the Public Utility Holding Company Act
8 with three other neighboring entities.

9 In addition, you find Alabama Electric Cooperative,
10 which does have a coordinating services agreement that is
11 clearly such since at least 1972. So we are going at least
12 seven years back in history if this question is going to be
13 of any importance, Mr. Sharfman. But you have that relation-
14 ship.

15 I guess the question really comes down to, are you
16 going to decide there's a coordinating services market based
17 on the fact that there is an interconnection agreement and an
18 exchange of services between Alabama Power Company and AEC.
19 when you look at it narrowly and if your focus, as the Board's
20 below was, was on South and Central Alabama. If you expand
21 it outward, however, you find that as far as relationships
22 between Alabama Power Company and Duke or Florida Power or
23 the other entities and utilities that Mr. Balch identified
24 several times, as to those, they have less favorable relation-
25 ships, unlike consumers, less favorable relationships with

1 Alabama Power Company than AEC does.

2 The small systems in Alabama do better with the
3 Alabama Power Company than the Middle South and the Duke
4 Power. And part of the reason for that is not to be nasty to
5 Middle South and Duke, who have a right to do their thing, too.
6 The reason is, that whole business is marginal. Basically --

7 MR. SHARFMAN: What whole business?

8 MR. BENBOW: That whole coordinating services
9 business is, just as the Licensing Board found below, it is
10 not important in the market context in Alabama.

11 MR. SHARFMAN: I was going to ask you one more ques-
12 tion on that. Then I will rest. And that is: If you take
13 the Licensing Board's analysis of the wholesale market, and
14 they said you have to consider the wholesale power produced
15 and delivered by Alabama Power Company for delivery to its own
16 retail customers as being in the wholesale market, by analogy
17 with that sort of reasoning, wouldn't you have to consider the
18 coordination services that Southern Services Company delivers
19 to Alabama Power as being in the coordination services market,
20 even though they're all under the same corporate umbrella
21 functionally.

22 MR. BENBOW: No, I think that the two -- there is
23 really no analogy between them, Mr. Sharfman, and let me try
24 to tell you briefly why.

25 First of all, the Licensing Board was wrong in making

1 the economic analysis which it did and suggesting that those
2 so-called "captive" systems should be treated as part of the
3 wholesale power market. And the reason they were wrong is not
4 only as a theoretical matter about which one may dispute, but
5 they are wrong in terms of Alabama law and practice. And in
6 that regard, I might add that we don't just argue that Alabama
7 laws are different; it's the implementation of those laws,
8 Mr. Saltzman, which are so different.

9 But in any case, on your point, we don't agree with
10 the Board's analysis in that regard. But they did it for a
11 particular reason. They were trying to decide whether the
12 wholesale market in Alabama should be statewide, as we main-
13 tain it should be. They tried to decide whether various kinds
14 of retail business should be attributed to the various entities
15 in the market.

16 They arbitrary excluded TVA and SEPA from that
17 wholesale market, which they should not have done. They are
18 obviously important factors in the wholesale market in
19 Alabama.

20 And then they proceeded to say there was some kind
21 of analogy between the contractual bonds of 35 and 40-year
22 contracts, voluntarily entered into by AEC, making those
23 contractual captive customers in an antitrust sense violative
24 of the antitrust laws. Clearly, if it's ever tested by this
25 body or any other body, with the normal outgrowth in the

1 Alabama system, which merely reflects what happened to the
2 electrical utility industry in Alabama and probably elsewhere
3 that is, that gradually groups of customers came together and
4 said, we want electrical service, we need electrical power
5 supply, where can we get it.

6 The first source in Alabama was hydro. But hydro
7 provides, while it is very cheap, it is also very undependable
8 service. So necessarily, those same distributing groups turned
9 and said, who can provide us with more constant sources of
10 generation, and they proceeded to do so. And that is the
11 birth of steam. And all that nuclear, far from being its
12 unique quality -- and I know you gentlemen have an institutional
13 interest in thinking nuclear is unique. Nuclear is just a
14 further development, in our view. There is nothing unique
15 about it. It provides power at whatever turns out to be the
16 rates. And there are lots of indications that the rates, as
17 you gentlemen probably know better than I, may not be so
18 favorable as against coal and other fossil plants.

19 So you know we are to some extent, it seems to me
20 here, playing linguistic games. And certainly our adversaries
21 in some of their arguments are suggesting linguistic games to
22 you.

23 As far as the other element is concerned, though,
24 of coordinating services, that comes under, to continue with
25 your question, Mr. Sharfman, that comes under an entirely

1 different umbrella, as I have tried to indicate. The idea of
2 a market, as is accepted by the Supreme Court, lawyers and
3 economists, is the idea of sellers and buyers. Well, to the
4 extent of the exchange of services within the seven-company
5 pool operates pursuant to the mandates of the Public Utility
6 Holding Company Act, under the careful scrutiny, Mr. Saltzman,
7 of the SEC, it is not like -- I've lived through it.

8 MR. SALTZMAN: How about in south Texas?

9 MR. BENBOW: In south Texas, it was not light either.
10 It was the move by the SEC to challenge the west Texas
11 relationships which caused the companies down there to have
12 to make their decision.

13 MR. SALTZMAN: They operated independently, notoriously
14 independent, as I understand, for many, many years. Everybody
15 knew the South Texas Pool -- everybody in the utility industry
16 knew it wasn't connected with the rest of the nation. And any-
17 body looking at it must realize that the company that is connected
18 with them was not connected with the rest of the industry.

19 MR. BENBOW: It is another case, but there is some
20 interesting language in the case that comes down there as to
21 the extent of competition and the significance of whether or
22 not FERC --

23 MR. SALTZMAN: What, Mr. Benbow, while we're on the
24 Public Utility Holding Company Act, does the Act forbid such
25 holding companies from engaging in similar energy interchanges

1 in coordination with non-holding company members?

2 MR. BENBOW: Forbid? No. Alabama Power Company
3 has not been reluctant to engage in it with others. It is
4 just merely the simple fact that primarily relationships
5 necessarily take place among affiliates, results in the fact
6 that Alabama, other than as others may come to it and say, we
7 would suggest this, we would like this, would you do this with
8 us -- it doesn't leave it in the position that one would
9 expect it normally to be taking the initiative with others.
10 But it is quite willing, and Mr. Farley is quite willing to
11 do so, when it does not work a burden on Alabama Power
12 Company.

13 MR. SALTZMAN: Well, my question to you again is,
14 has AEC ever asked to join the Southern Company Pool?

15 MR. BENBOW: Never, and for good reason, because it
16 has better benefits outside of the pool. They wouldn't take
17 it on a gift platter, on a silver platter. And even here,
18 where they have not been reluctant to ask for everything else,
19 including conditions that have nothing to do with the Farley
20 plant and nothing to do with nuclear licensing, I think that's
21 our primary objection on the remedy front.

22 Our Board appropriately tried to tailor remedies to
23 the Farley plant and nuclear power and what the parties pre-
24 sented in a separately-held hearing on that subject. The
25 other four parties didn't put in a tiddly of evidence to help

1 that Board try to determine what were appropriate conditions,
2 while we put on a full panoply of factual and expert testi-
3 mony.

4 In light of that, they now have what I think is an
5 extraordinary gall to come here and try to try something
6 before you that they failed to try adequately before the
7 Board.

8 MR. SALTZMAN: All Gaul is divided into four parts.

9 CHAIRMAN FARRAR: Didn't you in fact suggest these
10 conditions?

11 MR. BENBOW: No, we did not. The history is this.
12 The Licensing Board, having wrongly found, in our board,
13 certain limited inconsistency with the antitrust laws by the
14 Applicant over the whole course of its history --

15 CHAIRMAN FARRAR: Could the answer be a short one
16 rather than a long one?

17 MR. BENBOW: It certainly could be. The answer was,
18 they said negotiate with the other parties, and these are the
19 kinds of remedies that we think as of now would be appropriate.
20 Based on that, we tried to act in good faith and come up with
21 proposals that seemed to be consistent with what they were
22 suggesting at that time.

23 We made it perfectly clear that we were offering it
24 only responsive to that, and that we didn't think that any
25 license conditions should appropriately be imposed.

1 CHAIRMAN FARRAR: You didn't think any conditions
2 should be imposed because you disagreed that there was a
3 situation inconsistent.

4 MR. BENBOW: Precisely.

5 CHAIRMAN FARRAR: Did you indicate to the Board that
6 even if those five -- or the situation inconsistent was upheld,
7 these were still inappropriate conditions, or were these con-
8 ditions that you thought were just right, given the five
9 findings.

10 MR. BENBOW: The answer to that is, we thought,
11 because they are ancient history and because they had taken
12 care of themselves, as you see, in the courts, including the
13 Supreme Court recently -- Pueblo-Bowlamat; others -- you can
14 have a technical violation of Section 2 or of the other
15 antitrust laws and require no remedy. We think, under these
16 circumstances, frankly, that no remedy, even given the findings,
17 are appropriate.

18 But at most, we would say that certainly no more
19 onerous conditions than those that the Board saw fit to propose.

20 CHAIRMAN FARRAR: What I'm trying to get at is, you
21 preserve that position before --

22 MR. BENBOW: Yes, consistently throughout. It was in
23 the initial statement by counsel when we began the remedy
24 phase of the hearing. There's no dispute about it. And if
25 you're referring to the kind of linguistic game that

1 Mr. MacGuineas is playing in the AEC's brief on this subject,
2 that is one where I frankly tell you you can save your time.

3 Thank you very much, unless you have other questions
4 for me. I think you've been more than generous.

5 CHAIRMAN FARRAR: Thank you, Mr. Benbow.

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CHAIRMAN FARRAR: Mr. Mac Guineas.

ORAL ARGUMENT ON BEHALF OF INTERVENORS,

ALABAMA ELECTRIC COOPERATIVE

BY MR. MAC GUINEAS:

MR. SALTZMAN: You're not here to confess error after you heard argument, are you?

MR. MAC GUINEAS: NO, we are here to offer a modest proposal for the distressing situation that we heard Mr. Balch describe with respect to their need to shut down construction of Farley Unit II, with only a merely 10 percent left of it to be completed.

Our proposal is the same one we have made in our brief with respect to what the appropriate remedy would be in this proceeding.

We note in passing that the situation the company finds itself in with respect to Unit II is not of course applicable to Unit I, which has been on line for some time now. But we do indeed feel that the relief we seek here in proposals we have made to the company for nearly a decade now would in fact alleviate the situation with respect to their problem of the construction of the remaining 10 percent of Unit II, certainly.

We contend that the conditions adopted by the board are indeed the conditions -- and taken almost verbatim from the company's phase two proposed conditions with the

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1 exception, I believe, of condition number one, which did
2 not derive from the company's proposed license condition, and
3 the board dropped one proposed condition that the company
4 did contend for which was that they be required to purchase
5 all of the excess capacity from an AEC conventional unit
6 which has just now come on line.

7 The board did not require the company to purchase
8 that excess capacity. On the other hand, the board did not
9 require the company to wheel out of its system that capacity
10 or any capacity that AEC would have in temporary excess
11 situations.

12 MR. SALTZMAN: I thought I heard this morning
13 counsel for the company say that you have got all the
14 interconnections you need to draw whatever power is available
15 from outside.

16 MR. MAC GUINEAS: Applicant contended a state of
17 facts which contradicts the facts as all other parties have
18 presented them.

19 MR. SALTZMAN: All other parties opposed to the
20 applicant, of course.

21 MR. MAC GUINEAS: And as the board itself found
22 below.

23 MR. SALTZMAN: Are you interconnected with
24 Georgia Power?

25 MR. MAC GUINEAS: We have a connection at the

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1 busbar of a SEPA hydro project, and Alabama as a connection
2 there. Georgia has a connection there. There's a connection
3 from which power at that project flows into the respective
4 systems.

5 The only agreement that exists with respect to that
6 connection is simply one which controls the flow of power;
7 the only economic relationship AEC has is with SEPA. There
8 is no economic exchange. There is no financial --

9 MR. SALTZMAN: For whom would you wish to have
10 wheeled?

11 MR. MAC GUINEAS: For whom we would wish to have
12 power wheeled, in the immediate instance to Tennessee
13 Valley Authority.

14 MR. SALTZMAN: You wish to wheel it to or from?

15 MR. MAC GUINEAS: To, in terms of our temporary
16 excess capacity. I'm speaking now just of a specific case
17 in this immediate time frame.

18 We contend that we need the company to be under the
19 obligation not to refuse reasonable requests to wheel in
20 situations which may arise and are likely to arise, or at
21 least are likely to arise in light of the present situation.

22 MR. SALTZMAN: Has the company refused to wheel
23 the power to you in the past?

24 MR. MAC GUINEAS: The company has not specifically
25 refused to wheel power; they did refuse --

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1 MR. SALTZMAN: Were they asked?

2 MR. MAC GUINEAS: They did refuse to include in
3 the '72 interconnection agreement a number of coordinating
4 factors which the board found to be reasonable in that
5 AEC requested them at that time.

6 MR. SALTZMAN: Let me see if I understand correctly.
7 This is not a situation I take it where AEC feels it
8 needs low cost power wheeled in from outside across the
9 company's lines. That's not your problem?

10 MR. MAC GUINEAS: We do not in this immediate
11 time frame have that problem.

12 MR. SALTZMAN: Did you have that problem in the
13 past?

14 MR. MAC GUINEAS: What we have sought -- because
15 we have not --

16 MR. SALTZMAN: Mr. Mac Guineas, did you need that
17 power wheeled to you from outside the Alabama Power system?
18 You asked Alabama Power and they refused?

19 MR. MAC GUINEAS: No specific instance of a
20 specific request for such wheeling was made.

21 MR. SALTZMAN: Then how can you -- I take it you're
22 not complaining that Alabama has refused to wheel power to
23 you in the past?

24 MR. MAC GUINEAS: No, we are complaining -- we
25 are factually, physically, and contractually in a situation

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1 where we are dependent solely upon Alabama Power for
2 coordination services, and as such, given the history of
3 their power, as found by the board below, in terms of
4 market power and given their history of conduct and the
5 type of conduct that the board found them to engage in,
6 we feel we need the option not only when concrete situations
7 occur, but we need the option as a bargaining measure
8 with which to deal with Alabama directly for coordination.

9 Thus, the example of our excess power, which
10 Alabama initially urged the board below to require them to
11 purchase in a licensing condition; and then when the board
12 did not do that, Alabama Power declined to purchase it.
13 Therefore, we need to go out of Alabama Power's area to find
14 other customers for it.

15 And in bargaining with Alabama Power, it is vital
16 for us, we contend, to have options other than Alabama Power
17 or we are never going to be able to achieve any -- we will
18 totally lack any form of bargaining power in these circumstances
19 where they are the sole and only source for coordination
20 services or sales on our part.

21 MR. SALTZMAN: Have they ever denied coordination
22 services to you under reasonable terms?

23 MR. MAC GUINEAS: The board found they denied
24 them for an extended period of time up to a time period --

25 MR. SALTZMAN: What precise services are you asking

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1 for?

2 MR. MAC GUINEAS: With respect to the interconnection
3 agreement, we asked for a reserve sharing position. We asked
4 for staggered construction of units. And we asked for a
5 coordinated planning of generation, which is somewhat broader,
6 but encompasses the staggered construction of units.

7 We asked for -- indeed, we asked for the elements
8 which were incorporated in the interconnection agreement.
9 Finally, we received some of those elements in 1972.

10 MR. SALTSMAN: Is it true that your prices for
11 power are cheaper than Alabama Power Company's?

12 MR. MAC GUINEAS: It is true at some points in
13 time they have been cheaper, and other points in time they
14 have been more expensive.

15 Operating as AEC and its members do under a
16 pooling rate, it is obvious that the substantial wholesale
17 power element that is purchased from Alabama Power, when a
18 new rate has been filed and goes into effect, that wholesale
19 rate is likely to be higher than the average of the pooling
20 rate and raise the pooling rate average.

21 At the end of the time frame when that wholesale
22 rate is in effect, the other factors -- self-generation and
23 so on -- having been subject to inflationary effects, that
24 rate tends to be lower than the average; hence, Alabama will
25 come in with a new rate filing, so that there is a criss-

1 cross. Certainly, all throughout this proceeding, the
2 history of the relationship between Alabama Power and
3 Alabama Electric -- one of Alabama Power's public rationales
4 for opposing our generation is that they can sell it
5 cheaper.

6 That runs throughout the history of their
7 opposition to our generation.

8 Now, we come to determination of redressing
9 the added competitive situation; Alabama says AEC can do
10 it much cheaper.

11 MR. SALTZMAN: I think at the moment AEC's power
12 is cheaper.

13 MR. MAC GUINEAS: I could not state that to be
14 true.

15 MR. SALTZMAN: What does it show on the record
16 here?

17 MR. MAC GUINEAS: I think the record is inconclusive
18 as to that point. It shows that the Tombigbee units,
19 given a constant cost of financing, are more expensive than
20 the Farley units, and I believe -- I'm not certain -- are
21 more expensive than the Miller units. But I can verify that
22 from the exhibits.

23 MR. SHARFMAN: But Mr. Mac Guineas, is it really
24 relevant, legally, whether or not your power is cheaper?

25 MR. MAC GUINEAS: At a specific point in time,

1 whether our power is cheaper or not than theirs, is totally
2 irrelevant.

3 MR. SHARFMAN: That's what I thought.

4 MR. MAC GUINEAS: What we should be focusing on
5 is the situation inconsistent, as found in the overall
6 propensity of the company to engage in the type of conduct
7 it has been found to engage in, coupled with its market
8 power, and what are the appropriate conditions to eliminate
9 the possibility or probability of recurrence of, not those
10 identical forms of conduct, but of similar types of conduct.

11 MR. SALTZMAN: What about joining the Southern
12 Company pool? Would you be interested in that?

13 MR. MAC GUINEAS: I think in terms of our
14 expectations of what we can -- have historically been able
15 to receive from the company, are so far down the line from
16 membership in the pool, that it really has not been given all
17 that serious consideration.

18 MR. SALTZMAN: Would it be to your advantage or
19 disadvantage to join the pool? That was suggested this
20 morning, that it would plainly be to your disadvantage and
21 you wouldn't take it if it were given to you.

22 MR. MAC GUINEAS: I couldn't say it would be to
23 our disadvantage. Certainly, there are a number of factors
24 that would have to be explored as to whether it would or would
25 not be a full pool membership. I would initially have some

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1 concern in the following respect: that annually the four
2 companies in the pool get together; they rate the
3 capacity of their units, and they draw up the schedules for
4 both capacity and energy pooling and exchanges for the
5 coming year.

6 And in light of the past conduct of Alabama
7 Power Company with respect to AEC, I would feel somewhat
8 queasy getting in there in a four to one vote situation,
9 those types of negotiations, without --

10 MR. SALTZMAN: Let me ask you another basic
11 question: has the Alabama Electric Company made a study of
12 the possibility of joining the pool of cooperatives to see
13 if they would have advantages or disadvantages?

14 MR. MAC GUINEAS: We have not made such a study,
15 because the types of requests we have made, such as those
16 requests, some of which eventually were granted in 1972,
17 have been much more, shall we say, simple and less complex
18 and one step at a time approach to getting from a situation
19 where Alabama was selling us ratcheted wholesale power for
20 when we had unit outages in emergency situations.

21 We were moving from that situation in the
22 fifties on. And we certainly have not come ot the point where
23 we would feel that we are realistically sitting on the edge
24 of the pool and should undertake a study of that sort.

25 MR. SALTZMAN: What about the fact that you keep

1
2 maintaining lower reserves than the company does? Do you?
3 Does AEC maintain a lower percentage of reserves than the
4 company?

5 MR. MAC GUINEAS: I think at times AEC can maintain
6 a lower percentage of reserves than the company. I think that's
7 because of a particular policy that apparently the Southern
8 Company pool has. I think I mentioned this in my brief, that
9 their reserves are their excess capacity, and at times under
10 their interconnection agreement which is in effect for this
11 year, in the off-peak months, the pool capacity reserve is
12 approaching 40 percent, and as we understand it, they have
13 no policy of attempting to go out and sell that, and we're
14 not sure that we would want to join a pool that has that
15 type of policy or philosophy.

16 MR. SALTZMAN: Why would they not wish to sell
17 their reserves?

18 MR. MAC GUINEAS: We have made inquiries and
19 questioned that, and we really haven't gotten an answer to that
20 question.

21 CHAIRMAN FARRAR: I'm puzzled by this dialogue.
22 Did they ever defend against this suit by saying you ought
23 to be in the pool?

24 MR. MAC GUINEAS: No.

25 MR. SHARFMAN: Let me ask you this: why isn't the
'72 agreement -- why doesn't that give you what you need?

1 MR. MAC GUINEAS: Well, that doesn't give us
2 any wheeling which we need in the immediate concrete
3 situation, and it certainly doesn't give us reasonable access
4 to base load nuclear capacity, which we feel, looking down
5 the 30 to 40 year time frame, is going to be vital for us
6 for the economic production of power as a base load element.

7 MR. SHARFMAN: Are those two items everything?
8 Is that everything that is defective, everything that you
9 don't need?

10 MR. MAC GUINEAS: Certainly, the protective
11 capacity provision, linked as it was to our largest unit, we
12 found defective. And the board without making a specific
13 antitrust finding has recommended that it be eliminated.
14 and I would think it's reasonably fair to say we have had
15 discussions at the company, and I think very possibly we are
16 on the way to eliminating that.

17 MR. SHARFMAN: That's the reserve requirement.

18 MR. MAC GUINEAS: Yes.

19 MR. SHARFMAN: Why can't you do your wheeling through
20 Georgia Power?

21 MR. MAC GUINEAS: Because we have no link with
22 Georgia Power that has the capacity for wheeling. We would
23 have to construct a link. We are attached to the busbar of
24 a hydro plant and so is Georgia. And the power flows from
25 that interconnection, comes into AEC --

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1 MR. SALTZMAN: You can't do it the other way?

2 MR. SHARFMAN: Let me ask you this: if your
3 lines go up to the hydro plant, it wouldn't be enormously
4 expensive to build a link there, would it?

5 MR. MAC GUINEAS: It probably would be reasonable
6 if you look at it in isolation to build a link there. But
7 when you have four other links much closer to the heart of
8 your system -- this is out on the end of the system -- the
9 AEC system is --

10 MR. SHARFMAN: I know. I looked at the map.

11 MR. MAC GUINEAS: And when you have links in the
12 heart of your system already existing with Alabama Power
13 Company, and you make a -- it doesn't take a sophisticated
14 study to realize that where you've got existing capacity
15 for interchange of power and coordination, that it doesn't
16 make much sense to strike out in a new -- or make an attempt
17 to strike out. We have no idea whether Georgia would be willing
18 to engage in it.

19 MR. SALTZMAN: Mr. Mac Guineas, Georgia Power is
20 part of the same Southern Company, isn't it?

21 MR. MAC GUINEAS: Yes.

22 MR. SALTZMAN: Do they want to buy your power?

23 MR. MAC GUINEAS: I have no indication they want
24 to buy.

25 MR. SALTZMAN: Why would you want to link up

1 to them if there's no possibility of buying?

2 MR. SHARFMAN: I was talking about wheeling.

3 MR. SALTZMAN: That's what I'm talking about. He's
4 going to wheel the power to sell to Georgia Power. He doesn't
5 know if Georgia Power wants it.

6 MR. MAC GUINEAS: We have not had discussions with
7 Georgia Power on the assumption that our discussions with
8 Alabama Power in the past decades have resulted in what you
9 see in the phase one decision in this proceeding. What would
10 be the point of going to Georgia?

11 Now, we have in fact gone to Gulf Power because
12 Gulf Power does approach the south side of our system, although
13 not adjacent to it.

14 MR. SHARFMAN: Is that also one of the companies?

15 MR. MAC GUINEAS: That is one their companies.
16 We have on the record and we have cited in the briefs that
17 they said they could not make a policy decision as to whether
18 they could even determine to hold discussions with us,
19 looking towards load flow studies which might lead to
20 discussions.

21 That was their response to us, and we consider that
22 totally consistent and confirmatory with certain conspiracy
23 findings made by the board. And we have no indication that
24 that situation of the policy of the Southern Company of
25 isolating each system within its region has changed.

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1 And we don't have the manpower, the time, energy,
2 and fortitude, frankly, to go all around the horn looking
3 for what appears on its face to be very clearly a futile
4 situation.

5 MR. SHARFMAN: You're saying they act as if they're
6 one company? They are in effect a single company with
7 monopoly power of the whole southern system, or do you say
8 we should analyze them as you would use the word, "conspiracy,"
9 as conspirators under the Sherman Act?

10 MR. MAC GUINEAS: I use that with respect to the
11 SERC findings, not only because of the concerted conduct
12 of the four affiliates, which I think under the Sherman Act
13 would constitute conspiracy, but also because they were not
14 affiliated involved in those agreements to in effect divide
15 the market or isolate small systems within which ever
16 particular area that system functioned in.

17 MR. SALTZMAN: Mr. Mac Guineas, I take it then
18 that this is the opposite of the situation in Midland and
19 in Davis Bessie in the sense that you are sitting in the middle
20 of their territory bulging with electricity, and you can't sell
21 it outside; is that the problem?

22 MR. MAC GUINEAS: We are sitting in the middle of
23 their territory, and we are wholly dependent on their business
24 judgment as to whether we can or not sell it. To me, that's
25 the most important point.

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1 The reason I phrase it that way is because the
2 company has indicated that they will perhaps for a limited
3 period of time wheel 50 megawatts for us from TVA.

4 MR. SALTZMAN: That's in to you or out to you?

5 MR. MAC GUINEAS: Our from us.

6 MR. SHARFMAN: Out to TVA?

7 MR. MAC GUINEAS: Out to TVA. Now, this has
8 all occurred during the time this matter has been pending
9 appeal here.

10 MR. SHARFMAN: In other words, you have no quarrel
11 with it. You jsut would like to be sure it would continue.

12 MR. MAC GUINEAS: I don't feel a great deal of
13 comfort looking at that and hypothesizing what would occur
14 absent the pendency of this appeal.

15 MR. SALTZMAN: I thought Mr. Balch told us
16 everytime you wanted something they gave it to you?

17 MR. MAC GUINEAS: Indeed, that's what Mr. Balch
18 told you, but that's not what the record shows that the
19 decision shows below.

20 CHAIRMAN FARRAR: Mr. Mac Guineas, let me ask
21 you something here. You said -- or as you said a few minutes
22 ago, the board found a number of refusals by Alabama Power
23 to give you coordination services that you wanted; in light
24 of that finding -- and maybe this shows my lack of knowledge
25 or sophistication in the area -- of what relevant is it --

1 what relevance was my discussion with Mr. Balch and
2 Mr. Benbow about whether there is a coordination services
3 market or not?

4 Suppose I disagreed with them and found there
5 should have been a coordination services market here? Hasn't
6 the board already looked at violations in that market? And
7 so what difference would it make if I were to disagree with
8 them?

9 MR. MAC GUINEAS: I'm not sure that it makes a
10 decisional -- fundamentally a decisionally significant
11 difference for the following reason: the board found below
12 that the applicant's monopoly in transmission gave it a
13 control over access to the coordination services which are
14 necessary and vital, whether you look at it from a bottleneck
15 analysis or whether you say they have monopolized the
16 relevant market for coordination services.

17 I frankly don't see when you come out at either
18 end of those analyses that there is a crucial difference.
19 I think they found the fundamental industry reality and the
20 reality of the necessity of having this type of access and
21 using it --

22 CHAIRMAN FARRAR: So I'm not as dumb as I thought I
23 was. The market finding itself is not crucial to the case.

24 MR. MAC GUINEAS: No. Because they found the
25 dominance in transmission, the control over the access in order,

1 and that gave them the power to monopolize the wholesale
2 market.

3 You need those factors to put together the bulk
4 wholesale power.

5 MR. SALTZMAN: Mr. Mac Guineas, are you arguing that
6 this case turns on the bottleneck analysis?

7 MR. MAC GUINEAS: I am arguing you can analyze
8 the coordination and transmission aspect of it, either
9 through a bottleneck analysis or through a relevant --

10 MR. SALTZMAN: Does a bottleneck analysis require
11 some sort of common carrier duty upon the part of the one
12 with the bottleneck?

13 MR. MAC GUINEAS: It has never really been
14 characterized as a common carrier obligation. I'm not
15 really sure what that means. I do know that some --

16 MR. SALTZMAN: We know what a common carrier
17 obligation means. I'm sure you do too.

18 MR. MAC GUINEAS: Well, I don't think it is quite --
19 it's not quite freighted with the same implications, I think,
20 of a common carrier. In other words, there are obviously
21 going to be a limited number of system who are geographically
22 located contiguous to a large transmission system that could
23 ask for services, but not like anybody can go to --

24 MR. SALTZMAN: My legal problem is this: absent
25 common carrier status -- and I'm frank to say that I don't see

1 it here -- the obligation of the utility company to wheel
2 power, that is, to let you use its facilities, comes into
3 play only if it's found to be a monopoly. And this can
4 only come into play and you can only be counted to be a
5 monopoly if we can show that it's monopolized a market.

6 Now, I understand my brother Farrar to suggest
7 that it's enough that they monopolize the wholesale market
8 for purposes of the relief given here, but you don't have
9 to say they also monopolize some coordination services
10 market.

11 MR. MAC GUINEAS: They monopolize the wholesale
12 market.

13 MR. SALTZMAN: One of the ways in which they did
14 it --

15 MR. MAC GUINEAS: Was through their single control
16 of a vital resource or vital access to the factors of
17 production, which would enable someone to participate in that
18 market.

19 MR. SALTZMAN: My point is then that it's not
20 necessary for us to decide whether or not there is or is not
21 a coordination services market to sustain the decision below:
22 that is, to give you the relief you seek, more accurately.

23 MR. MAC GUINEAS: You do not have to find --

24 MR. SALTZMAN: Obviously, we don't have to sustain
25 the decision below, but to give you the relief you seek does

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1 not depend upon there being an existing market for
2 coordination services that the board should have found.

3 MR. MAC GUINEAS: I agree, you do not have to
4 find that.

5 MR. SHARFMAN: May I ask you to finish an answer
6 that you didn't because Mr. Saltzman interrupted? You
7 said you could analyze coordination services, either as a
8 bottleneck or -- or was the last word. And I have this
9 insatiable curiosity about what was going to follow.

10 MR. MAC GUINEAS: Or as a relevant market. In
11 other words, a unique bottleneck facility is simply --
12 generally, is either a group or a single owner control over
13 a vital resource.

14 MR. SALTZMAN: What about the suggestion --

15 MR. SHARFMAN: Wait a minute, if I may, Mr. Saltzman,
16 please. Bottleneck is really -- isn't it -- what section
17 of the Sherman Act does that come under, one or two?

18 MR. MAC GUINEAS: It could come under either,
19 depending on the number of participants who control the
20 bottleneck and were excluding others from it.

21 I would indicate -- I must say, I haven't given
22 that great thought. But it would seem to me --

23 MR. SHARFMAN: In this case you would say it's
24 section two, then, and this is only one.

25 MR. MAC GUINEAS: Right. The relevant market in the

id20 1 area of concern for the protection of competition in the
2 terminal railroad was railroad traffic; it wasn't
3 bridges. It was railroads being able to compete for the
4 carriage of goods.

5 MR. SALTZMAN: Isn't it an offense to the charge
6 that they have used this vital link which is unique, the
7 suggestion that you could in fact, perhaps at some cost to
8 yourself, build the necessary linkages without bankrupting
9 yourself or otherwise?

10 After all, competitors must compete; that sometimes
11 requires the expenditures of their money.

12 MR. MAC GUINEAS: Indeed, that's an argument that
13 has run throughout this case that applicant has made. You
14 know, if AEC were as large and had the interconnections as
15 APCO does, then it wouldn't be in that situation.

16 MR. SALTZMAN: I think they've been saying fairly
17 that you've been growing steadily and that you do have the
18 resources and after all, there's nothing unique about this
19 power line in the sense that you can't build another one.

20 MR. MAC GUINEAS: I think the word "unique" when
21 analyzed in the cases you deal with really means: "is it
22 competitively necessary for the use." And yes it is, unless
23 we were to duplicate the company's transmission system.

24 MR. SALTZMAN: Just to build the line to TVA you
25 would have to build it from south Alabama all the way up to

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1 northern Alabama.

2 MR. MAC GUINEAS: We would have to have a radial
3 line leading through the company's system from AEC to TVA.

4 MR. SALTZMAN: How about --

5 MR. MAC GUINEAS: My guess is the engineers would
6 say you're nuts.

7 MR. SALTZMAN: How about to the Mississippi Company?

8 MR. MAC GUINEAS: As I understand it, -- and I
9 believe as the record shows -- I think any -- I suppose it
10 would be physically possible, engineeringly possible to
11 link with Mississippi Power Company, another affiliate of
12 applicant's. Again, what is the point? We have multiple
13 interconnections with applicants -- with applicant now. Their
14 system is linked at multiple points with Mississippi Power
15 Company.

16 MR. SALTZMAN: Was there any suggestion here that
17 applicant cannot physically wheel this power? I take it you're
18 not suggesting that they have to wheel your power, power for
19 you to the extent that it would impair or impede their
20 existing system, are you?

21 MR. MAC GUINEAS: No. There is no indication that
22 their system lacks the capacity to deal relative to their
23 system rather minute quantities of power AEC would be dealing
24 with.

25 MR. SHARFMAN: How would a wheeling system go?

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1 Would it depend -- I mean, maybe they have capacity now to
2 do what you want in wheeling and maybe they wouldn't have
3 the capacity to accommodate another wheeling proposal next
4 year or the year after.

5 How should that be dealt with in your view?

6 MR. MAC GUINEAS: It seems to me that it should
7 be dealt with in a manner similar to that in, I believe,
8 the CAPCO condition where there would be an obligation for --
9 in the future to project and to designate the needs, and so
10 that that could be taken into consideration in their planning,
11 could be taken into, our future needs combined with theirs
12 could be taken into consideration with their planning just
13 the way it is when you have a wholesale customer and you
14 project its load growth.

15 Obviously, we pay for the capacity that we use
16 in the transmission system when you wheel. That's what wheeling
17 is.

18 MR. SHARFMAN: You pay for your share on the capital
19 element of it.

20 MR. MAC GUINEAS: We can and we would be very
21 happy -- and we have, as Mr. Balch indicated, again during
22 the course of this proceeding the company expressed
23 willingness at our invitation to join in a joint transmission
24 enterprise for a particular area.

25 You can do it that way. You can do it through a

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1 wheeling rate. Or you can do it through splitting the
2 allocation of the cost of the construction and operation
3 of the expanded facilities, if that is required, pay
4 proportionate to the demand that you put on it.

5 MR. SHARFMAN: I gather FERC, even though it
6 doesn't have the power to order wheeling, has the power to deter-
7 mine a fair rate for it.

8 MR. MAC GUINEAS: Yes, it does.

9 Tariffs are filed there and if you disagree with
10 the terms and conditions as to their reasonableness or the
11 rate, the rate level or the rate structure, the methodology,
12 you can go in and attempt to persuade FERC that it's not
13 reasonable.

14 MR. SALTZMAN: In order to give you this wheeling
15 condition, would we in any way be involved in setting the appro-
16 priate rate, or would you in any way expect to come back
17 to us and complain that the rate set for wheeling by the
18 company is inadequate? Or I should say too high; would
19 you expect for us to support that?

20 MR. MAC GUINEAS: I would not anticipate that
21 in terms of rate level. No.

22 MR. SALTZMAN: Do you think we could?

23 MR. MAC GUINEAS: I haven't given that -- I hesitate
24 to give you an answer in this --

25 MR. SALTZMAN: The reason I bring this all up is

1 it disturbs me if you're asking for a remedy that's not
2 effective. I have, one, grave doubts as to the legal matter,
3 that this commission has any authority to set electric power
4 rates.

5 In the second place, even if it does, it may be
6 FERC can't give you effective relief. You are aware, are
7 you not, that unless something has happened recently,
8 that the rates in Otter Tail have not yet
9 been finally settled.

10 MR. MAC GUINEAS: There's been a series of
11 disputes as to the wheeling rates and discrimination issues.

12 MR. SALTZMAN: The wheeling rate went up 400
13 percent suddenly.

14 MR. MAC GUINEAS: Right.

15 CHAIRMAN FARRAR: Mr. Mac Guineas, may I get back
16 to your coordination services for a minute?

17 Assuming we thought we had to get to the question
18 of whether there was a market, is it your judgment that the
19 facts concerning that market are the same in Alabama as they
20 were in Michigan, or -- well, what is your position on that?

21 MR. MAC GUINEAS Our position on that is that the
22 only error in the decision below was the misapplication or
23 the misreading of -- I think it's Grinnell and Philadelphia
24 National Bank. And factually and analytically they came out
25 the same place as the commission appeal board came out in looking

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rid25 1 at the economic realities and the functional realities of how
2 you put together power production. It seems to me there
3 was only one brought to their finding a relevant market there,
4 and that was purely either an unwillingness or misappreciation
5 of those two cases, which to me stands squarely for the
6 purpose that a cluster of services of the nature of this
7 sort can and does constitute a relevant market.

8 MR. SHARFMAN: Supposing we were to hold that it
9 did constitute a relevant market; in your view, would we
10 have to remand for hearings to see whether there were any
11 violations of the antitrust laws in that market?

12 MR. MAC GUINEAS: No. I think the board below
13 has already found in effect the control that the company
14 has in that market by dint of their interconnections, their
15 transmission, their size, and essentially the geographic
16 realities of AEC's location vis-a-vis the applicant and its
17 affiliates.

18 And I certainly think that they have found refusal
19 to coordinate and they have found that to be inconsistent
20 with the antitrust laws because it was the purpose and
21 intent to monopolize the wholesale market. It is obviously
22 analytically if you found a relevant coordination services
23 market, it's a refusal to deal in the coordination services
24 market.

25 It's just the bottom line or the final line.

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1 MR. SALTZMAN: Mr. Mac Guineas, how do you deal
2 with the problem posed by applicant under the Public Utility
3 Holding Company Act? He says -- and I think he appears to
4 be accurate -- that the Act requires the force of
5 operating companies of the Southern Company to coordinate and
6 act as one unit. I think that's true.

7 Whether or not the FCC monitors them closely
8 is perhaps debatable. But that being so, is it realistic
9 to suggest that there is a coordination services market
10 when the only real commercial realities seem to indicate
11 that you just have dealings between four units of the same
12 company?

13 They don't turn outside themselves for coordination
14 services.

15 MR. MAC GUINEAS: There's nothing in the Holding
16 Company Act that says you must deny coordination to other
17 systems.

18 MR. SALTZMAN: That's not the point.

19 MR. MAC GUINEAS: That is the only point, that the
20 company, it seems to me, avoids; they are authorized to
21 coordinate --

22 MR. SALTZMAN: Mr. Mac Guineas, step back from the
23 problem a minute. Suppose Alabama Power Company and its
24 three sisters disappeared, and you had one enormous company.
25 Fair enough. And you shrank that company into the state of

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1 Alabama so that you don't have to worry about jurisdictions.
2 so you now have it in Alabama, and that company never
3 coordinates with anybody. It's entirely self-sufficient and
4 it just doesn't do it.

5 Now, have they violated the antitrust laws? Is
6 there a coordination services market? If there is, and they
7 don't do it --

8 MR. MAC GUINEAS: Yes, they have 100 percent of it.

9 MR. SALTZMAN: You're still in there.

10 MR. MACGUINEAS: You're in there, but assuming
11 they're refusing to coordinate with a smaller system inside
12 their system --

13 MR. SALTZMAN: We're talking about games now; the
14 coordination services market is, when entered into, as I
15 understand it, after much thought by independent power
16 companies to reduce the cost of producing electric power.

17 But these people are all in one company, and they
18 don't buy from anybody else. So the cost of reducing electric
19 power remains the same to them. They're all inside the system.
20 They don't make any effort to reduce their costs, which they
21 would have to do so by returning to somebody else's cheaper
22 plant.

23 Where would the market be? And isn't that
24 essentially, as I understand Mr. Benbow and Mr. Balch, what
25 they are driving at?

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1 MR. MAC GUINEAS: I don't think on the facts of
2 this case that that is what they can legitimately drive at
3 because there is all the evidence of their engaging in
4 the transactions with other large utilities that surround
5 them that are on various sides of them, the seasonal
6 transaction with TVA, the other transactions listed in the
7 phase one decision; so that the market, as I think all the
8 witnesses, both I think in Consumers and Alabama have
9 testified, is one that spreads out from the core of the
10 competitive focus, and of course as transactions become
11 uneconomic because of transmission distances, the market
12 edges tend to appear but not in a very concrete manner.

13 MR. SALTZMAN: Let me continue. I said for
14 purposes of this coordination market, as you just described it,
15 we would have to ignore the inter-company, the inter-Southern
16 Company transactions. We really must treat them as one,
17 because after all they're not going outside the system to
18 reduce the cost of electricity. The market consists only,
19 I would take it, in their dealings with independent entities.
20 Or are we to look at those transactions between Alabama and
21 Gulf and Alabama and Georgia as part of the market?

22 MR. MAC GUINEAS: Sure, you can do it if you want
23 to treat them as a corporate entity; you look at them in
24 the same way you analyze the wholesale on the in-house sales.
25 It's even more so in this circumstance because here they have

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vid29 1 got a document they filed which is the result of their
2 sitting down and bargaining among each other over capacity
3 costs and energy prices every single year among the four
4 companies.

5 So there is evidence of sitting down at a table
6 and bargaining for exchanges and bargaining and putting dollar
7 values on exchanges, buying and selling.

8 MR. SALTZMAN: I understand that they would put
9 a price on it, but is it realistic to consider this buying
10 and selling? I mean, they are under the same roof; it's
11 one company, isn't it?

12 MR. MAC GUINEAS: Sure, it's realistic to consider
13 the wholesale power transmitted to their in-house a captive
14 retail distribution system; in terms of relevant market
15 analysis, it's perfectly realistic.

16 MR. SHARFMAN: There's a difference there, isn't
17 there? There's a difference in that there is a wholesale
18 market outside their system, but there isn't one in
19 coordination services, except of course there is one now
20 that there is some coordination with AEC. But if not for that
21 there wouldn't be one. Is that right?

gsh

1 MR. MAC GUINEAS: It seems to me that there would
2 be one because they're sitting down and bargaining each
3 year with each other.

4 MR. SHARFMAN: Doesn't that turn on intercorporate
5 relationships under the anti-trust laws?

6 MR. MAC GUINEAS: No. I think it really more turns
7 on a common sense analysis of the business realities of
8 what goes on. And I -- there are minutes that the meetings
9 that the four companies engage in related to that bargaining
10 process and the record in this proceeding.

11 MR. SHARFMAN: Then in essence we can disregard the
12 holding company for purposes of --

13 MR. MAC GUINEAS: I think so. Completely, yes.

14 CHAIRMAN FARRAR: Mr. MacGuineas, if I can change
15 the subject slightly, the sham litigation and pattern of
16 conduct argument that you make, the company, Alabama Power,
17 was not notably successful with a lot of that litigation,
18 but yet they got out of Judge Godbold a fairly strong dissent.

19 I had the pleasure in my former incarnations of
20 appearing before him a couple of times and he -- I was duly
21 impressed with his ability, enough so that I would be a little
22 nervous in saying, notwithstanding what he said, that was
23 sham litigation.

24 MR. MAC GUINEAS: I think you would find a reading of
25 our brief, particularly in light of consumers' decisions

gsh 1 subsequent to our main brief and prior to our reply brief
2 that the essential point we're making here before the board
3 is the failure of the board below to look at that conduct
4 as purpose or intent evidence, or as indicative of the
5 essential — the intent of the company to retard, eliminate,
6 or delay any generation growth on that part of AEC.

7 I am content to rest on the briefs as to the sham
8 litigation nature as probably maybe the most extensively
9 briefed issue in this proceeding. And I really have nothing
10 to add to that aspect.

11 MR. SALTZMAN: Was the litigation that you instituted,
12 as AEC instituted, to prevent Alabama power from selling
13 certain bonds to run the line, as you say, would duplicate
14 your facility of the same nature?

15 MR. MAC GUINEAS: Of the same nature?

16 MR. SALTZMAN: You objected, I thought, on the
17 grounds --

18 MR. MAC GUINEAS: Totally devoid of the same intent
19 and purpose as Alabama's litigation. That's wasn't even put
20 in issue or contended to by any party in this proceeding.

21 MR. SALTZMAN: You know, Mr. MacGuineas, your
22 cooperative isn't the only cooperative in the country. And
23 rightly or wrongly, the business-managed tax-paying companies,
24 as they would like to call themselves nowadays, object
25 strenuously and realistically.

1 It's a little harder, isn't it, to say it's a sham
2 when people feel very strongly about it? You do have 35-year
3 requirements, contracts. Those may be perfectly legal.

4 But as I understand the suit, the decision was not
5 that the company was wrong, but you had no standing to
6 challenge it. The *damnum absque injuria* — I'm back that
7 far from law school that they used to say things like that.

8 MR. MAC GUINEAS: I think that's a permissible
9 reading. If you look at the reading of the board below,
10 they find it more of a two-pronged, have more of a two-pronged
11 reading of that litigation, and that is that the contracts
12 were lawful and were not violative of the anti-trust law,
13 and the company did not have standing.

14 I think the characterization in the licensing board
15 decision is somewhat different, although, as I say, I have
16 certainly heard your interpretation.

17 CHAIRMAN FARRAR: Let me ask you about the licensing
18 board decision on this pattern of conduct as — I forget which
19 of your opponents was making the point. This is a relatively
20 sophisticated licensing board, as good a one, perhaps as
21 has been put together.

22 MR. SALTZMAN: Perhaps it's better than the appeal
23 board.

24 (Laughter.)

25 CHAIRMAN FARRAR: They carefully analyzed the facts.

gsh

1 MR. BALCH: We didn't say that.

2 (Laughter.)

3 CHAIRMAN FARRAR: They found in any number of
4 instances no situation inconsistent, no anti-competitive
5 conduct. And again, reading it, it looks like it's carefully
6 done.

7 In order to win the case, do you have to have a
8 setback from that and look at this as part of the big — can
9 you win the case that way without stepping back and just
10 looking at the big picture and saying, all right, they are
11 right in their particular fact-findings, but there are some
12 overall inferences you can draw.

13 And if that's what we have to do, why should we
14 draw those inferences.

15 When they sat through, however, many days of
16 hearings and watched these people and maybe were in a better
17 position to draw inferences or draw the big picture than we
18 would be.

19 MR. MAC GUINEAS: Well, I think essentially they
20 didn't draw the big picture in the terms of taking the step
21 back and taking the overview. They tended to box in.

22 I think this is most visible in the Phase 2 opinion,
23 where they one, two, and this ended there and that ended
24 there, and so on like that.

25 CHAIRMAN FARRAR: But let's deal with Phase 1. First

gsh 1 all they required under the law to look at the whole, the
2 big picture, or am I making that up myself -- is it legitimate
3 for them just to analyze each specific incident in isolation?

4 MR. MAC GUINEAS: Certainly where those specific
5 incidents constitute violation of the anti-trust law, yes,
6 that would be sufficient.

7 CHAIRMAN FARRAR: No, but where they find in
8 isolation that they don't, you know, it doesn't quite
9 constitute a violation. You know, each one individually can
10 be set aside on the grounds that, you know, there is
11 nothing sufficiently wrong with it.

12 Have they done their job if they do that with each
13 one and make a negative finding on each one?

14 MR. MAC GUINEAS: No, they haven't because conduct
15 which in isolation might be lawful, but when coupled with the
16 monopoly power and the requisite general intent to monopolize
17 the market, would become part and parcel of the Section 2
18 monopolization.

19 So you can't look at -- I think I'm addressing the
20 question.

21 CHAIRMAN FARRAR: But did they do that?

22 MR. MAC GUINEAS: I don't think they did. I would
23 cite specifically where they treated the contracts which
24 tended to foreclose systems from access to other power
25 suppliers or tended to foreclose systems from the construction

gsh 1 of their own generation. And they said, well, it had that
2 effect.

3 But we don't think the company -- we don't find
4 evidence the company purposely put them in there. That's
5 simply application of the wrong legal standard to a
6 monopolist because if the monopolist presented that contract
7 and that contract had the clear effect of retarding AEC's
8 generation growth, which the board found, well, then, that
9 is a Section 2 monopolization.

10 CHAIRMAN FARRAR: Well, then, I shouldn't be --
11 because you're saying it's a different legal standard, I
12 shouldn't be reluctant to second-guess them like I would be
13 if it was just inferences?

14 MR. MAC GUINEAS: Absolutely not. I think you can
15 also go back and correct erroneous inferences or the failure
16 to make rational inferences. I don't mean that their
17 decision was irrational, but the failure to see or perceive
18 that a certain set of facts called for or required a
19 particular inference, I think certainly the appeal board,
20 in Consumers did that with the initial decision in that
21 case --

22 MR. SALTZMAN: Lots of things were blamed on
23 consumers. Mr. MacGuineas, you're challenging, are you not,
24 the finding that the lawsuit was not a sham, I take it,
25 that the lawsuit was evidence, that the lawsuit to prevent

gsh 1 you — I guess it was the age loan lawsuit is what they call
2 it.

3 MR. MAC GUINEAS: We're presenting that as part of
4 a series of oppositions.

5 MR. SALIZMAN: It's true it's part of a series. But
6 look at it from the other side. The company legitimately
7 believes these loans are improper. They have no choice except
8 to bring a lawsuit and the lawsuits tend to take time.

9 Not all the courts are as swift as this commission
10 in handling anti-trust matters.

11 (Laughter.)

12 And what can they do? I mean how can we say it's
13 not a sham? It didn't turn out to be a case rejected on the
14 merits. How do you do that?

15 I mean it's true, you've got lots of incidents.
16 But what is the company to do? Forego its legal position?
17 Was its legal position frivolous?

18 MR. MAC GUINEAS: No. Certainly it does not have to
19 forego its legal position.

20 MR. SALIZMAN: Isn't that a requirement in the
21 California motor transport, the case? I thought the big point
22 they made is they brought lawsuits without regard to the
23 merits. But once you begin to say that they had the merits
24 of the lawsuit, at least to that extent you can say that it's
25 Unfortunate.

gsh 1 You have something that has two effects: One, if
2 you want to find out if the position is right, they've got
3 to bring the lawsuit. If they bring the lawsuit, it may, for
4 many practical reasons, retard your ability to go ahead.

5 What do they do?

6 MR. MAC GUINEAS: The lawsuit itself would not
7 retard the ability to go ahead. It was the collateral
8 injunctions sort that retarded the ability to go ahead.

9 MR. SALTZMAN: That's part of the lawsuit. That's
10 the sort of relief one would ask for. If you were their
11 lawyer and you didn't ask for that kind of relief when it
12 was reasonably possible, you would open yourself up for a
13 potential malpractice suit, wouldn't you?

14 MR. MAC GUINEAS: If you look in that time-frame in
15 which it was brought and you looked at all the preceding
16 decisions which had so conclusively held that investor-owned
17 utilities were not immune from competition from REA going back
18 to the Ickes decision and the others, I think you also have
19 an obligation to think long and hard before you bring a
20 series of —

21 MR. SALTZMAN: Judge Godbold was way off base, wasn't
22 he?

23 MR. MAC GUINEAS: Well, he was.

24 MR. SHARFMAN: That really isn't the question, it
25 seems to me.

7sh

1 MR. MAC GUINEAS: The merits of the lawsuit that
2 you are concerned with analyzing, it seems to me it is the
3 pattern of the fact of the lawsuits, what were they were
4 clearly designed to do. The fact that they could go out to
5 Fort Rucker and say, well, you know, AEC is tied up in
6 that lawsuit that we brought to stop this loan and it may
7 be years before they could get any power close enough to
8 serve you.

9 MR. SHARFMAN: Mr. MacGuineas, now I think you're
10 being a little bit unfair. If you go out to Fort Rucker and
11 say that that may be an anti-trust violation in and of
12 itself — but that's not the lawsuit. That's something you
13 do independently of it.

14 It seems to me I am familiar with the principle of
15 law and monopolization that says that acts, even though
16 lawful in themselves, is part of a pattern of monopolistic
17 behavior, may violate Section 2.

18 But I'm wondering if you can apply that here in the
19 case of litigation, when it seems to me in the case of
20 litigation, you are dealing with a constitutional right to
21 redress in the courts. And that being the case, they either
22 have the right, it seems to me, or they don't have the right.

23 Now one of the ways that you see if they have the
24 right or not is to see whether or not it is frivolous and
25 sham litigation. But if it isn't frivolous and sham litigation

gsh 1 and they do have the constitutional right to seek redress,
2 how can it become part of the pattern? How can the exercise
3 of that constitutional right become part of the pattern that
4 creates illegality?

5 MR. MAC GUINEAS: I don't suggest that it is part
6 of the pattern. I suggest that it sheds light and helps to
7 clarify the motivation behind the rate reductions behind their
8 efforts to dissuade REA from granting loans, as the board
9 found similarly in Consumers.

10 It's a similar, if not identical form of conduct.
11 Also, events with the same intent.

12 I'm not suggesting the filing of the lawsuit is
13 an element in the Section 2 violation.

14 MR. SHARFMAN: Good. I'm glad we've gotten past that.
15 But on the question of intent, then, I'm not clear why you
16 have to establish that kind of intent when you clearly have
17 monopoly power, if you clearly have it.

18 Mr. Balch says you don't. But if you have monopoly
19 power, then specific intent is not necessary, as I read the
20 law.

21 MR. MAC GUINEAS: Essentially, we agree with you.
22 When you have the specific intent or the evidence that in
23 this case, the specific intent, you perhaps have gone further
24 than you need to.

25 The dangers of not doing that at the -- in not

gsh 1 showing that and putting evidence in and arguing for that is
2 shown in the Phase 2 opinion, where the board below, we think
3 quite incorrectly, went off on some sort of comparative moral
4 judgment between Applicant's conduct here and conduct of
5 other parties in other proceedings and say that affects
6 remedy.

7 We don't think it affects remedy. We don't think it
8 has anything to do with remedy.

9 But if this board, which we trust it won't, would
10 adopt a similar approach, why then we would want that type
11 of evidence so that we could contend here you don't just
12 have a Section 2 monopolization with the power and the
13 general intent.

14 You have a specific aggregated purpose and intent
15 on the part of Applicant. And if the board is going to think
16 that that's an element in determining appropriate remedy,
17 which we do not think it is, why, then we have it.

18 MR. SHARFMAN: Okay, that's a good answer.

19 CHAIRMAN FARRAR: Mr. MacGuineas, you have used up
20 an hour. Do you have anything else you want to do?

21 MR. MAC GUINEAS: I think with an hour I would just
22 close briefly. I think we have briefed fairly thoroughly
23 the point in Phase 2. The licensing board picked the wrong
24 remedy, picked the wrong conditions for the wrong reasons.
25 They literally adopted the Applicant's conditions, and we

gsh 1 point out in our brief what they are really doing is
2 providing us with wholesale power. When you look at the
3 constituent elements of the unit power and then you look at
4 the supplementary power, which, as Mr. Farlev testified in
5 support of these same conditions, would have no element of
6 the nuclear in its costing. And then you add to that the
7 third element, transmission wheeling, all you have is simple,
8 wholesale power, its constituent elements factored out.

9 MR. SALTZMAN: Something puzzles me at this, Mr.
10 MacGuineas.

11 Supposing you had your clients an ownership share
12 of this plant. How would you go about determining the cost
13 of the power you get from it?

14 MR. MAC GUINEAS: The plant? There are methods --
15 certainly the company's books reflects what that plant costs.
16 It also reflects their cost in money and financing it.

17 MR. SALTZMAN: I'm aware of the reasons. You don't
18 want that sort of relief.

19 Why can't that also be the case in unit power from
20 this plant. You can segregate out the costs appropriate to
21 unit power from this plant.

22 MR. MAC GUINEAS: I'm not suggesting you can't.

23 MR. SALTZMAN: How can you say it's the same as
24 wholesale power. Wholesale power affects the whole systems
25 costs.

gsh 1 MR. MAC GUINEAS: Because the power, when you look
2 at the sum of the conditions, unit power, supplement power,
3 which has the unit power costs removed from it --

4 MR. SHARFMAN: What is the supplemental power? Is
5 it like emergency maintenance? Is that what it is?

6 MR. MAC GUINEAS: I should say partial requirements
7 power. It would be wholesale power normally.

8 MR. SHARFMAN: But what is it for? If it's for your
9 unusual needs, occasional needs --

10 MR. MACGUINEAS: No, no. I'm speaking now of the
11 condition which provides for the partial requirements power
12 to off-system members of AEC, which would be simple wholesale
13 power.

14 Indeed, in the emergency power situation, you would
15 continue to pay for the capacity of the unit which you owned
16 or which you had access to in the unit power form under these
17 conditions, and then you would pay the emergency energy
18 rate available in the market place at that time.

19 But what I am speaking of here is Condition No. 4,
20 the second half of it: In addition, licensee will supply
21 the partial power requirements of existing members of AEC.

22 Now that would normally be wholesale power and
23 it would normally have Farley in the rate base, and it would
24 have Farley O&M costs and Farley fuel in the fuel costs.

25 But this is the language the company proposed and

gsh 1 in proposing it, Mr. Farley testified that partial requirements
2 power would have all of the Farley cost factors extracted out
3 of it.

4 And so what I am saying is that what they are
5 giving us here is Farley unit power plus wholesale power,
6 which is minus Farley unit power, the sum of which is wholesale
7 power.

8 MR. SHARFMAN: Is that because it exceeds your fair
9 share of the Farley power?

10 MR. MAC GUINEAS: No. That's because if you have
11 unit power covered in the contract over here, and if you have
12 all other elements of wholesale power except that unit power
13 covered in the contract over here, if you add the two
14 together, you have wholesale power.

15 MR. SHARFMAN: I understand that argument. What I'm
16 saying is do they have to go beyond your percentage, beyond
17 what they felt was a fair percentage to give you some
18 additional power for some other purpose, and therefore, have
19 to give you power from elsewhere on the system than Farley?

20 MR. MAC GUINEAS: We are not asking for allocation
21 of Farley beyond what our peak demands relative -- their
22 peak demands would entitle us to in terms of ownership, of
23 course, it was relative to.

24 MR. SALIZMAN: Then what is the problem with this?
25 This is just for your people who are not on the system, on your

gsh 1 system.

2 MR. MAC GUINEAS: Yes. One of the problems is we
3 don't — and these license conditions, we don't have a
4 provision requiring the company to wheel from our system to
5 the off systems. It may very well turn out it will be
6 cheaper for us to wheel some of our own produced power to
7 those systems rather than have them buy under the company's
8 wholesale rate.

9 MR. SALTZMAN: Can't they get unit power from
10 Farley? Farley is connected to them.

11 MR. MAC GUINEAS: Yes, but unit power is —

12 MR. SHARFMAN: Why can't they? What is the answer
13 to that question? Why can't they get power from Farley?

14 MR. MAC GUINEAS: I haven't said that they couldn't.

15 MR. SHARFMAN: Why does this license condition give
16 them some other kind of power which is not Farley power? I
17 am trying to understand what the licensing board had in mind
18 when it did that.

19 MR. MAC GUINEAS: I don't think the licensing board
20 appreciated what it was doing when it did that because I
21 don't think they appreciated the thrust of Mr. Farley's
22 interpretation of this language during the Phase 2 proceeding.

23 If the unit power — if an off-system member
24 received unit power and then had to buy emergency, of course,
25 when Farley went down, and that only took care of 50 percent

gsh 1 of its demand, it would then have to buy straight wholesale
2 power from the company to make up the extra 50 percent.

3 Mr. Farley is saying under these conditions, when
4 they go to buy that wholesale power, there is going to be
5 no unit power costs factored into it, no nuclear power in that
6 wholesale power.

7 Well, that's not the company's real wholesale power.
8 That's a gerrymandered form.

9 MR. SALTZMAN: Let me point out to you that the only
10 time they would want that power was when Farley was down.

11 MR. MAC GUINEAS: I am saying no. When Farley is on,
12 it only meets their allocation. It would only meet 50 percent
13 of their demand.

14 But Farley power isn't going to take care of 100
15 percent of their demand. It's being spread out over a number
16 of systems.

17 MR. SALTZMAN: I suppose that gets down to the
18 matter which I think was for once not settled at Consumers,
19 and that is to what extent is this commission supposed to
20 rectify your anti-trust problems?

21 This is the Nuclear Regulatory Commission, and to
22 a certain degree, the relief we give has got to be tied to
23 the nuclear plant. And you have been given access to Farley
24 and you have access to the courts and the anti-trust suits
25 with all the rest of the things you need. I mean to wag the

gsh 1 whole southern system on the basis of Farley is asking a lot,
2 isn't it? And didn't we caution that perhaps it wasn't
3 exactly what this commission was set up to do?

4 MR. MAC GUINEAS: I've heard you, but I don't see
5 how anything that you say or the considerations which you have
6 expressed apply to what I have just been saying.

7 MR. SALTZMAN: Let me suggest to you, if you have
8 gotten your fair share of power from Farley, what more do you
9 want out of them?

10 MR. MAC GUINEAS: We want the necessary coordination
11 elements to be able to utilize that power.

12 MR. SALTZMAN: You can't use Farley if Farley is
13 down.

14 MR. MAC GUINEAS: Right.

15 MR. SALTZMAN: The point is you are now part owner
16 of Farley. You've got it. You can assume one eighth or
17 a quarter of Farley is on your system, and it's down.

18 MR. MAC GUINEAS: And we recognize that they we are
19 going to be either purchasing emergency energy from the
20 company, or if this emergency energy — or if we had
21 transmission access, we might find that there was —

22 MR. SALTZMAN: Either the absence or presence of
23 Farley didn't contribute to that situation, did it?

24 MR. MAC GUINEAS: The absence or presence of Farley
25 didn't create that situation —

gsh 1 MR. SALTZMAN: Since you've got a share of Farley,
2 it's not maintaining it. You've got peak power from Farley
3 if it ever comes. It's not maintaining the situation. Farley
4 isn't doing anything to the situation at all.

5 In other words, Farley has been neutralized,
6 presumably.

7 MR. MAC GUINEAS: Yes, and I think that's precisely,
8 I think, the board below made wasn't conceptualizing that
9 you neutralize the impact of Farley on the ongoing situation.

10 I consider this commission's obligation, its legal
11 obligation under the 70 amendments goes beyond the
12 neutralization of any --

13 MR. SALTZMAN: The statute says to see -- it doesn't
14 maintain the situation. Farley doesn't maintain the situation
15 by being neutralized. That, I take it, is what we're supposed
16 to do.

17 MR. MAC GUINEAS: I don't the statute contemplates
18 this board is then to -- well the commission is to permit
19 the pre-existing and competitive situation which the board
20 found is to continue on in peace.

21 MR. SALTZMAN: The statute says the licensed
22 activities shall not maintain. Well, if Farley is not
23 maintaining the pre-existing situation, that's it.

24

25

gsh 1 MR. MAC GUINEAS: The simple — the isolated access
2 to the nuclear unit doesn't neutralize the impact —

3 MR. SALTZMAN: But it withdraws the nuclear unit as
4 contributing or maintaining the situation, doesn't it?

5 MR. MAC GUINEAS: No, because the nuclear unit has
6 to be viewed in the context of its function, what it's used
7 for and how it's coordinated with other units.

8 You don't look at a nuclear unit as floating on a
9 cloud. It's part of an electric system, a utility system,
10 and it has to — it cannot function in isolation. It has to
11 function in the context —

12 MR. SALTZMAN: That's true. Why don't we just assume
13 that unit is now attached to your system and you're going to
14 give all the power from that unit that you would be entitled
15 to if you built it by yourself, because that's all that this
16 is about, being given access to nuclear power.

17 Now this is a statute that was enacted after great
18 hearings, not by the anti-trust monopoly or subcommittees of
19 the House. Nor was there any great depth in theory in
20 anti-trust law thought out about it. And it was not, as far
21 as I know, pro-rated across the Congressional floors as a
22 cure-all for anti-trust problems in the electric utility
23 industry.

24 Once we have gotten beyond seeing that you get
25 fair access to nuclear power, and that the nuclear plant is

gsh 1 not doing anything to drag, so to speak, or increase the
2 monopoly power of anyone -- indeed, it's strengthening your
3 power by giving you access to what is at least, in theory,
4 cheap baseload power, why isn't this commission's role --
5 and we can't sit here and supervise the rates and structures
6 and actions of those companies. You are talking about half
7 a dozen people.

8 We have no staff to do that.

9 MR. MAC GUINEAS: Well, to the latter part of your
10 question, we are not asking rate regulation, obviously, from
11 the NRC. But it is not fair access or reasonable access or
12 rational access to the nuclear plant to treat the access in
13 total isolation without totally ignoring the practical
14 realities of how that plant functions, an electrical system
15 for the necessary backup for when it's down, and for the
16 necessary transmission needed to utilize that power.

17 The board is directed to focus on the concerns
18 entailed in the findings in Phase 1 and the decision below.
19 And those concerns are concerns of aggravating through the
20 unconditional licensing of Farley a situation in which the
21 Applicant has monopolized the production of baseload wholesale
22 power and the context in which the Farley must be viewed both
23 in its impact on the situation and in the remedies, in the
24 context of how it is used to produce baseload wholesale
25 power.

gsh 1 And it is used in inevitable conjunction with
2 transmission and the other coordinating services. There's no
3 way to separate them out.

4 MR. SALTZMAN: Mr. MacGuineas, that may or may not
5 be so. Suppose the only solution to the monopolistic situation
6 you see is to break up the Southern Company into four, eight,
7 or how many pieces. Do you want me to sign a order to that
8 effect?

9 I mean would that be appropriate for us to do if
10 that were the only way the situation could be eliminated?

11 MR. MAC GUINEAS: No, sir, because I wouldn't want to
12 defend that order in a court of appeals.

13 MR. SALTZMAN: On what grounds? Suppose, however,
14 that we had a record which shows the Southern Company is a
15 terrible ogre and it's chewing up electric companies left
16 and right and can hardly wait to get its teeth into you. And
17 the only way to neutralize that is because they have come
18 before us to build a nuclear power plant, is to say, that's
19 right. You can have the nuclear power plant, provided you
20 cut yourself into eight pieces and share the power from it.

21 Why wouldn't that order be preferably reasonable
22 under your theory of the law? And yet, you yourself would
23 suggest it may not be what Congress had in mind.

24 MR. MAC GUINEAS: I believe that moving into the
25 actual dissolution of the existing corporate structures is a

gsh 1 vastly different thing.

2 MR. SALTZMAN: Is it different than ordering the
3 company to sell off \$100 million of its assets?

4 MR. MAC GUINEAS: Certainly, yes. They need it,
5 too.

6 MR. SHARFMAN: Mr. Mac Guineas, it seems to me
7 throughout that long colloquy you said two inconsisent things,
8 and I'm going to bring you back to it, about what your quarrel
9 is with Condition 3.

10 First you said to me -- to me I thought you said
11 clearly -- that this wholesale power, not including Farley
12 unit power, was going to be part of the firm power requirements
13 of your off-system members.

14 Then in later answers to Mr. Saltzman, you said this
15 had to do with emergency power, maintenance power, and so
16 forth. Which is it? Because if it isn't the first, then it
17 simply seems to me it's a question of how big a piece of the
18 Farley pie you get.

19 MR. MAC GUINEAS: It is the first. It's the partial
20 requirements. If you would look at the board's Phase 2
21 decision, 5 NRC 1508, paragraph 4, the first part --

22 MR. SHARFMAN: Oh, it's paragraph 4, not paragraph 3.

23 MR. MAC GUINEAS: Yes, I'm sorry. Paragraph 3 is
24 the transmission service.

25 MR. SHARFMAN: I'm sorry. I was looking at 3. No

gsh

1 wonder I didn't find it.

2 MR. MAC GUINEAS: If you look at the sentence
3 beginning, "In addition, licensee will supply partial power
4 requirements of the existing members of AEC physically
5 connected to licensee."

6 MR. SHARFMAN: That's in paragraph 4? I don't see
7 it. Oh, yes, yes. Now I see it.

8 MR. MAC GUINEAS: That's what I'm talking about. It's
9 that partial requirements power which, under any normal
10 circumstances, would be average system wholesale power. And
11 the gloss that Mr. Farley put on that in his Phase 2
12 testimony is that it wouldn't be average system wholesale
13 power. It would be that wholesale power, absent any nuclear --

14 MR. SHARFMAN: How do you know they would have
15 requirements over and above A and B? Why couldn't you
16 allocate enough in B to cover the requirement?

17 MR. MAC GUINEAS: I think essentially because we
18 haven't been that greedy. I suppose we would accept it.

19 MR. SHARFMAN: That's why I was trying to suggest
20 to you that maybe the question is how much of Farley you should
21 get here, really.

22 MR. MAC GUINEAS: I see what you are saying. But
23 essentially, you have to recognize that we would like, I
24 suppose, it's argued, as much of Farley as one can get.
25 Except that Farley, again going back to how you put together

gsh

1 the production of firm power, Farley is a baseload unit and
2 will be for some substantial period of time. You obviously
3 are not going to utilize Farley as a peaking unit. So that
4 there might be -- there are practical limitations, for
5 instance.

6 If it were theoretically possible for the company
7 to put in a 5000-megawatt plant baseload, it wouldn't want to
8 do it because that's just 1000 megawatts or so below their
9 total load.

10 So it isn't just a question of Farley power being
11 utilized for full requirements. That's not feasible. It
12 certainly would be utilized on AEC's system in greater
13 quantity than we are asking for. There's no question about
14 that.

15 But we have proposed an allocation in terms of the
16 quantity of entitlement to ownership that relates the ratio
17 of the peak demands of AEC and its members to applicants as
18 being an equitable approach. We certainly have no objections
19 to greater quantity of ownership access to Farley.

20 MR. SHARFMAN: And this is what the licensing board
21 gave in terms of percentage?

22 MR. MAC GUINEAS: No, it did not.

23 MR. SHARFMAN: What did they give?

24 MR. MAC GUINEAS: They gave the sum of the demands on
25 AEC and its system, compared to the demand on the company

gsh

1 system at the time of the company's peak demand.

2 The peak demands on all these systems occur at
3 different times. So they are picking a non-peak measure of
4 our size and a peak measure of the company's size, which
5 disproportionately exaggerates the size of the company
6 relative to AEC and its members.

7 MR. SHARFMAN: How come you weren't able to point
8 that out at the licensing board level? Where did that come
9 from? It was a hearing. There was evidence as to what these
10 conditions should be?

11 MR. MAC GUINEAS: I thought Mr. Rogers did point
12 that out, but I would want to verify that. I'm not certain
13 as to whether that -- the impression I had was that Mr.
14 Rogers pointed that out. Your question throws me.

15 MR. SHARFMAN: Then you may be right. I haven't
16 looked at the record. I'm just asking you if it was pointed
17 out there.

18 MR. MAC GUINEAS: Well, your question threw me. Now
19 I'm not certain because I can't cite to you -- I don't know
20 whether it was pointed out or whether it was simply not
21 appreciated until after the close of record.

22 I should say that.

23 MR. SHARFMAN: If during the afternoon it occurs to
24 you, then maybe you can supply us with a citation.

25 MR. MAC GUINEAS: Fine.

gsh 1 CHAIRMAN FARRAR: I think we are all probably getting
2 to the — thank you, Mr. MacGuineas — I think we are all
3 getting to the limit of our endurance at this point.

4 Why don't we take a luncheon break and then we
5 will hear from the other three parties. It's not the easiest
6 thing in the world to find a quick lunch around here, so why
7 don't we take an hour and a quarter and come back at 2:15?

8 (Whereupon, at 1:00 p.m., the hearing was adjourned,
9 to resume at 2:15 p.m. of the same day.)

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AFTERNOON SESSION

(1:15 p.m.)

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CHAIRMAN FARRAR: Mr. Hjelmfelt, before you begin, according to my calculations this morning, in 3-1/2 hours we completed an hour and 20 minutes of argument. We are only here once, and we do want to hear everything everybody says. But maybe one tip would be advisable. Sometimes I ask some very simple questions, and you may think, gee, there is something very complicated to that question because no one could ask such a simple thing that takes a yes or no answer.

They sometimes do. So you can try to perceive whether questions are just preliminary -- you know, not everything we ask requires a lengthy oration in response. Sometimes we are as simple minded as we may appear to be.

With that and the hopes that we will finish before nightfall, go ahead, Mr. Hjelmfelt.

ORAL ARGUMENT ON BEHALF OF MUNICIPAL
ELECTRIC UTILITY ASSOCIATION

BY MR. HJELMFELT:

Thank you. I want to shift the focus somewhat from the markets that have been discussed before to the retail market.

I want to state first that the licensing board's analysis of the retail market is in error in failing to deal

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1 with franchised competition, and I think the problem, how
2 they got into this error, is that they did not consider
3 franchised competition to be within the protection of the
4 antitrust laws.

5 And I would suggest that this position was made clear
6 by Mr. Miller when he stated during phase two at transcript
7 26958 that the substitution of one natural monopolist for
8 another natural monopolist at the retail level is scarcely
9 within the thrust of the antitrust laws as we see it
10 presently.

11 And I would say that if this was the theory the
12 board was proceeding on, it is contrary to Otter Tail and
13 it's contrary to the Consumer's power decision, and it's
14 contrary to the Mishawaka decision.

15 MR. SHARFMAN: You're talking about the
16 Mr. Miller who's a member of the licensing board?

17 MR. HJELMNFELT: That's correct. The licensing
18 board did say that the liability of retail systems should
19 be protected, but it indicated that should be done in the
20 wholesale market.

21 Of course with respect to the retail systems, which
22 I represent, when it got to the wholesale market, he said,
23 you're not in the wholesale market, and therefore you're
24 not entitled to any relief.

25 MR. SHARFMAN: You're talking about franchises,

1 competition for the 9 percent that aren't perpetual?

2 MR. HJELMFELT: I'm talking about franchise
3 competition for the ones that are perpetual also.

4 Within those cities where the power company has
5 what may be perpetual franchises for an indefinite term,
6 whatever that might be, and the other cities where they have
7 30 year or up to 30 year franchises; there is in Alabama the
8 Booth Act which would allow a municipality to proceed
9 eventually, if necessary, if they couldn't work out a
10 purchase agreement to duplicate the lines of the power
11 company.

12 So there can be creation of new systems even in
13 those cities. Moreover, there is the Carmichael Act in
14 Alabama which provides for condemnation. It is really
15 unclear in light of the Booth Act whether the Carmichael
16 Act is available for the creation of a new municipal distribution
17 system.

18 Mr. Farley at transcript 20, 676 did indicate
19 that the Carmichael Act was a possibility with which they
20 were concerned, although the exact -- whether the Carmichael
21 Act proceeding could be carried out would certainly have to
22 be litigated.

23 MR. SALZMAN: Mr. Hjelmfelt, when was the last time
24 a municipality set up its own independent generation --
25 generating system in Alabama?

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1 MR. HJELMFELT: Well, for a municipality to
2 set up its own generation system would go back probably to
3 the twenties -- 1910. Aside from the fact that certain
4 municipalities that are members of AEC, of course through that
5 vehicle, did integrate vertically.

6 MR. SALZMAN: And when was the last time a
7 municipality took over from AEC -- not from AEC -- from
8 Alabama Power either by competition or purchase or by any
9 other method, an existing distribution system within its
10 boundaries and run it itself?

11 MR. HJELMFELT: I'm not aware of any since -- up
12 in the TVA area. The trend, unfortunately, for the munies
13 has all been the other way.

14 MR. SALZMAN: Are we concerned with potential
15 competition? There doesn't seem to be any potential
16 competition from municipalities, but Alabama Power --

17 MR. HJELMFELT: For franchises for new
18 systems developed, Mr. Farley thought so in his testimony,
19 and it contained several references to the fact that it was
20 quite possible. One of the factors of course is --

21 MR. SALZMAN: Let's do it the other way. When
22 was the last time Alabama Power took over a municipal
23 franchise?

24 MR. HJELMFELT: Well, they took over the
25 Birmingham Electric was the large one; and then in the sixties

1 they took over Lindell, I believe it is, which is a much
2 smaller system.

3 MR. SALZMAN: When did they take over Birmingham
4 Electric?

5 MR. HJELMFELT: In the fifties. And they have
6 made offers to purchase portions or all or lease several
7 other systems during the sixties.

8 MR. SALZMAN: Now, is your theory of the market
9 the one in Otter Tail, that it is the right to serve to
10 municipality as a whole rather than the right to serve an
11 individual householder?

12 MR. HJELMFELT: I think there's both here; these
13 are of course separate types of competition that will occur
14 in the retail market as a yardstick.

15 MR. SALZMAN: How much head to head competition
16 is there in Alabama? There's not very much, is there?

17 MR. HJELMFELT: Well, I think there's much more
18 than might be expected. There's not only a Sampson, which
19 of course is the one everybody focuses on, because of the two
20 franchisees, but there's numerous cities, for example,
21 Alexander City where the applicant serves, I think, over
22 1000 customers. There is Dothan. There's numerous small
23 cities where there is competition in the fringe areas.

24 MR. SALZMAN: Is this the kind of competition
25 with which we ought to be concerned? I mean, this sort of

1 competition involves duplication of electric facilities,
2 particularly, and nobody as far as I know ever suggested
3 that that is a particularly economic use of this power;
4 even people who favor competition don't suggest that running
5 the lines on the opposite sides of the streets is terribly
6 helpful.

7 MR. HJELMFELT: Well, I have not really seen
8 studies that show that all duplication necessarily leads to
9 increased costs.

10 Of course there was the study published by the
11 Brookings Institute that showed that in some institutes there
12 were actually lower costs. This sort of competition is the
13 kind that the licensing board or the appeal board in Consumer's
14 did indicate was subject to protection of the antitrust laws.
15 I think the focus here is not on whether in each instance
16 the end result is going to be lower prices or more efficiency.
17 The idea of the antitrust laws being that overall competition
18 is going to lean to that in the broad sense.

19 And we are not going to -- for example, the
20 Penn water case, where the FPC had already said that the
21 arrangement which the circuit found to be anticompetitive,
22 the FPC had previously commended that combination or those
23 actions for resulting in lower prices.

24 Now, in addition to ignoring the franchise
25 competition, which I think was predicated on a legal error,

1 I think factually the initial decision with respect to retail
2 competition is in error.

3 And that's primarily because I think the board
4 was seeking -- they just didn't accord sufficient
5 protection to the competition that was there and didn't
6 have the opportunity to have the appeal board's decision in
7 Consumer's before them.

8 Certainly the competition in Alabama at retail is
9 as great and suggests, as was found in Consumer's -- of
10 course they were the FD(?) Act franchises which were
11 perpetual, and there was some question raised by Consumer's,
12 as I understand it, with respect to the viability of the option
13 of condemnation for the creation of new systems.

14 The Alabama law, unlike Michigan law, permits
15 retail competition for existing customers. And the Alabama
16 law did not -- does not have a provision like the Michigan
17 law which put a 25 percent limit on the amount of power that
18 a municipality could sell outside the city limits.

19 MR. SHARFMAN: Who do you expect will compete
20 for existing customers?

21 MR. HJELMFELT: Competition for existing customers
22 is most likely to occur for industrial customers that locate --
23 at least most of them are locating out in industrial parks
24 on the fringes of cities. There are also industrial customers
25 that are within cities that are served by the power company.

1 MR. SHARFMAN: I don't think you heard my question.
2 My question was: who is going to compete for those customers?

3 MR. HJELMFELT: That's why I'm trying to find
4 out where they are so I can --

5 MR. SHARFMAN: Okay.

6 MR. HJELMFELT: The municipalities would compete
7 with Alabama Power Company for them.

8 MR. SHARFMAN: They don't have any generation.

9 MR. HJELMFELT: They don't have any generation,
10 but they can purchase power at wholesale, and in the absence
11 of a price squeeze, they have the opportunity to offer a
12 lower price if they can operate in the system --

13 MR. SHARFMAN: Do they have distribution systems?

14 MR. HJELMFELT: Yes, some of these industrials
15 can be served off a distribution line, probably most of them
16 in Alabama.

17 MR. SALZMAN: Didn't your clients attempt to prove
18 the existence of a price squeeze in a recent Federal Power
19 Commission proceeding and wasn't it rejected, at least by
20 the trial judge?

21 MR. HJELMFELT: The price squeeze raised -- was not
22 raised as a price squeeze at the FPC, because at that time
23 the FPC was contending it had no jurisdiction to consider
24 price squeeze.

25 It was raised in the context of rate discrimination

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1 and hardship. The FPC did not state in any form what
2 its measurement was, either of whether or not there was a
3 price squeeze or whether it would be anticompetitive. They
4 did find that in certain situations the wholesale rates
5 were higher than the retail rates which would clearly put
6 a price aqueeze -- and they did not -- in other situations the
7 retail rates and the wholesale rates were close together,
8 and of course they gave no consideration apparently to the
9 cost of distribution that would be incurred by the
10 municipality.

11 MR. SALZMAN: When was Conway decided, 1976,
12 wasn't it?

13 MR. HJELMFELT: That's correct.

14 MR. SALZMAN: That was decided before docket E8851
15 in the Power Commission?

16 MR. HJELMFELT: The licensing board decision --
17 or the ALJ's decision came out before that..

18 MR. SALZMAN: The ALJ's decision was October 22,
19 1976. Conway followed that?

20 MR. HJELMFELT: Yes.

21 MR. SALZMAN: What has the Commission done about
22 that, nothing?

23 MR. HJELMFELT: That issue, as I recall, was not
24 pressed on the appeal.

25 MR. SALZMAN: Not pressed by whom, by you?

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1 MR. HJELMFELT: Not pressed by the municipality.
2 The FPC has never applied an antitrust standard on the
3 price squeeze. It has been difficult for anybody to understand
4 what basis --

5 MR. SALZMAN: They did attempt to find out whether
6 one existed, didn't they? And they held there wasn't any.
7 I mean, that's what it says. I am reading part 10 of the
8 decision in which you were counsel, and it says discrimination
9 and price squeeze, and it says it wasn't proven as far as
10 they could see. There wasn't any.

11 MR. HJELMFELT: They don't tell us what standard
12 they used. They did find that the wholesale rates in some
13 instances were higher than the retail.

14 MR. SALZMAN: Those are just words. The question
15 is whether the wholesale rates are justifiably higher than
16 retail rates. If you have an enormous wholesale customer with
17 relatively steady power requirements who runs around the
18 clock against a municipality with relatively few houses and
19 a couple of small businesses with varying power needs, I would
20 be quite surprised if the wholesale rate for that customer
21 wasn't lower than the retail rate -- I mean, the other way
22 around.

23 You can't just simply say because they labeled the
24 rate wholesale; it has to be either lower or higher.

25 MR. HJELMFELT: That's one of the problems with

1 the FPC decision. It doesn't tell you what it was looking at
2 or what standards it applied.

3 MR. SALZMAN: Saying it doesn't doesn't get away
4 from the fact that wholesale rate doesn't necessarily have
5 to be lower than the retail rate, does it?

6 MR. HJELMFELT: That's correct. Now, in this case --

7 MR. SALZMAN: And is the industrial rate in this
8 case the retail rate?

9 MR. HJELMFELT: Yes. We have -- in this case
10 we have presented evidence based on similar types of service
11 and demonstrated that there was price --

12 MR. SALZMAN: I take it the board, however,
13 disagreed?

14 MR. HJELMFELT: That's correct, but I think they
15 relied upon exhibits that applicant had offered, which
16 applicant's own witness repudiated.

17 One more point I would like to make with respect
18 to the retail market. It was pointed out in my brief also
19 that one of the motivating factors in applicant's refusal
20 to give access to the Farley units has been their fear of
21 its effect on retail competition. And this again was expressed
22 by Mr. Farley.

23 MR. SALZMAN: In the wholesale market as defined
24 by the licensing board, didn't it take into consideration or
25 did it not -- I'm not certain anymore -- the sale of the power

1 wholesale to municipalities for resale?

2 What I'm driving at is whether or not they
3 may have lumped the concept in Otter Tail of replacing the
4 wholesale distributor-provider of electric power in a
5 municipality in with the general wholesale market; is that
6 possible?

7 MR. HJELMFELT: There was an indication they
8 were going to do that, but they didn't give any relief
9 based upon that because then they said there wasn't any
10 competition involving the municipalities in the wholesale
11 market.

12 At the end of their discussion of the retail
13 markets, they indicate the viability of a retail distributor --
14 distribution system is of some concern, and then they say of
15 course in Otter Tail they handled that by focusing on the
16 bulk power market, the implication being they are going to
17 do the same.

18 But I submit they didn't. Of course we were not
19 allowed to offer any evidence on remedies.

20 MR. SALZMAN: They wouldn't allow you to offer
21 any evidence on remedies because they found there wasn't any
22 competition to begin with. I'm a little puzzled.

23 MR. HJELMFELT: To return to the wholesale market;
24 in any event, I think it's clearly error that the licensing
25 board did not find that at least Riviera utilities was an

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1 actual competitor in the wholesale market; when the licensing
2 board discusses competition existing in the wholesale market,
3 most of their references are to the competition that occurred
4 between Riviera, who made sales for resale to Baldwin
5 County, Robertsdale, and Fairhold. And yet their conclusion is
6 that the municipalities, none of them are involved in the
7 wholesale market.

8 And this inconsistency I think is an error
9 that should be remedied by the appeal board.

10 CHAIRMAN FARRAR: Mr. Hjelmfelt, forgive me for
11 not knowing the answer to this, but did you make an offer of
12 proof at the second --

13 MR. HJELMFELT: At phase two?

14 CHAIRMAN FARRAR: Phase two.

15 MR. HJELMFELT: Yes, I did.

16 CHAIRMAN FARRAR: And then you went home?

17 MR. HJELMFELT: Then I went home. It had been
18 made quite clear that no evidence with respect to municipalities
19 was going to be admitted by me or by anybody else.

20 The initial decision, the licensing board spoke
21 in terms of applicant's potential competition with distribution
22 systems in central and south Alabama, which are considering
23 integrating backwards into generation, and it also found that
24 the vertical integration of a municipal system is a form of
25 potential competition.

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1 Nevertheless, they found that MEUA -- neither
2 MEUA or its members were potential competitors in the wholesale
3 market or apparently it did, considering what position
4 it took in phase two.

5 MR. SALZMAN: Doesn't this turn on the fact and
6 the question as to whether your potential competitors can
7 turn on the judgment of the licensing board is just not
8 realistic. We have to take that into consideration in
9 deciding whether your potential is competitive. Surely,
10 you can go out and start an automobile industry tomorrow,
11 but you're not really a potential competitor of GM. Nobody
12 says you can't borrow \$10 million and do it, but try and get
13 it.

14 MR. HJELMFELT: That's right, but certainly the
15 situation where I announce that I am going out to build a
16 motor vehicle plant tomorrow is not going to cause any ripples
17 at General Motors headquarters. However, the testimony in
18 this case was that Alabama Power was concerned with the
19 potentiality of the municipals building a plant. And as

20 Dr. Wein pointed out, one of the important tests
21 of potential competition as to whether that potentiality
22 has any effect --

23 MR. SALZMAN: I thought Dr. Wein was criticized
24 because he didn't do much of a study of the Alabama situation;
25 in other words, his testimony is in the abstract, not

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1 concrete.

2 Now, the question here is whether the realistic
3 matter, whether the municipality is going to enter the
4 wholesale power business by generating their own electricity,
5 and if the answer to that is realistically they're not
6 there's nothing to protect under the antitrust laws anymore.

7 MR. HJLEMFELT: Even if you take Dr. Wein's
8 statement as an abstract statement, and then you look at the
9 Alabama situation and you say, okay, in fact was this
10 potentiality something that Alabama Power considered, the
11 evidence shows that it was.

12 CHAIRMAN FARRAR: You're saying out of their own
13 mouth.

14 MR. HJELMFELT: Out of their own mouth.

15 MR. SALZMAN: But the fact that somebody considers
16 something doesn't mean it actually is. After all, every
17 business man is very concerned, I would take it, if any part
18 of his business is likely to be affected, but that doesn't
19 always mean it's a realistic concern. The licensing board
20 is supposed to take an objective view.

21 I mean, if everything Alabama -- everything was
22 concerned about was immediate competition, you know, that
23 would be difficult.

24 He has to assume you might do it. The question
25 of whether it's realistic is an objective standard.

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1 MR. HJELMFELT: That's correct. And there are
2 some other factors that demonstrate that there was in fact
3 potential competition. There was that potential. For
4 example, we know that in 1965 Dothan made of study of
5 whether or not to engage in generation. We know another
6 study was made on behalf of the Municipal Electric
7 Utility Association during the early seventies with respect
8 to participation in the Farley plant.

9 CHAIRMAN FARRAR: Yes, but Dothan studies it
10 and came to the conclusion, forget it.

11 MR. HJELMFELT: That's correct. And Dothan's study
12 was at the time that the Cousa rates were in, which were
13 according to Alabama Power were returning an uncompensatory
14 rate.

15 Moreover, Alabama Power refused to interconnect
16 with Dothan at that time, rather refused to engage in any
17 purchases of excess capacity.

18 MR. SHARFMAN: Isn't it more likely that they
19 would go out and buy power from someone else than they would
20 start their own generation?

21 MR. HJELMFELT: The most likely thing for them
22 would be to purchase a portion of a large generating unit
23 where they can take advantage of scale capacities. And that's
24 what we seek to do here. In fact we are quite ready to join
25 with Alabama Electric Cooperative in the bailout effort to

1 get Farley II back on the line.

2 MR. SHARFMAN: Then you would sell to your own
3 retail customers.

4 MR. HJELMFELT: We would service our own retail
5 customers, that's correct; and we would also want to have
6 the option of engaging in those activities in the regional
7 power exchange market which are necessary to implement
8 effective access to the nuclear plants.

9 MR. SALZMAN: Mr. Hjelmfelt, have we not been
10 leading you up the primrose path, and you've been following
11 eagerly along. Competition is a two-way street.

12 Suppose any of these municipalities elected not
13 to remain in the distribution business; does anybody stand
14 ready to move in and take over their systems?

15 MR. HJELMFELT: They certainly do.

16 MR. SALZMAN: Doesn't that suggest the existence of
17 competition from Alabama Power Company for the wholesale
18 supply of each of these cities?

19 MR. HJELMFELT: Sure.

20 MR. SALZMAN: I thought you'd never say it.

21 MR. HJELMFELT: I thought that that was a given.

22 I also wanted to say a few things with respect to
23 remedy, the Association's right to relief, even given the
24 licensing board's findings, which I think are substantially
25 in error. What we have here is a situation where the board

id18
1 found at least two instances of anticompetitive behavior
2 on the part of the applicant which directly affect the MEUA
3 members.

4 First of course is the SEPA agreements which
5 limited us to purchasing any power other than the SEPA
6 power from the applicant, unless we are willing to forego
7 the SEPA power.

8 And the others were the applicant's wholesale
9 contracts which the board found were anticompetitive with
10 regard to precluding access to alternative sources of supply.
11 Now, there is language in the board's discussion of the
12 SERC arrangements, which show that the SERC arrangements
13 were also calculated to keep the municipalities as well as
14 anybody else in a situation where they could deal only
15 with Alabama Power Company.

16 Given these findings, we would submit that MEUA
17 is entitled to relief, that the focus of the remedy here is
18 to eliminate the situation inconsistent with the antitrust
19 laws, either under a target area test or direct injury test
20 and MEUA would be within the protection afforded by the
21 antitrust laws.

22 Of course when injunctive relief is what is sought,
23 the requirement is lower than it is when damages are sought.

24 MR. SALZMAN: Again, Mr. Hjelmfelt, we're concerned
25 here with the licensing of the Farley Nuclear Plant. If you

1 thought or your clients thought that Alabama Power was
2 blocking -- acting as a monopolist and blocking access to
3 the power from some other source, you had antitrust remedies
4 open to you which you can choose.

5 Is that the sort of remedy that Congress had
6 in mind for the NRC? It's one thing to say that we can
7 perhaps say that you are entitled to access to the nuclear
8 plant and even that you're entitled to be treated as another
9 wholesale utility and a certain amount of coordination to make
10 that access useful or effective.

11 But isn't it a horse of another color to say that
12 you are also entitled from us to have us order that you
13 be allowed to have power wheeled to you, say, from outside
14 the Alabama system over Alabama's lines. Is that the sort
15 of relief that Congress thought the Nuclear Regulatory
16 commission or the Atomic Energy Commission was going to be
17 allowed to give?

18 MR. HJELMFELT: I think what Congress was concerned
19 with and what the statute is concerned with is giving access
20 to the small utilities in these situations and they mean --

21 MR. SALZMAN: Access to what?

22 MR. HJELMFELT: Access to nuclear generation in
23 a usable form.

24 Now, certainly, if you give access to nearly ant
25 company without any other coordinating resources, that access

id20

1 would simply be economically unfeasible.

2 MR. SALZMAN: You want power, baseload power,
3 don't you, wheeled in from the outside if you can get it
4 cheap. Isn't that one of the remedies you want?

5 MR. HJELMFELT: We would suggest -- our suggested
6 remedies would be that we be able to deal with other
7 than Alabama Power Company for our power needs as well
8 as purchasing a portion of Farley.

9 MR. SALZMAN: That's my point. But my point is
10 that's above and beyond your need for coordination with the
11 Farley plant.

12 And that is -- is that what the Nuclear Regulatory
13 Commission is supposed to be doing?

14 MR. HJELMFELT: First, our needs with respect to
15 the Farley plant of course are the same sorts of needs that
16 anybody else has. And that's the ability to go out and
17 put together the optimum source of power supply to back it
18 up and to support it and to come out with an ultimate rate
19 to the retail consumer that's as low as possible.

20 Now, certainly, Alabama Power Company has a
21 variety of options without which it wouldn't proceed --

22 MR. SALZMAN: You missed my point. My point is that
23 this is a Commission that is supposed to be concerned with
24 people who want to purchase and develop nuclear plants. And
25 at the time the statute was enacted, there was one Atomic

id21 1 Energy Commission. Now, doesn't it strike you as rather
2 odd that Congress with the Joint Committee on Atomic Energy
3 would wish to subject every prospective purchaser or
4 applicant for a nuclear power plant to a full blown antitrust
5 lawsuit opening all sorts of doors that otherwise might not
6 be chosen as a condition of getting a license to build one
7 plant?

8 Alabama has lots of plants. And the question is:
9 isn't that sort of self-defeating? I can't imagine that
10 Congress had that in mind, and that's what troubles me about
11 the sort of relief unrelated to the use of the nuclear power
12 plant that you seem to wish and so does the Alabama Electric
13 Power Company.

14 MR. HJELMFELT: Well, the only companies that need
15 to be concerned about the antitrust situation are those
16 who submitted violations. But be that as it may, certainly
17 what we are asking for is access to the Farley plant along with
18 those coordinated -- coordination services that are necessary
19 to use it effectively.

20 Now, the problem with being limited only to Alabama
21 Power Company to deal with is that Alabama Power Company has
22 a history of denying this sort of access on reasonable terms
23 or denying them at all. And the opportunity to bargain with
24 others and to deal with others as well as Alabama Power may
25 well be that once license conditions were imposed and the

id22
1 Association owned a share of the units, that the principal
2 trading partner may well be Alabama Power Company, but
3 one of the things that would eliminate the monopoly situation
4 would be access to look to others to market.

5 MR. SALZMAN: Well, the statute doesn't say
6 eliminate the monopoly situation; the statute says, as I
7 understand it, that activities under the license which would
8 either create or maintain a situation in violation of the
9 antitrust laws. The suggestion here is that they will
10 maintain them. And if the Farley plant is "neutralized,"
11 the activities under the license are not maintaining anything
12 in violation of antitrust laws.

13 And why is there reason to believe that more than
14 that was wanted? You could quote lots of legislative
15 history. Each side makes a lot of self-serving statements.
16 I have read their hearings from one end to the other. And
17 sometimes I think there were two different sets of hearings
18 going on.

19 But in the reports to the committee as to what was
20 submitted to Congress, I didn't get the idea that the Joint
21 Committee on Atomic energy was proposing a radical new
22 antitrust forum for every electric power company. That seems
23 to be the thrust of the arugment here.

24 You want the nuclear tail here to wag the rest of
25 the industrial dog, and if necessary, to shake it loose until

id23

1 it stops behaving like a monopoly.

2 It's a big dog for a little Commission to wag.
3 And is it likely that that's the sort of relief that the
4 Joint Committee on Atomic Energy had in mind?

5 MR. HJELMFELT: Quite frankly, it's pretty difficult
6 to know what they had in mind, as far as I can tell.

7 MR. SALZMAN: Well, they didn't have in mind
8 plainly your forum of the electric utility industry; did they?

9 MR. HJELMFELT: I don't know that they didn't. I
10 think the fact that they were concerned with access to the
11 nuclear plant to avoid it being monopolized by the larger
12 power companies --

13 MR. SALZMAN: That was based on the fact that the
14 nuclear plants were in large measure developed at government
15 expense, but the rest of the plants were not developed at
16 government expense. The government didn't pay for Alabama's
17 power line.

18 MR. HJELMFELT: That's correct, and we haven't
19 come in here and asked for license conditions that would give us
20 an opportunity to participate in the Miller units.

21 MR. SALZMAN: But you have asked for license
22 conditions of issue to wheel power across their lines to the
23 extent you want.

24 MR. HJELMFELT: Not on a common carrier basis;
25 but certainly when we can find opportunities and that can be

id24 1 necessary for effective utilization of the nuclear plant.

2 MR. SALZMAN: See, that's the part that troubles
3 me. What do you mean by effective utilization of a nuclear
4 plant?

5 Why isn't the relief of the licensing board
6 fashion designed for just those purposes? Why should you
7 or anyone get any more than that?

8 MR. HJELMFELT: Sir, we got nothing.

9 MR. SALZMAN: I'm assuing you're in no better
10 position --

11 MR. HJELMFELT: Assuming I had the same relief
12 that AEC had. Well, in the first place, what they got was
13 wholesale power broken into two pricing situations. They
14 got nothing. Now, assuming that we had ownership access,
15 then we would need the opportunity -- there may be situations
16 where parties would find it mutually advantageous, for example,
17 for MEUA, to buy a block of power larger than its needs for
18 this year. Where are we going to sell that additional power?
19 If we only have Alabama Power to deal with, our effective
20 ability to use that power is cut down considerably because of
21 their monopoly power over the transmission lines.

22 MR. SALZMAN: I see. So you are worried again
23 like the cooperative about selling out rather than bringing in.

24 MR. HJELMSFELT: We're concerned about bringing in
25 too, because obviously the Farley plant is going to be down

id25 1 for fuel reloading, plant maintenance, and probably at times --

2 MR. SALZMAN: I can appreciate that sort of
3 wheeling. I thought what you had in mind was the opportunity
4 to buy power at wholesale from some entity unrelated to
5 Farley, whatever you could manage to get, a block of this
6 power, and require Alabama to sell it to you so that you
7 don't have to deal with Alabama.

8 And if that is so, how is that related to the
9 Farley plant?

10 MR. HJELMFELT: Again, as Mr. Mac Guineas discussed,
11 Farley plant is baseload power, and you're going to need
12 other increments of power. And some of that may be some
13 long term, partial requirements power, and again --

14 MR. SALZMAN: Long term partial requirements
15 power is not in contradistinction to baseload power. What
16 kind of power are you talking about?

17 MR. HJELMFELT: I'm talking about baseload power
18 down at the bottom, first 20 megawatts of your load or
19 whatever. Then you need more power that's going to cycle up
20 and down with the intermediate part of your load. And that's
21 called intermediate power.

22 Again, if you are going to make effective use
23 of nuclear power, you don't want to have to have to buy --
24 because nuclear units typically don't cycle up and down --

25 MR. SALZMAN: You see, I'm perfectly willing --

id26

1 I mean, I can see where you might want the right to have
2 power wheeled to you for those purposes, but I understood you
3 to be seeking -- or I understood the municipals to be seeking
4 the unlimited right to wheel any kind of power they want
5 in any quantities they can, subject to the technical
6 requirements of the load over Alabama's system to their
7 customers.

8 And that strikes me as not being related to the
9 license conditions here. It might be a perfectly appropriate
10 antitrust remedy, but it doesn't seem to be related to the
11 conditions under the license, and I wonder -- and I take it
12 you are not asking that kind of relief for your clients. All
13 you want is a sufficient amount of peaking or intermediate
14 power or emergency services and the like to service the Farley
15 plant and the right to wheel that power over Alabama's lines.
16 You're not asking for additional baseload power beyond what
17 you get from Farley.

end 14

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MR. HJELMFELT: I am not here saying they have to offer us the option of Farley or the option to wheel in power from Georgia Power if that is what you mean in lieu of --

MR. SALZMAN: I am asking whether you want the right to wheel in your access, which is what you want, wheeling access to generating capacity outside the southern system. Do you want that access above and beyond for base load power uses above and beyond what you get from Farley?

MR. HJELMFELT: If we don't get enough Farley to cover our base load, we have to get base load someplace.

MR. SALZMAN: Fine. But the problem you get right there once you get beyond Farley, you've got to get enough base load from someone else. Then why is that related to the situation under the licenses? You've been given access to nuclear power. You are now in as good a position if you had that plant for yourselves, and you can use that plant. Above and beyond that, you have a situation that is not connected with a nuclear facility.

You are in a position of wanting to be even bigger than that, and for that remedy this may not be the correct forum then.

MR. HJELMFELT: No, because unless you're going to say that I have the option to buy enough Farley power to cover all my base load needs, then the option to buy Farley power but not to buy any other base load power, I can't use the Farley.

pv 1 If all I have got Farley for base load, I have got 10 megawatts
2 and my base load is 40, my system is going to shut down.

3 MR. SALZMAN: That is so you can continue to buy
4 wholesale power for the remaining 30; you just don't have to
5 buy wholesale power for 40.

6 MR. HJELMFELT: I have to buy it from Alabama Power,
7 which is a monopoly.

8 MR. SALZMAN: That may be true, but that's not the
9 fault of the activities under the license.

10 MR. HJELMFELT: Certainly, without being able to buy
11 that other base load power, I can't make use of the Farley
12 power. And meaningful access means I also have to have
13 meaningful access for emergency maintenance --

14 MR. SALZMAN: Yes, as far as it's related to the use
15 of that base load power from Farley. But why, in order to use
16 10 megawatts of base load power from Farley, must we insist
17 that they wheel 60 megawatts of base load power from some other
18 source over their line? How is that related to the use of
19 Farley?

20 MR. HJELMFELT: Because as long as they have control
21 over our access to all of the other portions of our power
22 supply need, they can render us -- they have got the same
23 monopoly power to render our use of Farley --

24 MR. SALZMAN: My point that you don't seem to be
25 listening to is that the remedies and powers of this commission

pv 1 may be limited to helping you break -- if you wish to put it in
2 these terms -- monopoly power, total monopoly power, insofar as
3 it deals with a nuclear unit. But we may not sit -- and I have
4 my grave doubts that we do sit -- to break up the utilities
5 monopoly, generally.

6 If you are able to prove a monopoly case, you have
7 remedies available elsewhere. I have grave doubts, as I think
8 I have said five times today, that this commission sits as a
9 court of antitrust jurisdiction to chop up or to otherwise
10 rearrange the business of electric utilities, absent the clear
11 connection with the need to operate the nuclear plant.

12 If that is what you want -- suppose you just drop
13 the whole Farley business completely. Why don't you just ask
14 us to require the company wheel all your needs for base load
15 power and forget about whether it comes from Farley or not.
16 Clearly, that has no relation to the plant, and I just don't --
17 you know, I just don't see that this does.

18 MR. HJELMFELT: I understand what you are saying. I
19 guess I just have to disagree and say if we are to make -- have
20 real access to the base load power, then we have to have these
21 other things and --

22 MR. SALZMAN: Mr. Hjelmfelt, don't companies operate
23 with less than all the base load power they want in this world
24 and purchase the rest?

25 MR. HJELMFELT: Yes.

pv 1

2 MR. SALZMAN: And perhaps the commission -- I will
3 drop it here because the chairman, who normally doesn't ask any
4 questions is getting upset at my asking them -- is perhaps the
5 problem you have here is that you're expecting the good fairy
6 to give you too much?

7 MR. HJELMFELT: I will just briefly answer it, and
8 then I will quit.

9 I think the idea of what we are asking for is an
10 opportunity to have an option to purchase part of the Farley
11 units along with an option to deal with others so that Alabama
12 Power does not remain in a situation where it can negate what
13 the commission has given us, assuming the commission does give
14 us an option to get into Farley, and if a monopolist is left in
15 a position where it still wheels all its power with respect to
16 every other element of our power supply that we need to make
17 effective use of Farley, then I submit that we haven't been
18 given fair access to Farley.

19 MR. SHARFMAN: Just one quick follow-up there.

20 If you get, let's say, half your power from Farley
21 from an ownership interest, where you save the return on
22 investment, the taxes, aren't you better off than you are now
23 where you merely buy all wholesale power from the company? I
24 mean, pro tanto, to the extent of that 50 percent you're
25 getting from Farley, you're much better off; are you not?

MR. HJELMFELT: With respect to that 50 percent.

pv 1 But I am concerned with --

2 MR. SHARFMAN: So, we're not neutralizing the
3 advantage you get from having the nuclear power. You do get an
4 advantage from having it.

5 MR. HJELMFELT: It depends on what happens to our
6 other 50 percent.

7 MR. SHARFMAN: Well, it may not solve all your
8 problems.

9 CHAIRMAN FARRAR: Are you suggesting that on the
10 other portion that you have to continue to buy from them,
11 they're going to jack up the price or do something with that
12 that's going to nullify whatever you gain from the Farley
13 plant?

14 MR. HJELMFELT: That's what Mr. Farley said he was
15 going to do on unit power sales. He said he was going to
16 design the other rates without any reference to the Farley --
17 no Farley increment -- so that the end result is a price list
18 the same as the wholesale power price.

19 I take it now, if everything else remained the same,
20 if you got whatever we were saying -- 40 megawatts or whatever
21 -- that you are buying wholesale now, you could get 10 unit
22 power from Farley and 30 wholesale from them under precisely
23 the same conditions that exist now, you would have gained
24 something?

25 MR. HJELMFELT: That's correct.

pv 1

CHAIRMAN FARRAR: But you're saying they will do something to you on the other 30 to make it come out that you gain nothing?

MR. HJELMFELT: We certainly have no assurance that they won't.

CHAIRMAN FARRAR: Can they do it? Now, here's where we're talking about setting rates and things. Can they do it that easily? Are you powerless to prevent that?

MR. HJELMFELT: As the district court in the Mishawaka Case pointed out, for something like five years the rates that were charged in municipalities had never been passed upon by the Federal Power Commission because each time a new rate was filed and went into effect after five months or less, depending on what suspension period is involved and by pancaking rates, the municipalities were always paying rates that had not been adjudged to be just and reasonable.

The Federal Power Commission just doesn't provide a full and adequate protection on rates.

MR. SHARFMAN: Does it have power to grant refunds?

MR. HJELMFELT: It can grant refunds, but refunds that come five or six years after the fact are certainly not full and adequate relief.

MR. SALZMAN: Of course, the municipalities have -- the point I am driving at is that you have a route to plenary relief in the district court. You may not have it before this

pv 1 commission. That's all. That isn't necessarily either your
2 fault or our fault.

3 MR. HJELMFELT: I fully understand your position,
4 and I don't think the fact that it's available elsewhere means
5 it's not available here. And I think that there is a
6 sufficient tie between what we're asking and to efficient
7 utilization of the Farley plant.

8 Thank you.

9 CHAIRMAN FARRAR: Thank you, Mr. Hjelmfelt..
10 Let's take a five-minute break.

11 (Brief recess.)

12 CHAIRMAN FARRAR: Back on the record.

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1 CHAIRMAN FARRAR: Mr. Hjelmfelt, I don't know if
2 I took the time to thank you for your remarks.

3 All right, Mt. Whitler, I know you expected to be
4 on first a long time ago. It's been a long time coming, but
5 go ahead. We are anxious to hear what the government has to
6 say about this.

7 ORAL ARGUMENT OF JOHN D. WHITLER ON BEHALF OF
8 THE UNITED STATES DEPARTMENT OF JUSTICE.

9 MR. WHITLER: I am pleased to announce, at least
10 to a certain extent, because of the vast amount of material
11 that the Board has already covered, that some of the presenta-
12 tion or points that I had intended to make had I gone first,
13 I really don't feel there is much need to go into at this
14 point.

15 As we noted in our brief on exceptions that's been
16 filed with this Board, the Department has been in agreement
17 with many of the findings of the Board below in its decision.
18 We file this appeal, however, because of certain fundamental erro
19 of law in the two decisions of the Licensing Board.

20 I want to address just one main point in my
21 prepared arguments, and then I want to go back to some of the
22 areas that have been covered this morning to see if I can't
23 expand or assist the Board in some regard on those.

24 The point that I want to touch on is the question
25 of the adequacy of license conditions. It is our position, as

1 we set forth in our brief on exceptions and also in our
2 answering brief, that the license conditions that were ordered
3 by the Licensing Board were not adequate.

4 The Licensing Board had found, quite correctly,
5 that Applicant had monopoly power in the relevant market of
6 wholesale bulk power sales. The Licensing Board also found
7 Applicant had engaged in a pattern of anticompetitive practice
8 before AEC.

9 We also argue that that pattern of conduct was
10 also directed -- at least indirectly -- towards municipal
11 systems as potential competitors in the wholesale market of
12 power.

13 The Licensing Board had also found Applicant owns
14 the bulk of generation and transmission, and importantly
15 controls all the transmission facilities providing access to
16 utilities outside the market area.

17 And the Licensing Board further found that the
18 exclusion of AEC -- and we would argue also the municipal
19 systems -- from the Farley Units probably would create a
20 decisive competitive advantage to the Applicant.

21 Thus the Board made the requisite finding under
22 Section 105(c)(5) that the activities under the license would
23 maintain a situation inconsistent with the antitrust laws and
24 the policies underlying those laws.

25 It then became the duty of the Board under section

1 105(c)(6) to remedy the situation that it had found incon-
2 sistent with the antitrust laws by attaching appropriate
3 conditions to the Farley Plant license in order to eliminate
4 the concerns entailed in its affirmative findings under
5 Section 105(c)(5).

6 The proper test of the adequacy or appropriateness
7 of the licensing conditions, we contend, was whether those
8 license conditions would correct the situation that was found
9 to be inconsistent with the antitrust laws.

10 This Board, in Consumer's, set forth two goals that
11 the Licensing Board must keep in mind in fashioning remedy
12 relief. The legislative goals under the Act were:

13 One, fair access to nuclear power under conditions
14 which permit reasonable opportunity to make effective use of
15 its potential;

16 Two, to see that activities undertaken pursuant to
17 the license neither create nor maintain an anticompetitive
18 situation.

19 The Licensing Board below applied a test, or adopted
20 a license condition that would neutralize the Farley Plant on
21 the competitive situation.

22 Applicant, in its brief on exceptions, argued in
23 favor of this test, but complained that its application called
24 for wholesale sales as access rather than unit power if the
25 plant were to be truly neutralized.

1 We certainly disagree with that position. The
2 Applicant cited in support its citations in support of the
3 application of this type of test that is neutralizing Farley
4 on a competitive situation are basically the Phase II decision
5 of the Board, and certain references in there to legislative
6 history.

7 CHAIRMAN FARRAR: Let me ask you, Mr. Whitler:
8 Is Mr. Hjelmfelt right when he -- let me back up.

9 I can understand his wanting to make sure he gets
10 effective use of the access, whatever it is, to the nuclear
11 plant. But is he correct in arguing that the company has
12 such leeway on other aspects of its business that whatever it
13 gives them on the nuclear plant it can make up elsewhere?

14 I took it, at the end of his argument, that that
15 was an important part of his position in showing that it
16 wasn't what he was getting now, or what the AEC was getting
17 now was not effective.

18 MR. WHITLER: If I can restate your question to make
19 sure I understand it, the question is: Is the situation that
20 if the Intervenor or the Municipal Systems, in your question,
21 are granted access to the Farley, whether it's unit or
22 ownership access, that even with that access, does Alabama
23 Power Company, the Applicant in this case, still have monopoly
24 power so that it can extract other costs from its wholesale
25 competitors?

1 CHAIRMAN FARRAR: I wish I had said it that clearly
2 myself.

3 MR. WHITLER: Thank you.

4 Our position is: Yes, that they will have this
5 power, because the license conditions that have been imposed
6 on Phase II do not remedy the situation inconsistent with the
7 antitrust laws.

8 In the first place --

9 CHAIRMAN FARRAR: Will they continue to use the
10 same techniques you had used or had been using in the past?
11 Or will they have to get more imaginative?

12 I ask --

13 MR. WHITLER: I understand your question.

14 If the license conditions are not such that you
15 can pretty much predict or channel what they are going to
16 do -- that is, unless they pretty much control the
17 relationship between the Applicant and the smaller systems,
18 then I am sure -- well, I can't say with any degree of surety,
19 but at least there is the possibility that they can either
20 use the same tactics that they had used in the past, which
21 basically was monopolization and use of their dominance in
22 transmission and distribution, or they may even be more
23 imaginative.

24 CHAIRMAN FARRAR: Okay, if they are so bad, or if
25 we are afraid that they are going to be imaginative, maybe

1 Mr. Hjelmfelt's people don't have the resources, but where
2 are your people? Why aren't you after them in the United States
3 District Court somewhere?

4 MR. WHITLER: Your Honor, I believe, as the statu-
5 tory scheme is set up, that we are at a position now where the
6 Nuclear Regulatory Commission Licensing Board, or this Board,
7 would have the authority to order a license condition that
8 would attach the license.

9 Under those licensing conditions, as I understand
10 the statement of the Nuclear Regulatory Commission in its
11 Houston Lighting & Power South Texas decision, it says that it
12 contained -- maintained a continuing policing jurisdiction over
13 the license conditions that were attached to a license after
14 105(c) review, antitrust review, to the extent that applicant's
15 activities would then be controlled by those licensing
16 conditions, the Nuclear Regulatory Commission would have some
17 responsibility.

18 To the extent that those license conditions would
19 not apply to the Applicant's activities, then the only recourse
20 would be through the courts, or through our assistance in
21 prosecuting future anticompetitive acts.

22 CHAIRMAN FARRAR: How many electric utilities of
23 this size has the department initiated antitrust litigation
24 against in the courts?

25 MR. WHITLER: It's difficult to answer, because there

1 have been many that perhaps were just beginning to be
2 initiated, and then they were settled. Of course, Otter Tail
3 is the one prime example.

4 CHAIRMAN FARRAR: I take it that it is easier to
5 get authorization to participate in our proceedings than it
6 is to get authorization to file an independent lawsuit?

7 MR. WHITLER: Well, our authorization to participate
8 in these is more by the mandate of Congress, or at least we
9 have to get involved initially in the antitrust review, and
10 we are entitled to participate as full parties in this.

11 And I would just like to add, on this particular
12 point, that it would certainly seem to make more sense that
13 when you have gone through a proceeding of this nature that is
14 as long as this one has been, which has taken its toll on
15 everyone that's been involved, that it would not seem to be
16 wise at this point to pull back and say, "Well, wait a minute;
17 let's let some other forum that would certainly have juris-
18 diction to handle this thing, let them do it, and start all
19 over again in that forum," when it is our position -- the
20 point that I was going to make:

21 What we were asking the Nuclear Regulatory Commis-
22 sion to do on this thing in terms of relief we feel is clearly
23 within your statutory powers.

24 MR. SHARFMAN: Why don't you go ahead and explain
25 to us why it is within our statutory powers?

1 MR. WHITLER: The reading of Section 105(c)(5) and
2 105(c)(6) together clearly states that the Nuclear Regulatory
3 Commission can and must order appropriate relief in the form
4 of license conditions to attach the license to -- and I had
5 already read the two goals in Consumer's.

6 The Consumer's appeal board, or this Board, had
7 stated -- well, I won't read it. It stated that no type of
8 relief, whether it be for wheeling, for unit power access,
9 or including a share of the plant, is necessarily foreclosed as
10 a form of relief.

11 And I read that -- This panel, at that point in
12 Consumer's, was not speaking specifically to facts in
13 Consumer's. It was giving general guidance to the Board
14 below as to guidelines --

15 MR. SALZMAN: Wasn't there a caveat at the end of
16 it, that it was to be related to the situation -- to the
17 activities under the license? After all, I mean if I presume
18 you are relying on the statutory language in 105(c) and 106 --
19 I mean, 105(c)(5) and (6), the language in one says it's
20 the activities -- if the activities under the license -- i.e.,
21 the nuclear license -- are found to either create or maintain
22 a situation inconsistent with the antitrust laws, then I read
23 Section (6) as saying that that should be eliminated by
24 license conditions.

25 But eliminating, in this case, the likelihood of

1 Farley who maintained a situation is not necessarily the same
2 as eliminating this entire situation itself.

3 And I put it to you again, as I put it to
4 Mr. Hjelmfelt, that I saw nothing in the legislative history
5 that gave the NRC plenary antitrust jurisdiction over that
6 segment of the electric utility industry which sought to
7 license a plant.

8 What is the answer to that?

9 MR. WHITLER: The answer, your Honor, is, as I see
10 it, is that the Act requires the Nuclear Regulatory Commission
11 to condition the licenses to eliminate situations inconsistent
12 with the antitrust laws -- activities under the license.

13 MR. SALZMAN: To condition the activities -- my
14 problem is, again, you always read it without the phrase
15 "activities under the license." What were the purposes of the
16 activities under the license? You can't just forget them.

17 MR. WHITLER: As I read it, the activities under
18 the license are going to include the possible future exercise
19 of the applicant's monopoly power.

20 MR. SALZMAN: The applicant doesn't exercise
21 monopoly power under the license. The license authorizes him
22 to operate a power plant fueled by nuclear energy.

23 MR. WHITLER: Speaking of his activities under
24 the license.

25 MR. SALZMAN: That's the only activity the license

1 allows him, nothing else.

2 MR. WHITLER: I am sorry, perhaps I'm misinterpreting,
3 but "activities" --

4 MR. SALZMAN: What do you think is licensed by
5 this Commission, sir? The operation of the Farley Nuclear
6 Power Plant.

7 MR. WHITLER: I don't think "activities under the
8 license" meant simply the turning of the knobs with respect
9 to just that nuclear power plant.

10 MR. SALZMAN: Using power from Farley, agreed.
11 You can go that far.

12 MR. WHITLER: That the activities under the license
13 would refer to all of the utility's activities in conducting
14 its electric-power business.

15 MR. SALZMAN: But the utility doesn't conduct its
16 activities under a license. The Alabama Power Company doesn't
17 need a license from the Nuclear Regulatory Commission; it
18 operated for years very successfully without them.

19 MR. WHITLER: I think we are hung up on semantics,
20 at this point.

21 MR. SALZMAN: No, no. I am hung up -- again, at
22 the risk of repeating what I told Mr. Hjelmfelt -- that we're
23 hung up on the fact that this is a bill that originated in
24 the Joint Committee on Atomic Energy, a committee concerned
25 with nuclear power, and generally favored the use of nuclear

1 power would be unlikely to discourage it. And those who, as
2 I read the legislative history of these, were concerned that
3 the small entities in the industry got a fair share of the
4 nuclear power. They were concerned with their getting a fair
5 share of power, not with breaking up monopolies, generally.
6 That was outside their jurisdiction.

end #16

7 MR. WHITLER: To interpret activities under the
8 license in the manner I believe you're interpreting it is in
9 effect applying the second-nexus requirement, a requirement on
10 relief.

11 Okay, now certainly there is a nexus requirement
12 on liability. The parties in this case have met that nexus
13 requirement in terms of liability.

14 The nexus, if there are -- and I don't like to use
15 that term, because it's almost a term of art in these things.
16 When you get to ordering relief, it is our view -- and I think
17 a reasonable interpretation of the Act in the legislative
18 history that was intended, was that the situation found
19 inconsistent, as it would be, manifested in applicant's
20 future activities, is to be remedied, to be corrected.

21 MR. SALZMAN: Let me press this a bit further.
22 Suppose that the only effective relief here would be to divorce
23 control of Alabama Power from the Southern companies and to
24 require it to operate independently so it would coordinate
25 with other entities other than the Southern pool.

1 Now is it the position of the Department of Justice
2 that the Nuclear Regulatory Commission can order the breakup
3 of the Southern Company if we find it necessary to eliminate
4 the anticompetitive situation?

5 MR. WHITLER: If that was what was necessary to
6 remedy the anticompetitive situation that this Board had found
7 after a hearing, then it would be our position, yes, this
8 Board would have that authority.

9 MR. SALZMAN: Thank you.

10 MR. SHARFMAN: I wonder, Mr. Whitler, from something
11 you said which I thought was very perceptive, that this was
12 really a nexus requirement.

13 I wonder if maybe the Commission, in its sometimes
14 not too articulate way, was really thinking about -- was
15 perhaps thinking about what powers it had when it talked about
16 nexus requirements?

17 Maybe it wasn't really thinking only of what the
18 situation had to be, but really of what relief it could give.

19 MR. WHITLER: Well, if that is what they were
20 thinking, then I would hope that they could have stated it
21 in a little more clear language than what they did.

22 MR. SHARFMAN: Fair enough. I am interested to
23 hear. You said you had an analysis of how this statute of
24 ours worked, and I don't think you have had a chance to give
25 us that analysis. I would love to hear it.

1 MR. WHITLER: All right, I will try to continue
2 through.

3 MR. SHARFMAN: Okay.

4 MR. WHITLER: The point that I was making was:
5 The Board below had applied a test of neutralizing the Farley
6 Plant on the competitive situation.

7 I think, in the first place, the test that they
8 applied -- or that is, the conditions that purport to neu-
9 tralize the plant on a competitive situation, didn't really
10 neutralize it in our view.

11 What they had done in the conditions below, by
12 ordering unit power and some limited wheeling and some
13 limited supplemental power, what they did in effect was
14 actually to neutralize the benefits that its competitors had.
15 In particular, AEC is the only one that was affected by the
16 relief, or positively affected.

17 It simply neutralized AEC's benefits. And parti-
18 cularly, the lawfully conferred tax and financing advantages,
19 while Applicant's competitive position essentially remains
20 unchanged.

21 See, it is going to get all the benefits, all the
22 advantages that it would have from the remainder of the Farley
23 Power, as well as it still has the benefit of its interconnec-
24 tions with the Southern System benefits of its large generation
25 and transmission system and the conditions that were ordered

1 by the Board below do not address those problems at all.

2 And those establish the real heart of, in our view, Applicant's
3 monopoly power.

4 The pre-existing anticompetitive situation is
5 essentially left undisturbed. The most that can be said for
6 applying this neutralizing test is that what it does is
7 destroys or removes the previous nexus that had existed
8 between the Farley Plant and the situation inconsistent, or
9 the anticompetitive conduct or acts of the Applicant.

10 It certainly doesn't remove the inconsistency that
11 existed; only the nexus.

12 MR. SHARFMAN: Why is that not enough under 105(c)?
13 That is really what I would like to hear.

14 MR. WHITLER: As I interpret the statute, and I
15 think as I would hope this Board had interpreted in Consumer's
16 at least as I read it, is that the statute requires that the
17 Nuclear Regulatory Commission attach appropriate conditions
18 that would eliminate the concerns that were entailed in its
19 affirmative findings under Section 105(c)(5) -- the situations
20 that would remedy the situation, or conditions that would
21 remedy the situation that have been found inconsistent.

22 And that situation, in our view, was Applicant's
23 monopoly power, its abuse of that monopoly power, and its
24 propensity to abuse that monopoly power in the future.

25 MR. SHARFMAN: That's your view, your Department's

1 view. What are the grounds for that view?

2 MR. WHITLER: There have been previous holdings by
3 this Appeal Board that certainly support that view. And as
4 I read them --

5 MR. SHARFMAN: Midland is the only one? Midland,
6 in a sense. I haven't read that language recently. Do you
7 have a particular page in mind?

8 MR. WHITLER: No, sir, I don't have that.

9 MR. SHARFMAN: As I remember, basically they left
10 the question of relief open in Midland. I was not on that
11 Appeal Board.

12 MR. WHITLER: That's right, but some guidance was
13 given as to what would be appropriate relief. And as I read
14 the clear intent of that language -- of course, standing here
15 telling this Board what the intent was is really comparable
16 to carrying coal to Newcastle -- I don't have my brief in
17 front of me, but the other Appeal Board decisions that are
18 applicable are cited in our brief.

19 MR. SHARFMAN: Okay.

20 Do you think there's anything clear in the legisla-
21 tive history that points the way?

22 MR. WHITLER: To speak quite candidly, I'm not
23 sure there's anything clear in the legislative history.

24 You can certainly point to statements made by Congressman Hart
25 and by Price during the debates on the effect of Section 105(c) (6)

1 in terms of whether certain other factors would -- should be
2 used to mitigate or limit the correction of the antitrust
3 problems that were found under Section 105(c)(5). Those are
4 also cited in our brief.

5 MR. SHARFMAN: Okay.

6 CHAIRMAN FARRAR: Mr. Whitler, let me ask you
7 something. You said that the Board, instead of neutralizing
8 Alabama Power's advantages, really neutralized the cooperatives
9 advantages, kind of wiped them out in the remedy that it
10 granted.

11 But if I read the Board's decision correctly,
12 I thought it said flat out that it was intending to preserve
13 those benefits.

14 Are you saying that -- is my recollection of what
15 it said correct?

16 MR. WHITLER: Your recollection of what was said
17 is accurate.

18 CHAIRMAN FARRAR: But -- so you're saying that --
19 but then they went ahead and wiped out those advantages
20 unknowingly, perhaps?

21 MR. WHITLER: Yes, and this is the point that we
22 also made in our brief on exceptions; that the Board wanted to
23 neutralize or not extend AEC's tax and filings and advantages,
24 although the Board had held those particular advantages were
25 irrelevant for all purposes.

1 But the problem in the Board's action of not
2 extending them was in effect to deny them.

3 CHAIRMAN FARRAR: Let me, before you get on to
4 another subject, ask you a question in a somewhat different
5 area.

6 One of the arguments that at least Municipal makes
7 concerns these wholesale rate reductions back in the '40s to
8 prevent the -- I guess it was the Cooperative, from establishing
9 its own generating facilities.

10 Now I know that in the antitrust -- you know, that
11 it's anticompetitive when your competitor comes in, so you
12 cut the price on your own product to the ultimate consumer,
13 taking a loss for awhile just to cut out your competitor who
14 is new to the game and can't meet that price, so you cut him
15 out, then you jack the price up.

16 But I wasn't aware of it in this context, where
17 you're cutting a price not to the ultimate consumer, but
18 cutting the price to your competitor. Now I can see how this
19 could have the effect of tricking him, or lulling him into
20 taking that price rather than doing what he might or should
21 have done in his best interests to add additional generating
22 capacity.

23 My question is: Isn't this a rather novel use of
24 this price-cutting theory when you're cutting the price to
25 your competitor? Are you aware of other industries, other

1 situations in which that theory has been applied? Or is this
2 brand-new to this case?

3 MR. WHITLER: I cannot think of any situation
4 right now in other industries where this has been the
5 situation. This is not to say that there hasn't been any.

6 CHAIRMAN FARRAR: Should I not worry about that;
7 the theory is so clearcut? And I can see how it could induce
8 you to take action in your short-term interest, which is not
9 in your long-term interest, but it makes me just a little
10 nervous to think of writing that it was a bad thing to give
11 your opponent a great deal.

12 MR. WHITLER: I guess one way to look at it is:
13 Had AEC installed generation, and they did subsequently
14 install generation, the generation is there for the life of
15 the plant, be it 20 years, 30 years, or even longer. Okay?

16 Yet, if the action that you are taking, if you
17 can dissuade them from building that generation by lowering
18 your rates, your rates can be raised in four years, five years,
19 six years.

20 CHAIRMAN FARRAR: All right, but isn't that their
21 own fault? In other words, if I cut the price to the ultimate
22 consumer, my competitor can't do anything about it; I'm selling
23 at a loss to the ultimate consumer. He can't meet it. He's
24 stuck. There's nothing he can do to prevent me.

25 Here, this was a nice -- if it was what your

1 opponents say it was -- it was an imaginative tactic, but it
2 didn't have to work. The Cooperative had in its power the
3 power to keep that tactic, if that's what it was, from
4 working.

5 Why should we be on the lookout for them to protect
6 them against something they could have protected themselves
flip bu 7 against?

8 MR. WHITLER: I think the record shows here that,
9 up until fairly recently, the last six or seven years, that
10 AEC's cost of power has been much greater than Applicant's.
11 And there were times in which I believe the record shows that
12 AEC was pretty close to going under.

13 And the situation that they were in, I'm just not
14 sure that they had a great deal of options.

end #17 15 CHAIRMAN FARRAR: They didn't have a real choice.

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1 MR. WHITLER: Another point that I want to make on
2 the proposed license conditions, the ones that we are advocating
3 as what is necessary as appropriate to remedy the situation,
4 is that the conditions that we are seeking are not onerous
5 burdens, extraordinary type of conditions, extraordinary type
6 of relief.

7 We are simply asking that Applicant render the same
8 type of coordination of services to smaller competitors, or
9 potential competitors as it enjoys itself in the markets in
10 which it operates.

11 MR. SALZMAN: I thought that it was in fact
12 rendering the services; that the unhappiness of AEC is that it
13 won't wheel power out. Other than that I didn't understand
14 that there was any problem.

15 MR. WHITLER: Certainly --

16 MR. SALZMAN: What, specifically, is it?

17 MR. WHITLER: Certainly they do render some of the
18 services that the license conditions go towards.

19 We, of course, excepted: to the Board's finding
20 that the 1972 agreement was not anticompetitive. We said it
21 was deficient in many regards, and we set those forth in our
22 brief.

23 The other point I wanted to make is that we need to
24 bear in mind this 1972 interconnection agreement is post-
25 litigation type of conduct. They entered into this in 1967

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1 when they began these interconnection negotiations .

2 Applicant took the position then they were not
3 going to interconnect to coordinate with AEC if it would put
4 AEC -- make them more reliable, or put them into a better
5 competitive situation.

6 I am referring here in particular to a letter from
7 Mr. Joseph M. Farley, who was at that time Executive Vice
8 President, DJ-424.

9 Now they maintain their position up to -- in 1969
10 they took that position with the AEC, that they were unequivoco-
11 cally opposed to selling any part, or selling an ownership
12 interest in the SEALA, Southeast Alabama, which later became
13 known as the Farley plant, unequivocally opposed to selling
14 ownership interests in Farley Plant. That is DJ-604.

15 This was the situation up until the early 1970s.
16 1971, this proceeding here was instituted by an advice
17 letter from the Justice Department to the Nuclear Regulatory
18 Commission.

19 In 1972 Applicant entered into this interconnection
20 agreement with limited forms of coordination, and has been to
21 some extent, more cooperative.

22 MR. SALZMAN: Applicant still doesn't wish to sell
23 any portion of the plant. Its condition is the same.

24 MR. WHITLER: That's my understanding.

25 And we allege that that was anticompetitive and we

1 allege that the Board's failure to find that Applicant had
2 denied the smaller competitors access to Farley, was in
3 error.

4 MR. SHARFMAN: Mr. Whitler, Mr. Hjelmfelt said, as
5 I understood him, that in order for the relief to come within
6 our jurisdiction, the test had to be met that it was necessary,
7 in order to get full benefit from the nuclear access or make
8 full use of the nuclear access.

9 I understood that to be his position.

10 Do I understand you correctly to say that you don't
11 even have to show that, you merely have to show that it is
12 needed to remedy the situation which was inconsistent with
13 antitrust, that the relief really needn't be related to the
14 nuclear access at all?

15 MR. WHITLER: In this particular case -- I am not
16 trying to evade the question, but in this particular case, the
17 board below made a finding that if AEC didn't have access to
18 Farley, that Alabama Power company would have a decisive
19 competitive advantage.

20 So that particular point, I think -- you know, the
21 relief here has to go to Farley.

22 MR. SHARFMAN: Okay, I am not disputing that. But,
23 what about the question of coordination though, which the '72
24 agreement went to? That goes beyond Farley.

25 Now that is why I raised the question. You were

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1 talking about that and it certainly is relevant to the situation
2 inconsistent.

3 What about -- is it related to nuclear access, or do
4 we have to consider whether it is related to nuclear access?

5 MR. WHITLER: I'm sorry, I just, quite frankly,
6 missed the point of your question. If you can restate it --

7 MR. SHARFMAN: All right.

8 We were talking -- Mr. Salzman had a lengthy
9 colloquy with Mr. Hjelmfelt over the question of our jurisdiction
10 to grant relief beyond nuclear access.

11 And as I understood Mr. Hjelmfelt, he said we have
12 jurisdiction to grant relief beyond nuclear access so long as
13 it is necessary to get the full benefit of the nuclear access.

14 Now, I am saying to you, is it the Justice Department's
15 position that we don't even have to show that that is so, that
16 merely we have to show it is necessary to remedy this situation
17 inconsistent?

18 MR. WHITLER: My answer would be, again, unfortunately,
19 a qualified "yes."

20 MR. SHARFMAN: I am not sure what "yes" means, but
21 go ahead.

22 MR. WHITLER: Because in this situation the facts
23 would indicate that the Farley plant is going to be an
24 addition of slightly less than 20 percent, 18, 19 percent of
25 Applicant's -- that much of an addition to its generating

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1 capacity, assuming that the second unit is constructed.

2 Okay. The impact of Farley on to the competitive
3 situation is quite clear in that situation. And so, the
4 conditions that we are posing, although we might talk about
5 wheeling that would appear to be unrelated to Farley, I have
6 difficulty conceptualizing as to how you can take a system
7 which is providing almost 20 percent of the power in the area
8 per unit and disassociate it from what else is going on.

9 MR. SHARFMAN: Are you telling me then, in the
10 context of this case we don't even have to reach that legal
11 question because anything related to the anticompetitive
12 situation here is related to Farley?

13 MR. WHITLER: Farley is the major factor, yes, sir.
14 That is what I meant when I said a "qualified yes."

15 MR. SALZMAN: May I pose this problem?

16 I understand that the Alabama Electric Cooperative
17 now has surplus capacity which they can't market. That is,
18 they can't do it unless Alabama is willing to wheel it for
19 them.

20 Suppose Farley is completed, or it is completed and
21 it is in operation and they give additional surplus capacity,
22 should we -- or presuming we agree that relief that should be
23 given to the Cooperatives, should we instruct or should a
24 license condition be that Alabama wheel not moerely surplus
25 power from Farley, but any surplus power that AEC has?

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1 And if so, how does the surplus power which
2 preexisted Farley relate to the activities under the license
3 that this Commission has given to the Alabama Power Company?

4 MR. WHITLER: I will try to answer that as I
5 understand it.

6 What you have here is a situation in which one of
7 Applicant's competitors, AEC, has its own generating with
8 certain capacity and energy out of that at certain cost.

9 He also has a right or entitlement to capacity and
10 energy out of Farley.

11 Okay?

12 Those two, together, go into his mix in generating
13 resources plus whatever else he might have.

14 The question, it seems to me, that comes down is:
15 How is AEC best going to utilize this mix of generating resources
16 that it has? Is AEC going to be able to put it together and do
17 with it what it may in the most efficient manner, assuming that
18 it is going to operate its system in a prudent manner in the
19 same way that we would assume that Alabama Power Company is
20 going to operate its system?

21 Does AEC get to make those choices, or does Alabama
22 Power Company get to make those choices? I think that is what
23 it boils down to. And that is how Farley would impact on
24 this particular situation with surplus power from the Tombigbee
25 units.

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1 MR. SALZMAN: Thank you, Mr. Whitler.

2 MR. WHITLER: I want to say one point in response
3 to Applicant's -- some assertions that they made in their
4 answering brief; in particular, the point -- I don't have a
5 page cite -- when they were talking back in remedy, they made
6 the assertion that other parties in this proceeding -- speaking
7 of the Department, the Staff and Intervenor -- argue that
8 public interest should not be considered in this proceeding.
9 And that we are ignoring the public interest.

10 And I want to make it clear that as far as the
11 Department of Justice is concerned, that it is here representing
12 the public interest, and as we view it, there is a strong
13 public interest in the application of the antitrust laws to
14 remove failure to competition that had been raised by
15 Applicant in its abuse of its monopoly power as found by the
16 Board below. And that we certainly take issue very strongly
17 with Applicant's suggestion that we are ignoring the public
18 interest.

19 CHAIRMAN FARRAR: I think -- aren't they suggesting
20 rather that you are saying that other than how the public
21 interest is reflected in the antitrust laws, you shouldn't
22 be taking the public interest into account?

23 MR. WHITLER: If they are saying that, then I do
24 not have as much quarrel with what they have said. But I
25 don't read it that way.

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CHAIRMAN FARRAR: Let me ask you about that.

2 At subsection 6, I take it it is the Department's
3 position -- I think I remember your brief correctly -- that
4 you take public interest factors such as the need for power
5 into account only in considering whether to issue the license
6 at all, and not what types of conditions to put on it,
7 assuming you found a situation inconsistent and assuming you
8 decided to issue the license. That then all that is taken into
9 account is remedying the situation and not other public-
10 interest factors such as need for power?

11 MR. WHITLER: That is almost correct, but not quite.

12 I think what we argued on our brief was that the
13 Board misapplied the need for power in the particular situation
14 here. And I do not think that we equated in our brief the
15 need for power with public-interest considerations.

16 MR. SALZMAN: Is it the Justice Department's
17 position in deciding whether the antitrust law or antitrust
18 policy had been violated, we should take into account concepts
19 of the public interest, particularly related to the public
20 utility industry, in the manner that the Federal Power
21 Commission might do?

22 MR. WHITLER: I don't think that that is necessary
23 to be done.

24 MR. SALZMAN: Not necessary.

25 Should we?

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1 MR. WHITLER: I don't think you should, sir. Your
2 public interest considerations or standards are set forth in
3 the statute in terms --

4 MR. SALZMAN: Just those under those of the anti-
5 trust laws. We don't concern ourselves, at least in finding
6 anticompetitive situation, with any of the obligations on the
7 part of Alabama Power to serve its customers or otherwise?

8 MR. WHITLER: Those findings, of course, were
9 looked at in Phase 1 in terms of liability.

10 MR. SALZMAN: I take it on the liability question,
11 the liability is strictly an antitrust liability? There is
12 no public service? I mean, there is no -- it is not a question
13 of taking the antitrust laws into account and deciding whether
14 something is convenient or necessary or in the public
15 interest? It simply is a straightforward application of the
16 antitrust laws and in the finding of liability or not based on
17 those laws?

18 MR. WHITLER: As well as policies --

19 MR. SALZMAN: Yes, that's the point. It is only the
20 antitrust policies that we should consider in finding
21 liability.

22 But, moving now to the remedy phase, aren't we
23 supposed to take the public interest into account in that
24 phase? We are not supposed, I would take it, are we, to
25 make the Alabama system inoperative or impair it?

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1 That's a problem. It is a real problem.

2 Suppose the question was on wheeling power. Alabama
3 says, "We need it ourselves." What are we to do? Are we to
4 say, "Too bad."

5 MR. WHITLER: Let me try to answer the last question.
6 Then if I can remember the former one, I will try to answer
7 that one, too.

8 Of course, in terms of wheeling, we are talking
9 about a wheeling condition. That is with reasonable notice
10 and with compensation and with planning, and would not -- and
11 would use only capacity that is applicable. Okay, would not
12 reach the particular point that you are speaking of there.

13 MR. SALZMAN: Justice does not argue that we must
14 add a license condition that they will wheel X power for the
15 cooperatives, and then if there is just not enough capacity,
16 then Alabama loses?

17 MR. WHITLER: No, sir, it doesn't work that way.

18 Getting back to the public interest, okay. Under
19 Section 105(c)(6), I think one part which I feel the legislative
20 history is fairly clear on, is the question of -- as to where
21 the public interest consideration such as the need for power
22 in the area would normally override the elimination of the
23 antitrust concerns. The legislative history is pretty clear
24 that it would not and that it would only be in rare or
25 exceptional cases in which public interest -- the need for

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1 power in the area would outweigh the need to remedy the
2 situation inconsistent for the attachment of appropriate
3 license conditions.

4 I am taking more time than I wanted to. Let me
5 see if there are a couple of points I can touch on to help
6 the Board clear it up.

7 All right. There is one point that the Applicant
8 brought up this morning which -- in terms of Alabama Public
9 Service Commission jurisdiction.

10 We hadn't addressed this particular point in our
11 brief because we, quite frankly, had just not taken
12 exception to what the Board had found, although we did
13 suggest that there were many examples of retail competition.

14 One particular point that I want to bring to the
15 the Board's attention after Mr. Balch made his comment today,
16 in terms of when the Board had asked, has Alabama Power
17 Company ever gone in and sought a franchise, asked for a
18 franchise?

19 In a situation in Sampson, back in the early '60s, --
20 Sampson, Alabama -- the City of Sampson is being served at
21 retail by a distribution cooperative. That distribution
22 cooperative wanted to acquire the system and become a wholesale
23 customer of Alabama Power Company.

24 Alabama Power Company, when it met with the system,
25 back in 1960 or '61 said to the system, to the representatives

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1 of that system, okay, we know you are asking for wholesale
2 power, but if you will grant us a franchise to serve you at
3 retail, we can bypass the Alabama Public Service Commission
4 because they do not have jurisdiction over franchises.

5 And this is what happened eventually in Sampson,
6 and that is the reason why you have duplicative --
7 wasteful duplication distribution system in Sampson. And that
8 in in DJ -- I am not sure, it is in either DJ 4012 or 4013.

9 MR. SALZMAN: Okay. One or the other.

10 CHAIRMAN FARRAR: Mr. Whitler, I will give you a
11 minute or two more.

12 MR. WHITLER: One other question on the wheeling.
13 The question was asked of Mr. MacGuineas of whether low-cost
14 power -- there had ever been anything to be wheeled in.

15 And Mr. MacGuineas was, of course, representing
16 AEC. And in the Section 4.2 episode, because AEC had its
17 own hookup to SEPA, was not a party to the 4.2 system of
18 contracts.

19 Okay. The Department has alleged in this case,
20 and we have complained, that the Board erred in not finding
21 these. That the Alabama Power Company had, in effect, refused
22 to wheel the SEPA power when it came on line, or early SEPA
23 power back in the '50s.

24 What Alabama Power Company's proposal in conjunction
25 with the Southern Company was, that we will buy the low-cost

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1 SEPA power at the busbar and then resell it. We are going to
2 wheel it.

3 Okay.

4 The other situation, the more current situation was
5 SEPA. And the company cites this in their brief as an
6 example of their wheeling policy and their practices. That
7 when low-cost SEPA power became available, they did wheel it
8 to their wholesale customers.

9 What the company neglects to point out is the terms
10 and conditions upon which they wheeled that power were anti-
11 competitive, eliminated their wholesale customer from going
12 out and getting other sources of power. They were tied into
13 Alabama Power Company.

14 Thank you.

15 MR. SHARFMAN: Did the Licensing Board find your
16 way on that one?

17 MR. WHITLER: On Section 4.2, yes.

18 MR. SHARFMAN: That's the one you won on that?

19 MR. WHITLER: Not in terms of a refusal to wheel,
20 but rather it was in effect wheeling on unreasonable terms.

21 MR. SHARFMAN: Anticompetitive conditions?

22 MR. WHITLER: Yes, sir.

23 Thank you.

24 CHAIRMAN FARRAR: Thank you, Mr. Whitler.

#19

1 CHAIRMAN FARRAR: Ms. Axelrad?

2 ORAL ARGUMENT OF JANE AXELRAD ON BEHALF OF THE
3 NUCLEAR REGULATORY COMMISSION STAFF.

4 MS. AXELRAD: The Staff had hoped that this would
5 be the one opportunity in this particular proceeding when they
6 would not have to go last, but that doesn't appear to have
7 to have been the case.

8 Mr. Chairman, Members of the Board:

9 I believe that I will begin my remarks this
10 afternoon by addressing myself to the key question that you
11 seemed to have addressed to every other party that has
12 appeared before you --

13 MR. SALZMAN: Ms. Axelrad, I am having difficulty
14 hearing you. Could you turn the microphone toward you? Is
15 it turned on?

16 MS. AXELRAD: Yes, it's on.

17 MR. SALZMAN: Thank you.

18 MS. AXELRAD: I will address myself to the question
19 that you have addressed to all of the other parties that have
20 appeared here before you. And that is, to the scope of the
21 Commission's antitrust relief powers under Sections 105(c)(5)
22 and (6) of the Atomic Energy Act.

23 The NRC Staff's position is that this Board has
24 the authority to attach conditions to the license sufficient
25 to remedy the situation inconsistent with the antitrust laws

1 which the Board found in its Phase I decision in this case.

2 Section 105(c)(6) empowers the Commission to
3 attach conditions -- whatever conditions it deems appropriate.
4 And the legislative history of this provision -- and I refer
5 specifically to the Joint Committee Report -- indicates that
6 the Commission should be able to impose conditions to
7 eliminate its concerns.

8 The Staff submits that this phrase "eliminate its
9 concerns" refers to any concerns that it finds in its
10 liability findings that --

11 MR. SALZMAN: Ms. Axelrad, the question is: What
12 do you do with the words immediately preceding the ones about
13 the anticompetitive activities in the 105(c)(5)? That is,
14 "activities under the license"?

15 And what do you do with the suggestions in
16 Waterford, and with the suggestions in our opinion in Wolf
17 Creek, and with the closing line in Consumer's, that this isn't
18 carte blanche to restructure the electric utility industry,
19 but it must relate to the licensed activities.

20 That is, it is one thing to suggest, as I think I
21 understood Mr. Hjelmfelt to insist, despite unfair harassment
22 by one member of the Board, that these conditions were neces-
23 sary to make fair use of Farley.

24 But it's another thing, I think, to insist that we
25 can break up the Southern Company, as I think I heard somebody

1 agree to a moment ago.

2 I mean, surely there is nothing in those hearings
3 that I was able to see that suggest that we were to be the
4 antitrust watchdog over the electric power industry. I mean,
5 for all intents and purposes.

6 And once you get away -- well, let me put it to you
7 graphically. The statute says that the license conditions may
8 neither create nor maintain in the plant a situation that's
9 inconsistent with the antitrust laws. And we are to see that
10 the license activities neither create such a situation nor
11 maintain it.

12 But it doesn't say that we are to rectify it if a
13 license condition can be neutralized. In other words, if the
14 activities under the license are not contributing to the
15 maintenance of an anticompetitive situation, why isn't it a
16 fair reading of the statute, given the fact that this does not
17 come from an antitrust background generally but from a nuclear
18 power background, to say that we have thus done what Congress
19 expected us to do.

20 MS. AXELRAD: Well, first of all, we submit that
21 the "activities under the license" in this case would in fact
22 maintain the situation inconsistent with the antitrust laws;
23 and that any attempt by the Board to neutralize the situation
24 by simply granting a form of access to the nuclear power, would
25 not prevent the activities under the license from maintaining

1 that situation, even though you grant access to a small
2 system, to a portion of the power from the plant. The Appli-
3 cant also has the opportunity to take its portion of power
4 from the plant and integrate it into its total system
5 activities.

6 It can then continue to engage in the types of
7 anticompetitive conduct that it has engaged in in the past
8 while taking advantage of the addition of this nuclear plant
9 to its system.

10 CHAIRMAN FARRAR: Suppose that we do the worst
11 possible thing to this company and say, "This plant will
12 maintain the situation inconsistent with the antitrust laws,
13 and so you can't have a license; no license for you"?

14 They would go, I presume, merrily about their way
15 and that's the worst thing we can do to them, I think. Maybe
16 not.

17 (Laughter.)

18 CHAIRMAN FARRAR: I was thinking about breaking up
19 the Southern Companies.

20 MR. BALCH: It's good for starters.

21 (Laughter.)

22 CHAIRMAN FARRAR: But if we did that, they could go
23 merrily along with maintaining the situation inconsistent with
24 the antitrust laws on the entire remainder of their system.
25 In other words, the most drastic remedy we have against them

1 might not reach the situation as it affects the rest of their
2 system.

3 MS. AXELRAD: That's correct. But if you were to
4 do that and to deny them a license, then they would not be able
5 to take advantage of using a portion of the nuclear plant to
6 serve their own resources and to mix in with their own
7 generating resources, and to in fact continue to maintain
8 their monopoly power, because they wouldn't have a license.
9 They would have no access to the power at all.

10 So they would not be able to do what the statute
11 is designed to prevent: to maintain their position, to
12 maintain the situation inconsistent with the antitrust laws
13 by using a portion of the nuclear unit.

14 MR. SHARFMAN: Could you tell us what page of your
15 brief that quotation from the legislative history is that you
16 gave us before?

17 MS. AXELRAD: The quotation about eliminating the
18 concerns?

19 MR. SHARFMAN: Yes.

20 MS. AXELRAD: What I am citing is referenced in
21 the Licensing Board's Phase II decision on page 1486. The
22 Licensing Board itself quotes that portion of the Joint
23 Committee Report.

24 MR. SHARFMAN: Okay.

25 MS. AXELRAD: I would also like to say that we are

1 not proposing that there be a restructuring of the nuclear
2 industry by virtue of the remedy that the staff and the other
3 parties are seeking.

4 We are simply saying that this Board should attempt
5 to remove the competitive disadvantage at which small systems
6 in central and southern Alabama have been placed by virtue
7 of Alabama Power Company's abuse of its monopoly power in the
8 relevant market, the Board found was the wholesale market,
9 in central and southern Alabama.

10 The Licensing Board, in its Phase I decision,
11 found a very serious pattern of conduct on the part of Alabama
12 Power Company. Although in its Phase II decision it attempted
13 to examine applicant's conduct -- different instances of
14 applicant's conduct in isolation, and then attempted to fashion
15 a remedy nearly tailored to fit those five instances of
16 conduct, it completely ignored its findings of the entire
17 whole, the big picture.

18 And in this case, we submit that the whole is
19 greater than the sum of its parts.

20 The Board correctly described the pattern of
21 Alabama Power Company's anticompetitive conduct on pages 958
22 and 959 of its Phase I decision, where it said "Applicant has
23 achieved monopoly power over the generation and transmission
24 of wholesale power in that market. An anticompetitive pattern,
25 a course of conduct towards AEC's development and potential

1 competition for the sale of wholesale power was discerned."

2 Yet, in its Phase II decision, the Licensing Board
3 attempted to focus on the instances of conduct which were not
4 proved in the Phase I decision.

5 The Board found a serious pattern of conduct. It
6 found that Alabama Power Company had refused to offer fair
7 coordination from the years 1967 to 1972; that it had taken
8 actions to preclude small systems from achieving economic
9 coordination; and it attempted to insert anticompetitive
10 provisions in its contracts with these small systems; and it
11 had tried to prevent Alabama Electric Cooperative from
12 serving Ft. Rucker back in the 1960s.

13 Now we submit that this pattern of conduct is
14 equivalent to a finding by a court of monopolization under
15 Section 2 of the Sherman Act; and that the Board should have
16 looked to antitrust case law describing what proper remedy is
17 in a monopolization case to determine how to fashion relief in
18 this case.

19 Had the Board done so, it would have found that the
20 case law says that the remedy in a monopolization case should
21 break up or render impotent the monopoly power; and that the
22 key to the whole question of an antitrust remedy is the
23 discovery of methods to restore competition.

24 In order to restore competition and to break up
25 Applicant's monopoly power, the Licensing Board should have

1 granted effective access to the Farley Nuclear Units, which is
2 what it purported to do.

3 Effective access to the Farley Units requires an
4 ownership interest in the Farley Nuclear Units. The Licensing
5 Board attempted, in justifying unit power as opposed to
6 ownership access, to equalize the cost of Alabama Electric
7 Cooperative and the Alabama Power Company, and it justified
8 that attempt to equalize costs on the grounds that it did not
9 want to leave the competitive situation undisturbed.

10 It is this point I addressed earlier. The proper
11 test is not that the Board should have attempted to "leave
12 the competitive position undisturbed"; instead, it should have
13 attempted to remove the competitive disadvantage at which
14 smaller systems were placed, and therefore it should have
15 allowed those systems to take advantage of their lawfully
16 conferred taxing and financing advantages -- this being the
17 chief difference between unit power and ownership.

18 MR. SHARFMAN: May I ask you this?

19 Under your -- Did you finish when you were inter-
20 rupted at the beginning, in explaining your view of our
21 jurisdiction to grant relief? Or did you have anything else
22 there that you haven't gotten to?

23 I want to make sure I understand you fully. It's a
24 very important point.

25 MS. AXELRAD: Well, had I been able to go on, I would

1 have cited the Waterford case, and the Wolf Creek case, to
2 support my position and the Staff's position that in fact the
3 Commission does have broad authority to remedy the situations
4 inconsistent with the antitrust laws.

5 However, the other members of the Board asked me
6 to discount those.

7 MR. SHARFMAN: I know, but I'm interested. Do you
8 think there really is support in Wolf Creek? Because I recall
9 Wolf Creek really dealt with nexus, did it not, rather than
10 scope of relief?

11 MS. AXELRAD: Well, the language I was referring to
12 in Wolf Creek specifically discusses 105(c)(6). I believe the
13 nexus requirement in Waterford was in reference to the nexus
14 needed between the activities under the license, and the
15 situation in consistent with the antitrust laws, and that
16 wording is found in 105(c)(5).

17 However, there is language in Wolf Creek, on page
18 571, where it says that Section 105(c)(6) simply directs the
19 Commission to place appropriate conditions on licenses where
20 necessary to rectify anticompetitive situations. This is an
21 invocation of the Commission's discretion, and not a limitation
22 on its powers.

23 I think that's a fairly clear indication that the
24 Commission does have broad discretion in fashioning relief.
25 And while there is very little in the legislative history that

1 indicates that the Commission has very broad authority other
2 than the language that I stated to you in the Joint Committee
3 Report about eliminating the concerns which I think seems to
4 indicate they can eliminate any of the antitrust concerns
5 identified, there is also now indication that they meant to
6 limit relief to access to the nuclear unit.

7 MR. SHARMAN: Isn't the concern -- couldn't you
8 read that business about "eliminating the concerns" to mean
9 eliminacing the concerns that activities under the license
10 would create or maintain a situation inconsistent with the
11 antitrust laws, which gets you back to square one as to what
12 "activities under the license" that would cover?

13 MS. AXELRAD: I also believe there's a logical
14 argument you can make. In the Waterford cases, they -- the
15 Commission indicated that it was important in antitrust
16 proceedings that it was possible to go beyond simply examining
17 the activities under the license to determine whether or not
18 they would create or maintain a situation inconsistent with
19 the antitrust laws.

20 There are decisions that say that to maintain part
21 of that standard is very important; and that you must look at
22 the activities of the utility as a whole, not just the
23 nuclear power, but also their other activities --

24 MR. SHARFMAN: I understand. I always thought the
25 situation was inconsistent, obviously, and that's what the

1 Appeal Board decided in Wolf Creek, which has to be the total
2 situation. But the "activities under the license," which the
3 license would maintain, which would be inconsistent with that
4 situation conceivably might have a smaller scope to it than
5 the situation itself.

6 MS. AXELRAD: But if I can carry the logical argu-
7 ment a little bit further, if the Commission is empowered to
8 look into the broad activities of a utility coming in to
9 examine whether or not they're inconsistent with the antitrust
10 laws, and if the Commission is empowered to engage in antitrust
11 proceedings of the type that it has engaged in in this case
12 where the record exceeded 26,000 pages, it took years -- also,
13 the other antitrust proceedings were of a very wide magnitude;
14 it just doesn't make sense to me that Congress would have
15 empowered the Commission to go into that type of an antitrust
16 review and then not permit it to remedy any problems that it
17 might have identified in the course of that review.

18 MR. SHARFMAN: If we are going to get into that
19 kind of general feeling about it, what about -- what do you
20 do with the Commission's decision in South Texas, which sort
21 of gives you a general, philosophical impression that the
22 Commission wants to limit its jurisdiction -- its antitrust
23 jurisdiction?

24 MS. AXELRAD: I don't think that I would read the
25 South Texas decision in that way. I would say that the

1 Commission was interpreting the statute, and that it argued
2 that -- it actually held that the Commission's antitrust review
3 was limited to the specific circumstances set forth in the
4 Atomic Energy Act, which was that it had authority to conduct
5 that type of review at the construction permit and operating
6 license stages, and only in those two stages and nothing in
7 between.

8 But it also indicated that we had continuing police
9 power. I don't believe the Commission in South Texas addressed
10 itself to the scope of the review that was to be conducted at
11 either the construction permit stage or operating license
12 stage.

13 MR. SHARFMAN: You're absolutely right.

14 But let me ask you this, because this is an
15 important point, and it's very troublesome.

16 Under your view, under the Staff's view of what
17 the scope of our jurisdiction to grant remedies is, there
18 really isn't anything we can't do, is there?

19 I think that's what Mr. Salzman in a way was driving
20 at. Are we left without any limitation on our power? And if
21 so, does it make sense to think that Congress would have wanted
22 this Commission to have that broad a power?

23 MS. AXELRAD: I really don't want to have to take
24 the position here of what the ultimate limitations on your
25 power are. I can only submit that in this particular case we

1 haven't asked you to reach them. The remedy that the staff is
2 proposing is well within the discretion afforded to the
3 Appeal Board, the Licensing Board, and the Commission under
4 the statute.

5 MR. SHARFMAN: What about wheeling?

6 MS. AXELRAD: I submit, in this particular case
7 where Alabama Power Company has dominance over the transmission
8 system in the area, where it controls access to coordination
9 services by virtue of its control of the transmission system,
10 and where it has used this control to deny access to coordina-
11 tion services in the past, it is entirely appropriate for this
12 Board to grant access to the Applicant's transmission service.

13 And furthermore, I would also tie it into it being
14 necessary for effective access to the Farley Nuclear Units.

15 MR. SHARFMAN: How do you do that?

16 MS. AXELRAD: First of all, the Staff has identified
17 in its briefs below, and also in the license conditions that
18 were proposed below, four different types of power that are
19 necessary.

20 The first type of transmission services that are
21 necessary are transmission from the Farley Plants to the loads
22 of small systems. This is obviously necessary. The Licensing
23 Board recognized this type of transmission is necessary to
24 deliver Farley Power to small systems.

25 The second type of transmission service identified

1 by the staff is transmission from a small system's resources
2 to third parties. Now, for example, if the small systems are
3 granted a portion of the Farley Plant, then it would be
4 transmission from this resource to third parties so that
5 small systems would be able to market that power.

6 The third type of transmission that's necessary is
7 from third-parties to small systems' loads. This is important--

8 MR. SHARFMAN: That's what I call "wheeling." The
9 first two, I don't. Maybe I'm wrong in my definition of the
10 word.

11 MS. AXELRAD: I would agree that that is wheeling,
12 and also the fourth type of transmission -- which I may as well
13 deal with --

14 MR. SHARFMAN: Why do we have jurisdiction to grant
15 the third?

16 MS. AXELRAD: Because Farley Power isn't enough.
17 It doesn't satisfy all of the small systems' needs. They have
18 to have backup services. They have to have emergency and
19 maintenance power. They have to be able to integrate the
20 Farley power into their system, and to be able to create a mix
21 of generating resources in order to effectively compete in the
22 wholesale market.

23 Now in order to get these types of coordination
24 services, it can either turn to the applicant which has refused
25 them in the past, or it can turn to other systems.

1 In order to do that, it needs access to the
2 applicant's transmission service.

3 MR. SHARFMAN: You're talking about municipalities,
4 now?

5 MS. AXELRAD: I'm talking about cooperatives and
6 municipalities. Even if a municipality gets a portion of the
7 Farley Units and thus gains -- comes a step closer to becoming
8 a real competitor on the wholesale market, eventually it's
9 going to need coordination services to back up its portion
10 of Farley and other generating resources.

11 MR. SHARFMAN: If I were in District Court, I would
12 understand that very easily. But my problem is really, I am
13 not clear on why you think we have jurisdiction to do that.
14 I understand why they need it.

15 MS. AXELRAD: I am attempting to explain to you
16 why it is necessary that they have these other types of
17 transmission in order to effectively use Farley separate and
18 apart from the fact that access to the applicant's transmission
19 system is necessary to break up its monopoly powers.

20 MR. SHARFMAN: Are you saying -- maybe I am
21 beginning to get a glimmer of what I think you are saying.
22 Are you saying that, for example, perhaps a municipality might
23 want to resell -- buy power and resell on the retail market,
24 and not just be a full requirement customer of Alabama Power?

25 And if it wanted to do that, it would have to be

1 able to function like a fully functional utility. If they
2 wanted to use Farley, they would also have to have coordina-
3 tion.

4 MS. AXELRAD: That's correct.

5 MR. SHARFMAN: And they couldn't do that under the
6 present system because Alabama Power would be likely to
7 frustrate them and want them to remain simply as a wholesale
8 customer.

9 MS. AXELRAD: Correct, and even more easy to see
10 with regard to Alabama Electric Cooperative, which is already
11 a generating and transmission cooperative.

12 Now they -- Applicant also, I submit, and the
13 record shows below, that Applicant has sought to keep Alabama
14 Electric Cooperative as a captive wholesale customer. It
15 doesn't want them to compete in the wholesale market. And
16 Alabama Power Company needs access to the Farley Units, and it
17 needs backup services, and it needs access to coordination
18 services from other suppliers over Applicant's transmission
19 system in order to compete effectively with the Applicant.

20 MR. SHARFMAN: You said it's even easier to see
21 with Alabama Electric Cooperative. I find it harder to see it
22 with Alabama Electric Cooperative because Alabama Electric
23 Cooperative is in a much stronger position, and it's in the
24 kind of a position where, because it generates -- would like
25 to market some of its excess power elsewhere, how does that have

1 anything to do with it.

2 MS. AXELRAD: In terms of Alabama Electric Coopera-
3 tive's needs for coordination services, it is no different
4 from Alabama Power Company. Alabama Power Company needs
5 coordination services. It coordinates with a number of other
6 utilities. It is coordinated with AEC and receives --

7 MR. SHARFMAN: I have no trouble with that as a
8 matter of antitrust law. My question is really: How does it
9 get to us under 105(c)?

10 MS. AXELRAD: Alabama Electric Cooperative needs
11 these coordination services in order to back up its allocation
12 of Farley power, in order to make effective use of its
13 Farley power.

14 It can either get the coordination services from
15 the Applicant, or it can turn to other systems other than the
16 Applicant to get those services. And since Alabama Power
17 Company has in the past denied Alabama Electric Cooperative
18 those services, it seems reasonable for this Board to allow
19 Alabama Electric Cooperative to have access on a reasonable
20 basis to Alabama Power Company's transmission system so that it
21 can turn to additional sources of supply for coordination
22 services, and thereby effectively integrate its Farley power
23 into its system.

24 MR. SHARFMAN: All right, hold there.

25 It is true that they would be better off being able

1 to have access to other systems to get coordination services.
2 That would put them in a better bargaining position, obviously,
3 and they could get -- would be able to get coordination
4 services that are better, and cheaper, possibly.

5 But in terms of being able to utilize the Farley
6 power, they could utilize the Farley power by getting
7 coordination services from Alabama Power, and we could put in
8 a license condition that says Alabama Power has to give them
9 coordination services.

10 In other words, we wouldn't have to give them
11 wheeling of coordination services from outside companies.

12 So I am wondering whether that is within our juris-
13 diction to grant relief?

14 MS. AXELRAD: I didn't mean to imply that -- that
15 relief had to be necessary to create effective access to a
16 nuclear plant, because it is our position that in addition to
17 providing effective access to nuclear power, the Commission
18 has authority to remedy other antitrust concerns that turn up
19 in the course of its antitrust review.

20 And in this case, the antitrust situation is that
21 the Applicant has monopolized. It has monopoly power. It has
22 control over generation and transmission, and therefore the
23 Commission is empowered to remedy that entire situation.

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1 MR. SHARFMAN: Then you are really parting
2 company with Mr. Hjelmfelt and saying we have much broader
3 power as to grant relief.

4 MS. AXELRAD: Yes.

5 MR. SALZMAN: Ms. Axelrad, would you say in
6 Wolf Creek Run that the Commission has authority to order
7 wheeling if necessary to use in conjunction -- of if
8 necessary to make effective use of a nuclear plant? But
9 didn't we also imply in Wolf Creek Run we may have no
10 authority beyond that necessary to allow effective use of
11 the plant?

12 MS. AXELRAD: I don't think that you made a very
13 clear statement that under no circumstances do you have
14 authority to grant wheeling in other circumstances. And
15 I think this case shows precisely the type of case where
16 the Commission ought to recognize such authority.

17 MR. SALZMAN: I have just a bit of trouble with
18 this. Let me give you a hypothetical situation. Let us
19 assume the Alabama Power Company is precisely the good
20 fellow that Mr. Blach and Mr. Benbow believe it to be and
21 it in fact does coordinate, wheel, do anything that
22 reasonably could possibly be required. And it applies
23 for a nuclear power plant construction permit and operating
24 license, and it's granted without any conditions, there
25 being no indication that it has monopolized in the past.

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1 And the license is issue. The plant is built. The juice
2 is turned on.

3 And the following day much out of character,
4 Mr. Farley therefore announces he will have no further
5 dealings with the Alabama Electric Power Cooperative,
6 any other municipality in the state of Alabama.

7 Now, I would take it under the Commission's
8 flat holding in South Texas that that is not something
9 we would be concerned about at all, even slightly, because
10 no license conditions are pending and the Commission's
11 antitrust jurisdiction ends precisely when it grants a 40
12 year nuclear power license; am I right?

13 MS. AXLERAD: Other than its power to enforce
14 existing conditions on the license itself, the South
15 Texas decision would appear to support that view.

16 MR. SALZMAN: If that is so, if that's the view
17 the Commission takes of its power, the limits to look at
18 things, doesn't it strike you odd that the Commission's--
19 to take a position that the Commission really believes it's
20 going to have to remedy all sorts of other things that are getting
21 fairly remote from the activities which it actually licenses.
22 The difficulty is we sit here as the Commission's surrogate,
23 and while it's true the Commission hasn't spoken, we have
24 a certain obligation to read the Commission's decisions and
25 its nuances, and I don't get the impression from its decision

1 that it reads its authority as broadly as you suggest.

2 Indeed, I think it reads its antitrust authority
3 as narrowly as it can for what it takes to be good and
4 sufficient reason. You know, the good and sufficient reasons
5 being there are other forms for relief and it should concern
6 itself with only the nuclear power plant aspect of it.

7 CHAIRMAN FARRAR: All right. I don't agree that the
8 existence of other forums should preclude this board from
9 granting relief.

10 MR. SALZMAN: Perhaps I gave you that opening. I'm
11 prepared to agree that that's so. But you know, you are
12 arguing for a very, very broad antitrust jurisdiction in the
13 Commission, and the Commission when it had the opportunity to
14 say yes, that's right, if we could have vacated a license
15 or refused to grant a license for antitrust problems and we
16 can vacate one later, would not take that step.

17 MS. AXELRAD: That would have been in clear
18 contradiction to the statutory mandate, which is the grounds
19 on which the Commission decided the South Texas decision.
20 The statute was clear that the Commission had jurisdiction
21 in two instances: at the construction permit stage and the
22 operating license stage.

23 MR. SALZMAN: Is that what the staff argued? Of
24 course not.

25 MS. AXELRAD: Well, we are also bound by the

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1 Commission's decision.

2 MR. SALZMAN: But the point is, having been
3 bound by the Commission's decision there as we are --

4 MS. AXELRAD: You are bound by the Commission's
5 decision in so far as they reach the question which the
6 Commission addressed in the South Texas case. That
7 question was not -- the question that they addressed in South
8 Texas is not the same as the question --

9 MR. SALZMAN: I'm prepared to say they didn't
10 exercise this case in South Texas, but doesn't it give you
11 a fair idea which way the Commission is looking and what they
12 expect?

13 MS. AXELRAD: No, I don't think South Texas
14 gives you an indication of how the Commission views
15 its antitrust review responsibilities at the construction
16 permit and operating license stage, and I think it would be
17 improper for this board to go beyond the explicit findings
18 in the South Texas decision and in effect prejudge what
19 decision the Commission will make when it's faced with that
20 questions.

21 MR. SHARFMAN: The truth is the Commission never
22 has really had to face up to this difficult question.

23 MS. AXELRAD: That's correct.

24 CHAIRMAN FARRAR: Then we should decide the case
25 according to what we think is right rather than where we think

1 the Commission might want to go when it gets to the question.

2 MS. AXELRAD: That's correct.

3 MR. SALZMAN: That doesn't sound like the way
4 the staff usually sounds.

5 (Laughter.)

6 CHAIRMAN FARRAR: Ms. Axlerad, let me ask you
7 something. You are pushing here for ownership interest.
8 Mr. Benbow or Mr. Balch told us they can't work with these
9 guys, you know, have visions of them wrestling in front of
10 the control panel or some dreadful thing like that, something
11 that might even bring safety considerations --

12 (Laughter.)

13 But seriously, is that a valid concern, that there
14 is this 40 year history or however many years of not always
15 pleasant relationships and that you shouldn't put two people
16 like that together?

17 MS. AXELRAD: Well, the record is clear that
18 Alabama Electric Cooperative does not seek to participate
19 in day to day operation of the plant. I think the record
20 may be less clear whether the municipals would seek to
21 participate.

22 But I believe that these things could be worked
23 out contractually.

24 CHAIRMAN FARRAR: How do they do it in New England,
25 I mean, that being where almost every plant has 10 or 12 owners.

1 And I know that one company is designated the lead company,
2 but we've never gotten much into any questions like that.
3 at an operating license stage. What does that mean?

4 MR. SHARFMAN: They probably held a town meeting.

5 MS. AXELRAD: I really don't know how the
6 New England arrangements work, but I do know that the
7 ownership arrangements are quite common in lots of different
8 instances.

9 There are presently ownership arrangements and
10 in fact joint ownership arrangements for nuclear plants. So
11 I don't think that the obstacles are overwhelming.

12 CHAIRMAN FARRAR: Let me ask you another question
13 about need for power: in subsection six, I can see how,
14 if we were considering, as I mentioned before, the most
15 drastic remedy of not granting the license at all -- the
16 situation was so bad we just didn't want to give them a
17 license.

18 We would have to look at the need for power in
19 the area and say in the public interest we would have to give
20 them the license anyhow and try to derive some -- propose
21 some conditions that would take care of the problem.

22 But where everyone is in favor of the license
23 being issues, I have trouble with -- first I have trouble
24 with where the public interest factors come in at all in that
25 situation under reading of the statute.

1 But second, if they do, does need for power come
2 in? And the reason I ask is all the cases I have seen and
3 probably you have seen outside of the antitrust area, need
4 for power in the environmental sense, the benefit of the
5 plant is developed in terms of regional need for power. Now,
6 what does it matter if Farley is on line with however many
7 megawatts it is who owns it.

8 Presumably the need in central and southern
9 Alabama is the same. There's only so many people and so
10 many industries there now. What does it matter which --
11 whether Alabama Power or the cooperatives or the municipality
12 own a part of that power; either the region is going to
13 be served or the region is not going to be served.

14 Or is that again toosimplistic a view?

15 MS. AXELRAD: I agree in this case the need for
16 power isn't an issue. What they're simply talking about
17 doing is taking power that applicant would otherwise use
18 to serve Alabama Electric Cooperative and members of the
19 Municipal Electric Utility Association and giving them the
20 power so that they can serve themselves.

21 CHAIRMAN FARRAR: It either goes directly to them --

22 MS. AXELRAD: That's correct. I don't think need
23 for power is an issue in this case.

24 MR. SHARFMAN: Anything else you want to tell us?

25 MS. AXELRAD: If you don't have any questions,

1 the staff requests this board to reverse the licensing
 2 board's findings with regard to relief, and to issue an
 3 order providing for license conditions requiring the Alabama
 4 Power Company to furnish ownership access to the Farley units
 5 transmission services as defined in the staff's proposed
 6 license conditions and access to coordination services.

7 CHAIRMAN FARRAR: Thank you, Ms. Axelrad. Again
 8 we have been going for quite some time, so why don't we
 9 take a -- well, let's go until quarter of -- a fairly short
 10 break, and we will come back and here rebuttal at that point.

11 (Brief Recess.)

12 CHAIRMAN FARRAR: Mr. Benbow, Ms. Axelrad isn't
 13 back yet. If we can wait just a minute.

14 Mr. Benbow, at this hour I'm afraid I'm going to
 15 have to insist we hear only from one of you.

16 REBUTTAL ARGUMENT ON BEHALF OF APPLICANT

17 ALABAMA POWER COMPANY

18 BY MR. BENBOW:

19 I would like to be very brief or as brief as I
 20 can be.

21 As with our arguments this morning, I think the
 22 the board would find it most useful if you would hear briefly
 23 from each of us.

24 CHAIRMAN FARRAR: Okay. I hope you will both
 25 keep in mind that, as you both know, what the purpose of

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1 rebuttal is.

2 MR. BENBOW: Indeed.

3 CHAIRMAN FARRAR: And you have heard what we have
4 been interested in today so let's use our time as effectively
5 as possible.

6 Go ahead.

7 MR. BENBOW: While Consumer's 2 did not speak
8 definitively to the question of remedy, it did offer certain
9 guidelines. The NRC's antitrust responsibility is not
10 plenary. Authority to remedy the anticompetitive situation
11 is limited to the right to impose conditions on Consumer's
12 license to build and operate the Midland plant. See page 20 --
13 420 of the slip opinion.

14 Going on to remedy, the board noted that while
15 no type of license condition was necessarily foreclosed in
16 that remand, the authority to act was not carte blanche
17 and may not be divorced from the purposes of the legislation.
18 As Mr. Whitler concedes, those purposes were, one, to ensure
19 that smaller utilities have fair access to nuclear power
20 under conditions which permit them a reasonable opportunity
21 to make effective use of its potential; and two, to see
22 that the activities under the license neither create nor
23 maintain an anticompetitive situation, except as necessary
24 to accomplish these purposes.

25 License conditions are not to be used to

1 restructure the industry.

2 We submit that here the board below in our case
3 substantially anticipated that directive on Consumer's. The
4 board below correctly recognized these considerations in
5 rejecting the overbroad proposed conditions of the various
6 other parties which sought to go considerably beyond any
7 remedy rationally related to the license.

8 Our opponents, as you have heard, assert that
9 no nexus is required between the activities under the
10 license in this situation inconsistent with the antitrust
11 laws and remedy situations; in other words, referring to
12 the second purpose set out in the Consumer's appeal board
13 decision, our opponents argue that the proper way to ensure
14 that activities under the license do not maintain an
15 anticompetitive situation is to eliminate the situation.

16 Our analysis, of course, reads the phrase
17 "activities under the license" and the word "maintain" out
18 of the standard.

19 The board below correctly reasoned that there was
20 a nexus requirement between the activities under the license
21 and the situation inconsistent.

22 Accordingly, the board attempted to neutralize the
23 impact of the Farley plant on the existing situation in order
24 to ensure that its operations do not maintain that situation.

25 MR. SALZMAN: Mr. Benbow, may I ask one question:

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1 why is not ownership interest a more appropriate form of
2 relief than simply unit power? It doesn't change the amount
3 of power that would go, I presume, to the smaller companies
4 from Farley, but it does permit the smaller companies
5 to finance their share of the plant themselves and to take
6 advantage of the tax advantages that they undeniably have
7 under legislation that the Congress has passed.

8 I mean, why should the utility -- should the
9 small companies' advantages be neutralized? I thought
10 it was Farley that was to be neutralized.

11 MR. BENBOW: For reasons set forth in our briefs
12 and in light of the recent enactment of PURPA --

13 MR. SALZMAN: I'm sorry?

14 MR. BENBOW: PURPA: Public Utility Regulatory
15 Policies Act, which I am astonished that the Department
16 of Justice or none of the other parties have seen fit to
17 bring to your attention because, for example, Mr. Sharfman,
18 on your question of whether there is a federal regulatory
19 agency, namely FERC, which can require wheeling under the
20 mandatory an comprehensive provisions of the new Public
21 Utility Regulatory Policy Act, which I will call PURPA for
22 obvious reasons, it amends section 210 to 212, in particular,
23 of the Federal Power Act, and of course now provides for that
24 body to order comprehensive coordination and wheeling and
25 thus largely makes the arguments about domination over

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1 generation entirely irrelevant to this proceeding and further
2 make the question of domination of transmission no longer
3 possible, if it ever was possible by the Alabama Power
4 Company, because these parties can go freely to FERC and
5 ask for wheeling of such power in or out as they see fit.

6 CHAIRMAN FARRAR: You mean they can start all
7 over again and go over there with 26,000 more pages?

8 MR. BENBOW: That is up to them. They have not
9 been reluctant to litigate when they wish. It was made
10 clear to this Commission from day one by me personally that
11 if they were going to try to conduct this kind of
12 broad scale charges that the Justice Department saw fit
13 without specificity, unlike a Federal District Court action,
14 to just say, we don't like this, and how about that, and
15 maybe the other, and shouldn't you read an inference here,
16 that a complicated section two antitrust case doesn't
17 get tried overnight.

18 Actually, this case was tried with enormous
19 expeditin, I would maintain, and if you doubt it, look at
20 what's happening with IBM and ATT in the Federal District
21 Court.

22 MR. SALZMAN: Mr. Benbow, I heard you on opening,
23 and I heard Mr. Balch, and I have read the briefs, and I
24 didn't hear any arguments about PURPA. This is rebuttal.

25 MR. BENBOW: This is rebuttal, and I am rebutting

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1 the arguments on the misrepresentation.

2 MR. SALZMAN: Was PURPA mentioned in your briefs?

3 MR. BENBOW: PURPA was passed since our brief was
4 filed, sir. That's what i referred to in my earlier
5 arguments. You will recall there were substantial changes in
6 state and federal law with respect to Alabama, other than
7 what applied with respect to Consumer's.

8 If I had had the time and the opportunity, I
9 undoubtedly would have gotten under federal law to the
10 issue of PURPA. But I assumed it would come out in the course
11 of discussion this afternoon. It has not; it is certainly
12 something that the board cannot fail to take into account
13 because it is absolutely fundamental to the remedy and
14 the liability phases of this case.

15 CHAIRMAN FARRAR: If that is the case, then I
16 was taught when I was a lowly lawyer at the Department of
17 Justice that I was under an obligation to send a letter to
18 the court in advance of the arugment and tell them about it.

19 MR. BENBOW: But these parties are all involved in
20 the field. This is --

21 CHAIRMAN FARRAR: I'm talking about me. Me as the
22 deciding person or the Fifth Circuit or whoever you are in
23 front of is entitled to know about it ahead of time if it
24 is so fundamental as you have just said it is.

25 MR. BENBOW: It is as fundamental as I've said it is.

1 CHAIRMAN FARRAR: Then how come I didn't get it
2 in the mail recently?

3 MR. BENBOW: I assumed that being within an
4 agency which is concerning itself with such matters that
5 it would have automatically come to your attention. I
6 apologize if the passage of PURPA is unknown to you.

7 MR. SALZMAN: When was PURPA passed?

8 MR. BALCH: November 9, 1978.

9 MR. BENBOW: In any case, in responding, if I
10 should, to Mr. Salzman's question --

11 CHAIRMAN FARRAR: No, no. I want to pursue this
12 again because maybe I have missed it. Maybe I misinterpreted
13 the tone in your voice, but it seems to me that you are
14 telling me that I am at fault for not knowing about this
15 rather than you are at fault for not sending it to me.

16 MR. BENBOW: I'm not suggesting that. You are
17 a reviewing body and all I'm saying is, frankly, I would have
18 assumed it would have come to your attention otherwise, but
19 it was certainly my fault as counsel if the board wanted to
20 have it and I didn't provide it to you.

21 I am calling your attention to it at this time,
22 as I must.

23 In any case, to seek to respond to Mr. Salzman's
24 question, our opponents have attacked the lower board's
25 conclusion that unit power access to Farley is on the

1 facts of this case fair access; for reasons set forth in
2 our briefs and in light of the recent enactment of PURPA,
3 we believe that wholesale power access is more appropriate.
4 However, if, as your question suggests, the choice is to
5 be unit power versus joint ownership, unit power is the
6 more appropriate form of access, first because proportionate
7 unit power neutralizes all competitors' advantages vis-a-vis
8 nuclear generation.

9 AEC is not deprived of its tax and financing
10 advantages, nor are such advantages extended at applicant's
11 expense.

12 Next, applicant --

13 CHAIRMAN FARRAR: Wait. How are they not deprived
14 of their tax advantage when they have to pay -- maybe I'm
15 wrong about this. Maybe I don't understand the financial
16 aspects of it -- when they don't have to -- when they have
17 to pay you your cost, not what it would have cost them, but
18 what your costs are.

19 MR. BENBOW: Because they're buying unit power
20 from our plant.

21 CHAIRMAN FARRAR: But how do they not lose their
22 tax advantage?

23 MR. BENBOW: They've still got them. They've always
24 had them.

25 CHAIRMAN FARRAR: No, no. The tax advantage with

1 respect to this transaction.

2 MR. BENBOW: If you are saying, does this
3 transaction additionally extend beyond the benefits of
4 getting power from the plant at the same price that the
5 developer and builder of the plant is getting from it,
6 why they shouldn't above and beyond that get an additional
7 competitive advantage to reflect the extent of their tax
8 and financing advantages, on that transaction, no, they
9 don't get that additional advantage above and beyond.

10 They retain all tax and financing advantages they
11 otherwise had and which they are using at the present time
12 to build two very big Tombigbee plants at prices less than
13 applicant can build comparable plants for.

14 CHAIRMAN FARRAR: Mr. Benbow, you say this as though
15 it's a bad thing. I assume they had those tax advantages
16 because the United States Congress saw fit to give them
17 those tax advantages for reasons good and sufficient to the
18 United States Congress.

19 You act as though that's a terrible thing that we
20 should hold against them.

21 MR. BENBOW: Far be it from me to suggest it's
22 a terrible thing at all. All I'm suggesting is it is a
23 marked fact with respect to one of the competitors in this
24 market, which this board is responsible for reviewing. And
25 to the extent that they have those competitive advantages, it

1 may suggest something to you with respect to no further
2 need for excessive remedies as our opponents would argue
3 here.

4 Applicant is not deprived of its scale of
5 economies nor are such economies extended at the expense of
6 AEC. Both AEC and applicant will share in the benefits of
7 Farley power.

8 This principle was implicitly recognized during
9 the 1970 hearings. Joint ownership affords AEC a competitive
10 advantage at applicant's expense. The legislative history and
11 PURPA support the idea that license conditions are not to
12 confer a competitive advantage, and I would cite you to our
13 remedy brief below, which was dated May 27, 1977, and
14 submitted to the licensing board.

15 I would also like to cite you to the arguendo
16 holding with respect to relief by the licensing board in
17 Louisiana Power and Light which was ultimately reviewed
18 on one aspect with respect to -- with respect to one aspect
19 of its decision below.

20 Next, joint ownership would protect only one
21 competitor, that is, AEC. The antitrust laws protect
22 competition, not competitors.

23 The Pace testimony, that is, the tesitmony of
24 Dr. Pace is the only record that was made on this point from
25 an expert point of view. And that expert point of view

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1 stated that joint ownership would result in competitive
2 overkill in favor of AEC.

3 CHAIRMAN FARRAR: Let me interrupt you. Why did
4 you say it would only help the cooperative? I thought
5 Mr. Hjelmfelt's people were also asking for joint ownership.

6 MR. BENBOW: Well, of course I was addressing
7 myself to AEC in particular. I can extend it to the
8 municipality. I would support the finding of the board below
9 at the liability phase, but unfortunately Mr. Hjelmfelt
10 was late with his evidence and insufficient with his evidence
11 and so were the other parties in establishing any inconsistency
12 with respect to the municipalities.

13 Therefore, they are not entitled to relief at the
14 remedy stage.

15 MR. SALZMAN: Mr. Benbow, I might have gone
16 astray here somewhere. But we're talking about relief to
17 be granted against an entity that has been found to have
18 violated the antitrust laws.

19 MR. BENBOW: In a limited way, as stated by the
20 very board --

21 MR. SALZMAN: Mr. Benbow, let me finish first.
22 Normally the relief is given to protect those people who
23 have supposedly been harmed by the entity found to be a
24 monopolist and who has monopolized, and surely it comes
25 as no surprise that in any monopolization case consideration

1 of making relief equal to the monopoly -- the monopolist
2 is not the prime concern of the remedial tribunal.

3 MR. BENBOW: You are not a federal district court.
4 You are not operating under the antitrust laws without the
5 benefit of what the Congressional hearings and the Congressional
6 report, the joint committee's report, and the statute itself
7 said about what you were to take into account.

8 You must take into account public interest and
9 other factors. It is clear, I would maintain, in the
10 joint committee report, that you must --

11 MR. SALZMAN: In the remedies or liability?

12 MR. BENBOW: In the remedies. That's what
13 you directed me to, sir.

14 MR. SHARFMAN: What about subsection six?

15 MR. BENBOW: I'm talkin about subsection six.
16 And it was not ignored by the licensing board below as
17 when you asked Ms. Axelrad the question, where do I find it.
18 You find it in their opinion on remedies. They didn't ignore
19 it. They had it very much in mind, and they acted directly
20 in accordance with it.

21 They also acted directly in accordance with
22 what they were being told by the Justice Department. I
23 didn't hear Mr. Whitler once refer to what the Justice
24 Department testified in those hearings. Let's read
25 Mr. Donham (PHONETIC) and see what Mr. Donham said on behalf

1
2 of the Department. Let's read Mr. Comiches' (PHONETIC)
3 and see what Mr. Comiches said on behalf of the Department;
4 read Mr. Turner. What did Mr. Turner, what did Mr. McLaren,
5 what did the whole group of Department of Justice officials
6 say about these matters?

7 Were all of them contrary to the arguments being
8 made here -- indicated that exactly that balancing effect
9 had to take place if the public interest was going to be
10 taken into account, that you must not restructure the
11 industry, that unit power or wholesale contract power access
12 will well be enough except in exemplary cases of out and
13 out violations of the antitrust laws.

14 Now, under the second stance it seems to me -- plus
15 your own precedents here in the Commission and by members of
16 this appeal board and the appeal as a body -- you have
17 layed precedents here which make it thoroughly clear that there
18 must be this tight nexus between the conditions which are
19 granted -- they must take into account the seriousness of
20 the remedies charged, and for our opponents to suggest that
21 one body below, because they wrote two opinions, didn't know
22 what they had said in their prior opinion, almost challenges
23 the absurd.

24 I can't understand quite what that argument
25 means, that they forgot what they said in phase one or they

1 didn't know their own language so they ignored themselves?
2 The whole argument leaves me very much mystified.

3 In any case, the legislative history does reveal
4 that in the normal case, barring concerted action, unit
5 power access as is apparent is fair access, and I would add
6 a further cite, if I may, to Mr. William Wise at page
7 461 of the hearings in 1969, who was a spokesman for both
8 cooperatives and municipals.

9 And at page 462, Mr. Wise made it perfectly clear
10 that contract access, as he called it, or wholesale power
11 or certainly unit power access was adequate access in terms
12 of these nuclear plants, although he also mentioned the
13 possibility in certain cases of ownership.

14 He didn't make the arguments that you have heard
15 here, that it had to be joint ownership, that wholesale is
16 nothing and unit power is only its equivalent. I mean,
17 quite to the contrary; here's the advocate before Congress
18 standing there. He's not somebody from one of the investor
19 owned utilities; this is the coop spokesman who gets up and
20 he says wholesale or unit power is okay along with joint
21 ownership.

22 MR. SHARFMAN: Maybe it depends on the facts of
23 the case.

24 MR. BENBOW: He was talking about the statute.

25 MR. SHARFMAN: You just told me he said you

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1 could have ownership too. Wasn't the other side saying in
2 the facts in this case you should have ownership?

3 MR. BENBOW: What I am saying, Mr. Sharfman, is
4 this: it is being presented to this as if these alternatives
5 are just impossible and no rational person could consider
6 that. Quite the contrary. Here, even for the advocate,
7 for our opponents he was saying that it would be only under
8 very special circumstances.

9 No one doubts that if you have a certain
10 aggravated joint relationship between parties and a
11 conspiracy in combination to exclude small systems, that that
12 as in New England, perhaps, might be the kind of situation
13 where you are required to provide joint ownership or some
14 kind of joint basis.

15 But that isn't this case. This case was marginal
16 in terms of an inconsistency with the antitrust law. The
17 licensing board below had to bend over backwards, frankly,
18 to find five areas of ancient inconsistency with the antitrust
19 laws. And the board below in the remedy phase found it
20 necessary to chastise Justice and the other parties for their
21 failure to offer remedies which were geared to the limited
22 inconsistencies that were found or in fact, as I indicated
23 this morning, to offer any credible evidence, certainly no
24 expert evidence, on the subject of coordination.

25 CHAIRMAN FARRAR: Let me interrupt for two

1 questions: one, before we get away from it, I missed the
2 reference to this fellow who testified at the hearings.

3 MR. BENBOW: Dr. Pace?

4 MR. SHARFMAN: Wise.

5 MR. BENBOW: William Wise is at page 461 of the
6 joint hearings.

7 MR. FARRAR: Is that in your brief somewhere?

8 MR. BENBOW: It is.

9 MR. BALCH: Will you permit me to give you my
10 copy?

11 MR. FARRAR: No, I want to know if the reference
12 is in your brief somewhere.

13 MR. BENBOW: We certainly have many references
14 to this general legislative history. I can't at this moment
15 remember whether we specifically referred to Mr. --

16 CHAIRMAN FARRAR: If it's not in there, would you
17 be good enough after the argument to have someone put it in
18 a letter and send it to me. If it's not in there, I repeat
19 what I said before, and I recognize I'm in a vulnerable
20 position saying this because you have been practicing a lot
21 longer than I have. But I was always taught that you do
22 not bring in things on rebuttal and oral argument which the
23 other parties then have no opportunity to respond to.

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1 MR. BENBOW: This so much falls into the area of
2 your questioning and the assertions by your opponents this
3 afternoon.

4 CHAIRMAN FARRAR: You came down here with that piece
5 of paper, carrying it.

6 MR. BENBOW: I did.

7 CHAIRMAN FARRAR: I want to know again and why I
8 and your opponents weren't told about it ahead of time.

9 MR. BENBOW: I think it is relevant to my argument.

10 CHAIRMAN FARRAR: That's right, I'm not disagreeing
11 it's relevant. But since when do we bring in authorities
12 on rebuttal oral argument that don't — is that how you
13 practice in the United States courts, Mr. Benbow?

14 MR. BENBOW: No, it is not a new authority. We have
15 been discussing the legislative —

16 CHAIRMAN FARRAR: Mr. Benbow, I'm going to ask you
17 to listen to me for just a moment.

18 MR. BENBOW: Certainly, sir.

19 CHAIRMAN FARRAR: I ask you, is that in your brief?
20 I said I missed the references in your brief. You were not
21 able to tell me it was.

22 MR. BENBOW: That's correct.

23 CHAIRMAN FARRAR: I'm assuming it's relevant or you
24 wouldn't be bringing it to me at the 11th hour and 59th
25 minute. I'm asking you now, is that how you practice in the

sh 1 second circuit or the southern district? Is it on rebuttal
2 and oral argument? That's when you whip in on the judge and
3 on your opponent's relevant authority?

4 MR. BENBOW: I don't feel I'm doing that here, sir.
5 If you view it that way, I am sorry, but this is part of the
6 legislative history that we have been talking throughout this
7 hearing, and I don't think it's inconsistent with the
8 practice in the federal courts, as I know it, sir.

9 In any case, if you would like, I would like to
10 proceed briefly to a further discussion of Title II of the
11 Public Utility Regulatory Policy Acts of 1978.

12 CHAIRMAN FARRAR: Not at all. If you wanted to bring
13 anything in that to our attention --

14 (The board confers.)

15 CHAIRMAN FARRAR: Although we don't always agree on
16 everything, we agree on this. If there's anything in there
17 that you want to bring to our attention, we will give it ten
18 days -- you or Mr. Balch, I know you won't be here, you or
19 Mr. Balch can put it in a memorandum and attach a copy of
20 the statute, send it to us and the other parties can have
21 ten days to respond.

22 MR. BENBOW: All right, sir.

23 MR. SALZMAN: Let's keep it down. I don't wish to
24 see any more than ten pages. That's enough.

25 MR. BENBOW: Very good. We will attempt to do that.

sh 1 MR. BENBOW: Would you like me to step aside and
2 let Mr. Balch go ahead?

3 CHAIRMAN FARRAR: No, you are welcome to keep going.
4 But I agreed over my colleague's objection to hear from both
5 of you. It's not ordinarily the case, but particularly on
6 rebuttal, that we would hear from two people. And at some
7 point, we are going to get tired of listening and we wouldn't
8 want to keep Mr. Balch from having — as he at the outset
9 of his argument was grateful for the opportunity to appear
10 here.

11 We wouldn't want him to keep from having the time
12 to show up again. But it is 5:15. We have been at it for
13 a long time, and I ask you to keep your remarks to what is
14 rebuttal and to what you think we need to hear.

15 At some point there is diminishing returns.

16 MR. BENBOW: Fine. I will do so. Just another brief
17 word and then I will turn to Mr. Balch. And that brief word
18 I would like to make about the public interest because it
19 was discussed with the other parties this afternoon.

20 The board below properly held that there were public
21 interest considerations which should be harmonized with its
22 findings under Section 105(c)(5). This also comports with
23 the legislative history of the Act.

24 Two of the more important are: Applicant's
25 challenged conduct ceased in the year 1972, early '72, did

sh 1 not contribute to Applicant's size, did not affect the
2 existing market situation, and has been cured by subsequent
3 conduct.

4 And secondly, PURPA has radically changed the
5 existing market situation. Access to any alleged market can
6 be had —

7 CHAIRMAN FARRAR: Is this PURPA, again?

8 MR. BENBOW: Only in summary.

9 CHAIRMAN FARRAR: No, you didn't hear. Maybe I am
10 losing my faculties here. Maybe I don't express myself
11 clearly. But I thought I said anything from PURPA is going
12 in a memo and we're not hearing it now.

13 MR. BENBOW: Okay, I understand, sir. Excuse me.
14 I didn't think that excluded my referring to it in summary.
15 I won't refer to it again.

16 Applicant access to any alleged market can be had
17 under regulation and Applicant does not unilaterally control
18 it.

19 We contend that under these circumstances --

20 CHAIRMAN FARRAR: How can it be —

21 MR. BENBOW: FERC regulation in general, historic
22 to the present date. We contend that under these circumstances
23 the least onerous but effective remedy is appropriate, and
24 that at most, the board's remedy findings should be affirmed.

25 A final word: Our opponents have asserted repeatedly

sh 1 that without access to nuclear and the entire panoply of
2 their proposed licensed conditions, AEC will not be able to
3 compete with Applicant in the future.

4 This assertion is simply unsupported by the record.
5 What the record does reflect is what is shown in our moving
6 brief on remedies at pages 86 to 87. And if you will look
7 at that part of our brief, you will see an accurate
8 reflection as current as when the record closed, as to the
9 competitive relationships between the parties.

10 Thank you.

11 CHAIRMAN FARRAR: Before you sit down, you said
12 during the course of your rebuttal — I thought I understood
13 you to say the other parties were too little and too late
14 with their evidence on remedies.

15 MR. BENBOW: Yes, sir.

16 CHAIRMAN FARRAR: What do we do with poor Mr.
17 Hjelmfelt, who was told all during phase 1, don't give me any
18 evidence on remedies, and who was told on page 2, it's too
19 late for you to give us any remedies.

20 I am taking his argument that even if the board is
21 correct on the "liability phase," he still had an argument
22 about why he should have participated in the remedy.

23 Now how was due process extended to him if he didn't
24 get to participate at either stage?

25 MR. BENBOW: He did get to participate as fully as he

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1 wished at phase 1.

2 CHAIRMAN FARRAR: Right. But he was told no
3 remedies. Don't — this is a bifurcated hearing on your
4 motion. Don't give me any remedy stuff.

5 MR. BENBOW: That is correct.

6 CHAIRMAN FARRAR: Okay. So now he loses, more or
7 less loses on phase 1. He says, okay, I'm still in here on
8 phase 2. I'm going to tell you why: Since somebody else
9 won, I get a remedy. I'm entitled to a remedy.

10 I take it he was not heard on that.

11 MR. BENBOW: He was permitted to make his offer of
12 proof, as I think he indicated on response to your question.
13 The board had made its findings as it was required to do in
14 phase 1, and it was appropriate, based on its findings in
15 phase 1, which we believe to be absolutely correct in that
16 regard, that Mr. Hjelmfelt had failed to make out a case,
17 for the other parties to make out a case for him.

18 Under those circumstances, it clearly would have been
19 a fruitless gesture to permit Mr. Hjelmfelt, other than to
20 make the offer of proof and preserve his record.

21 CHAIRMAN FARRAR: Suppose we disagree with the
22 licensing board. Suppose we say that even a party who doesn't
23 win on phase 1, he has a line of cases here that says he is
24 still entitled to be protected in the remedy.

25 Suppose we agree with that. What do we do? I

sh 1 presume then we can't just march on to the remedy phase
2 because he was not heard.

3 Do we have to give him another chance?

4 MR. BENBOW: I think you also have your own guidance
5 from the consumers case with respect to the lack of the
6 necessity of coordinating services and the other things that
7 you were talking about for parties who are not generators.

8 And as you have heard, none of Mr. Hjelmfelt's
9 clients are generators.

10 It would seem to me that they are, in effect,
11 receiving remedies directly at the present time.

12 CHAIRMAN FARRAR: That's the merits. That's the
13 merits of remedies on which he was not heard.

14 MR. BENBOW: That is the merits on --

15 CHAIRMAN FARRAR: How can we march on to the merits
16 of remedies when one party wasn't heard on remedies?

17 MR. BENBOW: Well, as I say, I think that upon
18 analysis, even if you disagree with the board, which I don't
19 think you will do, but if you should in phase I, you will
20 find that the remedies called for for these non-generating
21 parties are more than amply taken care of. And I suppose
22 to the extent that you felt that they were entitled to them,
23 you might on the appropriate one perhaps of unit power access,
24 wish to consider extending unit power access to the
25 municipalities.

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1 CHAIRMAN FARRAR: No. I am asking, or perceive
2 what I think, if we have to put labels on it to make myself
3 understood, is a procedural, and you're answering me on the
4 merits.

5 How can I reach your arguments on the merits when
6 procedurally, one party hasn't been heard?

7 I would think --

8 You may be as right as can be, but when we come
9 to the merits, he's not entitled to anything, or something
10 else, but he hasn't been heard. Since when in our legal
11 system can we do something to him without being heard?

12 MR. BENBOW: He was heard at the appropriate places.
13 You are assuming that this appeal board views things
14 differently. In those circumstances, you may want to have
15 yourself a further brief hearing on the matter. You may want
16 to refer it back below for a further brief hearing. But I
17 believe if there are any hypothetical questions today, this
18 will prove to be a hypothetical question.

19 CHAIRMAN FARRAR: Thank you, Mr. Benbow.

20 MR. BENBOW: Thank you. Mr. Balch?

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REBUTTAL

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MR. BALCH: On the question of access, I will refer the board respectfully to the material that is set forth beginning on page 5 of Applicant's April 14th brief. But I — I really think that this question of access has taken on great significance in this case.

Perhaps it should.

And we are at loggerheads at what the facts really are. The contentions are still being made today by AEC, by the Department of Justice, and by staff, and I believe by the municipal council, also, that Alabama Electric Cooperative has no access — and now if you will permit me, I will just say external utilities.

I'm talking about utilities other than Alabama Power Company, except through the use of Alabama Power Company's transmission line.

The evidence in the case is overwhelming to the contrary. Mr. Lowman admitted the interconnection arrangement at the Walter F. George locking dam. They have tried to make an allusion of that as though it had no meaningful application to the opportunity of Alabama Electric to get out to the external utilities.

I would refer the board to an exhibit that was put in by Mr. Miller. He was the operating vice president of Alabama Power Company who testified, who had been operating

sh 1 vice president. In the meantime, he moved to Georgia. But
2 he put in in his exhibit JHM-18, a letter from Mr. T.H.
3 Wigglesworth, acting administrator of the Southeastern Power
4 Administration, dated March 5, 1964, and I'll just read
5 one brief sentence.

6 "It was not unforeseen at the time the operating
7 agreement was completed that it would be necessary for your
8 system to disconnect from the Alabama Power Company at the
9 time it was being connected to the Georgia Power Company.

10 "There has been only the one occurrence -- that of
11 January 30 -- in which this operation has resulted in a
12 disturbance, and this appears to have resulted from a failure
13 of the operators to follow established procedures."

14 Now I cite that to you as solid evidence that powers
15 were flowing across that bus from Georgia Power Company. And
16 if you examine the very contract under which Alabama Electric
17 Cooperative purchased power from CEPA, going back into the
18 early '60s, and it was the basis on which the connection
19 was made to Walter F. George Dam, you'll see that that
20 contract contemplated that there would be times when CEPA
21 simply could not furnish, deliver the dependable capacity
22 it was selling under that contract to Alabama Electric
23 Cooperative without using the resources, some of its other
24 resources, the power from which would have to come in over
25 the Georgia Power Company line.

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1 Mr. Brownlee is the only witness who appeared in
2 this case who testified with any particularity concerning the
3 two lines that come in from the guts of Alabama Electric
4 Cooperative system into the Walter F. George Dam bus.

5 Now who is Mr. Brownlee?

6 Mr. Brownlee was the chief engineer of Southern
7 Company Services for many years. He later became president
8 of Southern Company Services. He even now is administrator
9 of the SERC organization and is much involved with
10 understanding the configuration, the capacities and
11 effectiveness and lack of effectiveness of the transmission
12 in the whole southeastern region.

13 He is a very competent man. His credentials go
14 without question.

15 He stated while he was on the stand in this
16 proceeding that he had made a study. He had looked at the
17 various aspects — I have forgotten all of them. I'm sure it
18 was the thermal characteristics. He talked about the economic
19 loading of the two lines. I assumed he talked about
20 impedance.

21 But anyway, he talked about the kind of things an
22 engineer would talk about, and said he had examined those
23 lines, had examined the capacities of those lines, and he
24 said that there is capacity in the two lines that Alabama
25 Coop now owns, going into the Walter F. George Dam bus, over

sh 1 . which power could be transmitted into the Georgia Power
2 Company system, or received from the Georgia Power Company
3 system.

4 Now Mr. MacGuineas says, oh, but that's not
5 sufficient because Alabama Electric Cooperative doesn't
6 yet have an agreement with Georgia Power Company.

7 Gosh, they would have to have an agreement with
8 Duke, TVA, Vepco, Consolidated Edison, Florida Power,
9 whoever they're going to engage in a coordinated service,
10 as they would call it, arrangement with. They've got to
11 have an agreement.

12 But they physical facilities are there. And Mr.
13 Brownlee testified as to both the thermal and the economic
14 loading capacity available in those lines based upon data
15 he had examined.

16 And as I recall, and you will excuse me if I miss
17 on this because I just don't happen to have the testimony
18 with me today, but as I recall, it was substantially more
19 than the 50,000 kilowatts of capacity that Alabama Electric
20 Cooperative is undertaking to move through the Alabama system
21 to a direct connection with TVA.

22 And I just represent to the board that I have every
23 reason to think that is going to be consummated.

24 There has been no suggestion that the Alabama Power
25 Company hasn't been working in good faith to try to work at

sh 1 banging that thing out, and I think the parties are very
2 near agreement. And in due course, I think in days it will
3 be filed with the appropriate commission.

4 Now, then, Mr. Brownlee also examined the electric
5 system of Alabama Electric Cooperative with respect to the
6 relationship to the system of Gulf Power Company down to
7 the south and he found that Alabama Electric Cooperative had
8 some substantial lines already going into northwest Florida.

9 He learned and testified about the plans for
10 additional lines, and that's not disputed. The testimony in
11 the case is clear that Alabama Electric Cooperative is in
12 the process of strengthening its ties into northwest Florida
13 and those lines run close to or under or over the lines of
14 Gulf Power Company.

15 Now Mr. MacGuineas would answer that and say, oh,
16 but we don't have an agreement with Gulf. I say to this board
17 and Alabama Electric Cooperative is never going to engage in
18 a transaction that involves the use of interstate transmission
19 facilities to either receive power or to obtain power from
20 without an agreement. And the agreement is going to have
21 to be filed with FERC and processed through its filing.

22 That is a matter of law and that's not new law;
23 that's old law. It's ancient law. It's been around since
24 1935, since they adopted part 2 and part 3 of the Federal
25 Power Act.

gsh 1 Now going over to Mississippi, Alabama Electric
2 Cooperative, so the record clearly shows, has a line into the
3 little town of Chatham, which is the county seat of
4 Washington County, only about 15 or 20 miles from the
5 county line.

6 And right across that -- I mean to the state line --
7 and right across the state line, you find the facilities of
8 both Mississippi Power Company and South Mississippi Power
9 Association, a kindred generating and transmission
10 cooperative similar to Alabama Electric Coop.

11 It has the same engineer, Southern Engineering
12 Works, for both of them. Southern Engineer witnesses
13 testified in this case. And the record is clear that
14 Alabama Electric Cooperative has manifested that it has a
15 plan to tie that line at Chatham which is designed to be
16 a 230-KV line emanating out from the new Tom Bigby units
17 that they had planned to tie from Chatham to South
18 Mississippi Power Association.

19 Now that gets you to the south, it gets you to the
20 west, and the record is clear that Mississippi Power is tied
21 in with Mississippi Power and Light, is tied in with
22 Louisiana Power and Light, and they're both tied into the
23 Tennessee Valley Authority, and so on and so on and so on.

24 Now if you go to the south, Gulf Power Company is
25 tied in with Florida Power Corporation and it's tied in with

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1 Tampa Electric, the City of Gainesville, with Florida Power
2 and Light in the City of Jacksonville, and back up also with
3 Georgia Power Company.

4 Now, in particular, at the tail-end of the
5 proceedings, the question was put to Mr. Lowman about
6 Ogelthorpe, and Ogelthorpe is paraded in evidentiary or
7 earlies phase of this case as the new sign, the new advent,
8 this is what should happen. And they made much about the
9 development of Ogelthorpe Electric Membership Corporation,
10 and how it has risen from nothing and is now a very viable,
11 competitive situation in the State of Georgia.

12 Now it has access to Georgia Power Company's
13 transmission as a result of conditions that were imposed by
14 this very commission.

15 Mr. Lowman was asked if he had considered undertaking
16 to use his connection at the Georgia bus to connect and
17 make some service arrangement with Ogelthorpe.

18 And I believe he said that maybe he had discussed
19 that with Mr. Springs or somebody with Southern Engineering.
20 But what he really came down to saying is you don't have any
21 need for it. And he also said, we don't have any need for
22 doing anything with Georgia Power Company.

23 And we refer to that in our brief. And all I am
24 saying is for this board, this appeal board to uphold the very
25 critical error made by the hearing board, and I have nothing

sh 1 but respect for that board, as I have said before, but I
2 think they, just like me and any other human can make an
3 error, and I think they made an error there and they failed
4 to give account to the testimony.

5 We tried our best in our briefing, but perhaps we
6 didn't emphasize it enough. And now they say, they come back
7 and say in the briefs to this board, oh, but you're Mr. Harris
8 said that the AEC had to use Alabama Power Company's system
9 to go to the East with.

10 Well, let's examine that.

11 The evidence is clear that in the early stages of
12 the interconnection of Alabama Power Company and Alabama
13 Electric Cooperative at the Tom Bigby station, or at the
14 Jackston station — it's called both things in the record —
15 that Alabama Electric system was such that because of the
16 thin line running across state to its load center, that in the
17 operation of the 75,000-kilowatt unit that it would build
18 there and put in operation, that the flows were going to go
19 into Alabama Power Company's system.

20 All right. In a later stage, now we're moving down
21 the pike and we're in the era of 1975 — I have forgotten the
22 precise date — when Mr. Harris was on the stand and he was
23 vice president of Alabama Power Company, who had been involved
24 in the power of supply study that Alabama Electric Cooperative
25 requested be made to determine whether or not Alabama Power

sh 1 and Alabama Electric would get together on the joint
2 development of a new 230-KV transmission line, an expensive
3 line that needed to be built in the state.

4 And he was the logical one to testify about that
5 because he knew about it. He was to go on the stand and
6 he explained, and I'll try not to repeat what I said this
7 morning, how they divided up two important segments of that
8 line with Alabama Electric Coop going in one and Alabama
9 Power Company owning the other for the purpose, in part, to
10 handle the flows coming out of the Tom Bigby system going
11 eastward.

12 So when he was asked on the stand, there had been
13 discussion about the Walter F. George Dam bus and talk about
14 power flows, and he was asked, wouldn't power have to flow
15 through Alabama Power Company's system in order to go to the
16 east, well, he said yes, electrically and physically it would.

17 There's no other way for it to go there. It's
18 coming out of that plant and it's going into that 230-KV
19 line owned by Alabama Power Company, which is going to
20 transport it to Bellville, and then it will be picked up
21 by the segment owned by Alabama Electric Cooperative and go
22 where it wants to. You know, whatever lines they have or
23 what they can build, and Alabama Electric Cooperative, as
24 distinguished from Alabama Power Company, has an open door
25 to the Rural Electrification Administration of its loans and

sh 1 its lending capacities, and it doesn't seem to have any
2 problem getting money whenever it wants to if it comes
3 up with a feasibility study.

4 And it is even now engaged in building, the record
5 shows, transmission lines in the magnitude of 200 miles.

6 The point I am making, gentlemen, is you're going to
7 miss the boat in this case if you hold that Alabama Electric
8 Cooperative, as a matter of physical arrangement, must
9 depend upon Alabama Power Company to get power out of its
10 system out to other entities or to get from other entities
11 into Alabama Electric Cooperative system.

12 If you make such a holding, it will be contrary to
13 the overwhelming facts. Even Mr. Lowman admits it in the
14 connection. Mr. Mabin really didn't know anything about it.
15 Dr. Wein just knew what Mabin told him.

16 If there is anything in this record that is clear,
17 it's the message I'm giving you now. And I beseech you to
18 pay attention to what I say and take it to heart, review
19 our brief on this point, check the citations we give you, and
20 I think you will come to the proper conclusion. And then it
21 will be up to you gentlemen to decide what decisional impact
22 that would have.

23 I think one thing you will have to conclude, it
24 shoots down the bottleneck theory completely. It just falls
25 flat on its face. It shoots down, if there be such thing as

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1 a coordination services market, it shoots down the idea that
2 Alabama Electric Cooperative doesn't have access to it.
3 It distinguishes completely the situation the board found in
4 the Consumers case.

5 MR. SHARFMAN: May I just ask on that, what do you
6 do with the argument that I think some of your opponents made
7 today in answer to you this morning that it doesn't really
8 matter that they have access to Georgia Power and the
9 Mississippi Company on the west because they are both part
10 of the same Southern Company combine?

11 MR. BALCH: I will say this, and I don't mean to be
12 cute, but I can use one word to say it best, and it came out
13 of Genesis: "Am I my brother's keeper?"

14 And I hate to be biblical, so I will move away from
15 that, and I will say that there is no evidence in this record
16 that Alabama Power Company controls the actions of Gulf
17 Power Company, Mississippi Power Company, or Georgia Power
18 Company. And there never will be anything in this or any
19 other record because they do not control it.

20 Now it is up to Alabama Electric Cooperative to
21 see what it can do with Gulf Power Company. Georgia Power
22 Company and Mississippi Power Company, and I know of nothing
23 in the whole world or universe of the anti-trust law that
24 would put the burden on Alabama Power Company of going out and
25 providing the salesmanship or whatever it takes, the

sh 1 statesmanship or badgering or whatever it takes to force
2 or persuade, either one, Gulf, Georgia, or Mississippi, to
3 do a transaction with Alabama Electric Cooperative.

4 Alabama Power Company has no more control over the
5 actions of those than it has over Duke, TVA, any of the rest
6 of them.

7 Yes, they work very closely and they have to get
8 together on a lot of things. But they do not tell Georgia
9 Power Company —

10 CHAIRMAN FARRAR: Right. You don't have to tell
11 them, right.

12 MR. BALCH: We don't have to tell them.

13 CHAIRMAN FARRAR: Right, because they already know
14 that if you guys don't want to do it, don't they have just
15 a little bit in the back of their mind that if you guys don't
16 want to do it, you don't have to tell them not to do it, but
17 they aren't going to do it anyhow?

18 MR. BALCH: I don't know about that. Georgia Power
19 Company has made its deal with Ogelthorpe and we never told
20 them to do that. And they knew — well, I won't make any
21 further comments on that. I don't think you want me to.

22 (Laughter.)

23 MR. BALCH: I mean if you were to draw that
24 inference, it would be — it would be the most far-fetched
25 inference I have ever heard from a bunch of non-facts.

sh 1 CHAIRMAN FARRAR: That's the inference that I took
2 that they were drawing this morning.

3 MR. BALCH: They would suggest that inference to you
4 as they have suggested that you draw a lot of false
5 inferences in this case. That's just one of them.

6 There is a multitude of them. But on that, they
7 are just wrong, they are just wrong.

8 Now let me move on over — I have just got two or
9 three other points, if I can indulge.

10 CHAIRMAN FARRAR: Well, everybody is really getting
11 kind of tired. I will give you under a quarter of, and then
12 we are going to halt.

13 MR. BALCH: I wish to remind the board of what we
14 tried to set forth in our April 14th brief. And if you will
15 focus on page 40, 39 or 40, concerning this potential
16 competition.

17 Now there was only one fact witness who was put
18 on by the Department of Justice to deal with this question of
19 competition for the monopoly, or the competition at the
20 retail level, or competition that may be provided by existing
21 or potential municipalities.

22 And I just would like the board to focus on the
23 quotes I have there.

24 Mr. St. John was first asked about the city —

25 CHAIRMAN FARRAR: If you brought him to our attention,

sh 1 the worst thing you can do at 20 minutes to 6:00 is read
2 them to us. They are on page 40.

3 MR. BALCH: All right. And I would like to bring
4 to your attention that he had a little hedge in it. But his
5 hedge was — it could be different if they had technological
6 changes in the industry, such as other forms of energy.

7 And that is footnoted in footnotes 272.

8 Now the other thing that I would like to — there
9 are many things I would like to try to tell you about because
10 I feel like that I have got some things that the other side
11 is just clearly creating confusion on. But I know, I
12 understand the board.

13 But I would — well, there are two more things. If
14 I could get the board to again look at our brief on page 92 —

15 MR. SHARFMAN: The April 14th. brief?

16 MR. BALCH: Yes, sir. And focus on what happened
17 in Alcoa. Now Alcoa is relied on heavily in this case. The
18 Justice Department relies on it. The thrust upon concept
19 in many, many important principles are garnered from this
20 case and put forth to this board.

21 This has been going on all through this proceeding.
22 But look and see what happened at the remedy stage.

23 In Alcoa, just look after Judge — I believe it
24 was Learned Hand that wrote the original opinion. But let's
25 look and see what happened. And I commend to this board, and

sh 1 I'm sure you have already done it, but I just remind you to
2 do it again, to look at what happened when the case got to
3 the remedy phase, where the court -- and I won't read it, but
4 you can read the material on page 92, where they, in effect,
5 said when we get out on the remedy, we have got to look at
6 the real world of competition at the remedy stage.

7 We have got to look and see what is the competition.
8 Let's see what has happened to the competitors in the
9 meantime.

10 And they paid attention to the fact that Reynolds
11 Metal, with government financing, or government subsidies
12 that came along -- of course, there was a war involved and
13 I understand that. And they look at what happened to Kaiser
14 and they took those things into account and tailored the
15 remedy and decided what should be done about remedy in light
16 of the commercial realities at the remedy phase.

17 And I submit to you that this board ought to
18 give consideration to the same thing. And I come back and
19 I see Alabama Electric Cooperative well and strong under the
20 wise counseling and effective leadership it has gotten from
21 Mr. Boskey's firm.

22 They have made almost a great leap forward in the
23 sense of whoever that was that jumped around on the moon.

24 It is a great leap forward. They are now building
25 steam capacity, the cost of which beats Alabama Power Company's

sh 1 cost, and that's pretty good because Alabama Power Company is
2 a pretty good company. And they are beating its costs, and
3 that is undisputed.

4 They are beating its price. The only evidence on
5 the record shows they're beating its price and there's nothing
6 to show they're not beating it to death.

7 Now there's just one other thing. I would like to
8 close because I didn't get to finish to answer your question
9 this morning, Mr. Farrar, about the distinction between the
10 consumer situation and the Alabama situation as far as the
11 so-called coordination of services market is concerned.

12 I started but I didn't finish. And I would like
13 to suggest to you, just go to Dr. Wein's testimony and you
14 will find he said, 66 percent of the market he found, he
15 called it the regional power exchange market, is in the
16 Southern Company pool. He said 85 percent of the rest of
17 it is the seasonal power exchange transaction with TVA.

18 Now that only leaves 5 percent out there in the
19 wild blue yonder.

20 Now let's talk about TVA. And nothing has been
21 said about this to the board from the other side, even
22 though the Department of Justice did feel the imperative of
23 bringing this to the attention of the commission when it
24 filed its face letter. And that is, it is a matter of law.
25 The Tennessee Valley Authority cannot exchange power with

sh 1 Alabama Electric Cooperative, the reason being in the 1959
2 amendment —

3 CHAIRMAN FARRAR: We know that.

4 MR. BALCH: So that it gets down to the only market,
5 the only market that has any commercial reality at all, and
6 it would be a strange commercial reality related to Alabama
7 Electric Cooperative, is the body or a way of transaction
8 that takes place under the Southern Company pool.

9 Now I have discerned, and I sometimes don't hear
10 things right, Mr. Sharfman, you'll have to forgive me, but
11 I discern a little bit of confusion in some of your
12 questioning to some of the other counsel about the Southern
13 Company pool.

14 And I thought I detected an understanding that the
15 Southern Company services furnished an array of services. You
16 understand, I hope you will, that the Southern Company services
17 nothing but a group of engineers. The only property it has
18 that's pertinent here is a computer. It's just — they are
19 just engineers that perform technical consulting and
20 very important services.

21 Each of these companies operate their own
22 facilities.

23 I think it's important.

24 MR. SHARFMAN: Don't they make — do they make the
25 decisions on the transactions?

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sh 1 MR. BALCH: They make the quick decisions that come
2 out of the computer on the loading. They look at the line
3 losses and look at, you know, the practice of the coal at
4 a particular plant, look at the heat rate.

5 MR. SHARFMAN: I would call that operating
6 coordination.

7 MR. BALCH: And it's very valuable and very important.
8 I mean most of it's done by electronics, you know, and that's
9 right, they do that. And that's really the extent of their
10 function.

11 They don't have any decisional control at all except
12 to dispatch the unit that provides the best economy at a
13 given time.

14 MR. SHARFMAN: I understand that.

15 MR. BALCH: And all economies are preserved by
16 contract to the company that is supplying the facility.

17 MR. SHARFMAN: I understand. It's basically the
18 companies that make the basic decisions and they merely
19 implement them.

20 I understand that.

21 MR. BALCH: That's right. Well, I hope that I have
22 been helpful and I hope I have not been too much of an
23 imposition on this board.

24 I again appreciate the opportunity you gave us to
25 come up here, and I'm sorry that I have been so loquacious

sh 1 and verbose.

2 CHAIRMAN FARRAR: We tend to that ourselves. I
3 want to thank you, Mr. Balch, for your presentation, as
4 well as everybody else.

5 I can't remember in my many years here that we
6 have had as complicated a case so well handled by all the
7 parties.

8 You did an extraordinary job with it. A lot of
9 things have happened since your last briefs were filed. I
10 won't recite what they are, but a whole lot of things. This
11 may be whistling in the dark, but Ms. Axelrod and Mr. Whitler,
12 Mr. Benbow will be gone the next couple of weeks, three weeks.

13 Could you undertake within five weeks from tomorrow,
14 which will be Friday, the 13th of April, to attempt to get
15 these people to sit down together and see if there's any way
16 out of this case?

17 I can't imagine our decision will be written and
18 ready to go within that five weeks. It may be a hopeless task,
19 but there is always a chance that you being perhaps more
20 disinterested than the other parties, might be able to get
21 them together.

22 If you can't, just send me a letter by Friday the
23 13th and say you are unsuccessful.

24 If, on the other hand, you are successful and need
25 more time, let us know.

sh 1 MR. BALCH: Can I get a little clearer understanding
2 of the time-frame you're suggesting?

3 CHAIRMAN FARRAR: I just want them to get together
4 with you all in the next five weeks to see if they can get
5 your respective clients talking to each other in an effort
6 to see a way out of this case.

7 MR. BALCH: Is the request going to the staff and
8 Justice?

9 CHAIRMAN FARRAR: I want them to mastermind it. In
10 other words, rather than asking one of you who don't speak
11 to each other to mastermind it, them being more or less in
12 the middle, I would like them to. But it, of course, involves
13 all of you. I just want them to take the lead in it.

14 MR. BALCH: I see.

15 MR. SALZMAN: Partial settlements will be gratefully
16 accepted.

17 CHAIRMAN FARRAR: On that note, we will take the
18 case under submission. I know you are probably interested in
19 something a little stronger at this hour, but we do have a
20 pot of coffee in the back. Anyone is welcome to help
21 themselves to it.

22 Thank you.

23 MR. BALCH: At the expense of being impertinent, if
24 it would be helpful to the board, I will be glad to give the
25 board a copy of this PURPA Act, if it's of any use to you.

sh 1 I understood what you meant.

2 CHAIRMAN FARRAR: Just attach it to your little memo
3 and we'll read it when it comes in.

4 MR. SHARFMAN: It would be useful if you attached it
5 to your memo, because it may not be in our library yet. I
6 don't know how quick the various services are.

7 CHAIRMAN FARRAR: Thank you very much, sir.

8 (Whereupon, at 5:50 p.m., the hearing was adjourned.)

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