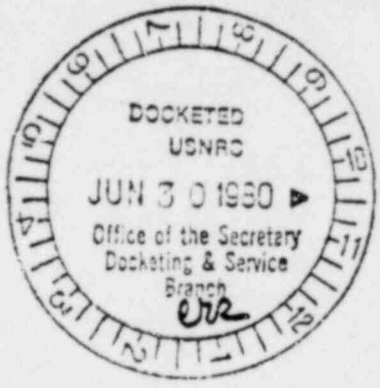
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



In the Matter of SOUTH CAROLINA ELECTRIC & GAS COMPANY and SOUTH CAROLINA PUBLIC SERVICE AUTHORITY (Virgil C. Summer Nuclear Station Unit No. 1	Docket No. 50-395A

MEMORANDUM AND ORDER
(CLI-80-28)

Pending before us is a petition of Central Electric Power Cooperative, Inc. (Central) for a "significant changes" determination under section 105c(2) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2135c(2).[1/] Central urges that we make a finding that there have been significant changes in the activities and proposed activities of South Carolina Electric and Gas (SCEG) and South Carolina Public Service Authority (Santee Cooper)[2/] so as to initiate antitrust review on their application for an operating license (OL) for the Virgil C. Summer facility.[3/] SCEG and Santee Cooper

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1/ Unless otherwise stated "Petition" refers to the "Amended Petition for a Finding of Significant Change" filed by Central on January 31, 1979, pursuant to the Commission Order of January 2, 1979 and any reference to section 105 is a reference to that section of the Atomic Energy Act.

2/ The South Carolina Public Service Authority derived the name "Santee Cooper" by which it is commonly known from the Santee Cooper hydro facility with which it began operations in 1942.

3/ Central's original petition requested an antitrust hearing as well; however, Central withdrew the request for hearing and only the request for a significant changes finding remains for Commission determination at this time.

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(the Applicants or Licensees), who filed that application in April, 1977, urge us to dismiss the petition or to deny it. The NRC Staff (Staff), also, opposes the petition.

In this memorandum we discuss briefly the elements for the section 105c(2) "significant changes" determination. We then set forth the facts of this case and apply those facts to that standard in order to resolve the issues. As we will explain more fully below, we are requesting the assistance of the Attorney General for the final step in this process and consequently do not today finally determine whether or not there have been significant changes as contemplated by the statute.

I. STANDARD FOR THE "SIGNIFICANT CHANGES" DETERMINATION

On only two previous occasions -- in South Texas and Comanche Peak[4/] -- has the Commission been called upon to make a finding that there have been "significant changes." In both cases there was by the time of Commission involvement substantial agreement that a determination in the affirmative should be made. The South Texas case presented the issue whether or not a second antitrust review might precede an operating license application and provided the occasion for us to explicate how the timing of the antitrust review process was related to the statutory intent. In Comanche Peak we declined an invitation to delegate our authority to make the "significant changes" determination, and in light of the fact there was no opposition

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4/ Houston Lighting & Power Company, et al. (South Texas Project, Units 1 & 2), 5 NRC 1303 (1977) and Texas Utilities Generating Co., et al. (Comanche Peak Steam Electric Station Units 1 and 2), 7 NRC 950 (1978).

made the determination ourselves "deciding only that the events [which have occurred] were of such a nature as to convince us that the Attorney General must be consulted."[5/] At neither time, therefore, did we discuss explicitly by what yardstick a contested significant changes determination should be measured.

Consideration of Central's request requires us to enunciate the standards for the significant changes decision. A related event makes it especially useful for us to provide additional guidance in this regard. Subsequent to the filing of Central's petition, which was correctly lodged with the Commission, we have delegated to officials of the Staff[6/] authority to make the significant changes decision for the Commission. At that time we approved procedures the Staff will employ in the implementation of our delegation. Our comments here will provide our views on the substance of the significant changes determination.[7/]

ROLE OF THE "SIGNIFICANT CHANGES" DETERMINATION IN THE STATUTORY SCHEME

Because the standards for the "significant changes" determination are essential to that determination's fulfilling the statutory intent, a brief

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5/ Id. at 951, citing South Texas, 5 NRC 1303 at 1319.

6/ To the Director of Nuclear Reactor Regulation (for reactors) or the Director of the Office of Nuclear Material Safety and Safeguards (for production facilities), as appropriate.

7/ While we use this opportunity to issue guidance on the significant changes determination, we do not mean to suggest that the instant case illustrates the typical determination. To the contrary, developments in agency law (see infra n.38) and procedures (see infra n.36) provide assurance that the factual circumstances of this matter will not be repeated. Furthermore, we do not anticipate a repetition of the two tiered decision process involved in today's opinion (see infra p.29). We expect in the future that all of the elements of the determination will be decided at the time of issuance. We take the tiered course on this occasion only because we feel that some response on our part to the parties is past due, and because we wish to provide an opportunity for comment where earlier opportunity did not exist.

recapitulation of the statutory framework and our role in antitrust area is warranted.

In licensing nuclear facilities the Commission has the statutory responsibility to avoid the creation or maintenance of situations "inconsistent with the antitrust laws". It is well established that conditions which run "counter to the policies underlying those laws, even where no actual violation of statute was made out, would warrant remedial license conditions under Section 105c of the Atomic Energy Act." 8/

As we carefully reviewed in our South Texas opinion,9/ section 105c "establishes a particularized regime for the consideration and accommodation of possible antitrust concerns arising in connection with the licensing of nuclear power plants."10/ Provision for Commission and Department of Justice antitrust review

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8/ In the Matter of Consumers Power Company (Midland Plant, Units 1 and 2), 6 NRC 892, 908 (1977) citing S. Rep. No. 91-1247 and H.R. Rep. No. 91-1470, 91st Cong., 2nd Sess., 14-15 (1970) Reports of the Joint Committee on Atomic Energy on Amending the Atomic Energy Act of 1954 to Provide for Relicensing Antitrust Review of Production and Utilization Facilities, inter alia.

Our Appeal Board has recently reviewed the antitrust responsibilities of this agency. See In the Matter of Toledo Edison Company (Davis Besse Nuclear Power Station, Units 1, 2 & 3) and the Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-560, 10 NRC 265, 271-273 (1979), (appeal pending in U.S. Court of Appeals for the Third Circuit). With regard to remedial license conditions the Davis Besse opinion concluded as follows:

> If the hearing record demonstrates with "reasonable probability" that an anticompetitive situation within the meaning of section 105c would result from the grant of an application, the Commission may refuse to issue a license or issue one with remedial conditions. Findings of actual Sherman or Clayton Act violations, however, are not necessary. Under section 105c, procompetitive license conditions are also authorized to remedy situations inconsistent with the "policies clearly underlying" the antitrust laws. Midland, supra, ALAB-452, 6 NRC at 907-09 and authorities there cited. See also, South Texas, supra, CLI-73-13, 5 NRC at 1316; Waterford I, supra, CLI-73-25, 6 AEC at 49 (emphasis provided).

9/ Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), CLI-77-13, 5 NRC 1303, 1309-1322 (1977).

10/ Id. at 1309.

is tied to the Commission's two-tier licensing process -- a thorough antitrust review is to occur at the construction permit (CP) stage,[11] a "narrower second review"[12] at the operating license stage, if -- and only if -- in the words of the statute "the Commission determines such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission ... in connection with the construction permit for the facility."[13]

We said in South Texas, by way of explaining the narrower scope of OL stage antitrust review, that "a full-blown de novo antitrust review, with the Commission's 'significant changes' determination acting only as a triggering mechanism, would be inconsistent with the statutory scheme of

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11/ At the construction permit stage the Commission is obliged by statute promptly to transmit to the Attorney General a copy of the license application. Within 180 days the Attorney General is required to give the Commission "such advice ... as he determines to be appropriate" with regard to the finding the Commission must make on whether or not to conduct an antitrust hearing. If the Attorney General advises that there should be a hearing, a hearing must be held. The statute provides (section 105c(5)) that the Attorney General's advice shall be published in the Federal Register. At the time of publication of the Attorney General's advice letter, if the Attorney General does not himself advise a hearing, the Commission offers an opportunity for any interested party to request a hearing on antitrust matters and to request the right to intervene. It may be seen, therefore, that it is the publication of the advice of the Attorney General that serves notice of the right to request a hearing on antitrust matters. The Commission's determination on whether or not to hold a hearing in response to such a request is determined by the provisions of the Administrative Procedure Act and the Commission's rules on intervention.

12/ 5 NRC at 1312.

13/ The practical import of this provision is that the Commission must determine that there have been significant changes before a formal request may be made for the Attorney General's advice concerning a possible antitrust proceeding. The publication of the Attorney General's advice triggers an opportunity for interested parties to request a hearing at the OL stage.

immunity from a second review for unchanged proposals,"[14/] We further found that a full-blown review would be inconsistent with "well established considerations consolidated in the doctrines of res judicata and laches."[15/] But, as we also pointed out:

> This is not to say that "significant changes" in a licensee's proposal can or should necessarily be viewed in isolation from unchanged features of the proposal. The antitrust implications of a "significant change" may indeed arise from its relationship to unchanged features of the proposal. Obviously, some account will have to be taken of the proposal as a whole, but as the proposal or its impacts have been altered by changed circumstances. 16/

The limitation on the scope of review at the OL stage does not impose any limitation on the nature of the finding to be made at the conclusion of that review, nor on the remedies then available. While, as we have just discussed, any review at the OL stage would proceed with a more limited scope than would obtain at the CP stage, focussing on changed circumstances, the ultimate question is the same for OL as for CP review. That question is: would the contemplated license create or maintain a situation inconsistent with the antitrust laws? In the event that question is answered in the affirmative, irrespective of the licensing stage, our full remedial authority may be invoked to provide such license modifications as would best serve the policies of the antitrust laws under the circumstances.

Since our full arsenal of antitrust remedies is available when an OL antitrust hearing shows that remedies are warranted and since a determination

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14/ 5 NRC at 1321.

15/ Id.

16/ 5 NRC at 1322.

that there have been "significant changes" is the necessary precedent to an OL antitrust hearing at the CL stage, it follows that the requirement of such a determination establishes a threshold of some importance. The legislative history of the antitrust provisions demonstrates that Congressional attention was focused on whether and under what circumstances antitrust review at the OL stage was desirable. The issue was considered both in hearings and in the Committee report.17/ The statutory language reveals explicitly and by implication the standards Congress intended be employed by us in making the "significant changes" determination.18/

Criteria for the Decision

The statute contemplates that the change or changes (1) have occurred since the previous antitrust review of the licensee(s); (2) are reasonably attributable to the licensee(s); and (3) have antitrust implications that would likely warrant some Commission remedy. These are explained below:

1. Occurrence since the previous antitrust review.

The statutory language is explicit that the significant changes, if any, need to have occurred "subsequent to the previous review by the Attorney General and the Commission under this subsection in connection with the

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17/ See notes 43 and 44 below.

18/ Our recent delegation institutes a procedure by which a record determination vel non will be made on the significant changes question in the case of each OL application. Until that delegation the statutory intent that there should be an OL stage antitrust review where significant changes had occurred was fulfilled in the following manner. Staff determined whether or not it in its view significant changes had occurred, and only when a determination of significant changes was recommended was the Commission approached.

construction permit for the facility." That language refers to a formal review process that contemplates at the least the publication of the advice of the Attorney General, as required by section 105c(1), and extends to include a subsequent antitrust hearing conducted by the Commission or its delegees.

2. Reasonably attributable to the licensee(s)

The act explicitly provides that the change or changes be those which occur in the activities or proposed activities of the licensees. The legislative history makes clear an intent to avoid a situation where the applicant will be subjected for a second time to antitrust review because the competitive picture had been altered in ways for which the applicant could not reasonably be held answerable.19/

3. Antitrust implications that would be likely to warrant Commission remedy

With this element of the determination we make explicit the interplay between the requirement that the changes be "significant" and the threshold nature of the determination. Were the significant changes determination to require more than a likelihood that the antitrust implications of changes would warrant Commission remedy -- i.e., that changes had occurred that required Commission remedial action -- it would be bearing an unwarranted freight. This is true because the significant changes determination is provided to trigger an inquiry that would have as its ultimate finding a determination of whether the competitive situation arising from the changes required Commission remedial action. Were it to require less, it would offer scant protection against subjecting the applicant to a second review process, especially given the possibility for a hearing that follows even a no-hearing recommendation by the Attorney General.

19/ See citations infra n.40 and 41.

These matters, whose outline we have sketched in brief, will be further discussed as we evaluate whether the facts of this case warrant an affirmative significant changes determination.

II. STATEMENT OF FACTS AND POSITIONS

SCEG, a public utility, filed as sole applicant its application for a CP for the Virgil C. Summer Nuclear Station (Unit 1) on June 30, 1971. In connection with SCEG's CP application, an antitrust review was conducted by the United States Department of Justice pursuant to section 105c(1) of the Atomic Energy Act. The Justice Department sent the advice letter (Attorney General's letter) to the NRC on March 31, 1972, and the letter was published in the Federal Register on April 12, 1972[20/] pursuant to § 105c(5), 42 U.S. § 2135c(5).

The Attorney General's letter examined the applicant (SCEG), discussed its relations with other utilities, among them Santee-Cooper and Central, and described the overall competitive situation in the relevant area of South Carolina. In that regard, the letter noted:

> In its service area the applicant faces strong competition in bulk power sales, and, until recently, in retail distribution. The principal competitive alternatives for bulk power open to municipals and co-ops in the area are SEPA and Santee-Cooper. 21/

and further,

> In wholesale purchasing, the power output of Santee-Cooper, as supplemented by SEPA and made available by the Central - Santee - Cooper transmission system, provides a competitive alternative to SCEG. 22/

20/ 37 Fed. Reg. 7265.

21/ Id. at 7266, col. 2.

22/ Id. col. 3.

It also noted the 1969 amendments to South Carolina law restricting distribution of electricity by private investor-owned utilities and rural electric cooperatives with a resulting limitation of retail competition.[23/]

The letter described the intertwined power supply relationship between Santee Cooper and Central, both regarding the actual power supply itself and Central's leasing of generation plants and transmission networks to Santee Cooper.[24/]

In concluding, the Justice Department advised that negotiations were proceeding between Santee Cooper and SCEG to enable Santee Cooper's participation in a substantial share of the plant's output. It observed that "Central is definitely interested in obtaining the benefits of a share in the Summer facility, but because of its contractual relations with Santee Cooper is awaiting the outcome of the negotiations between the latter and SCEG." [25/]

In light of all of the foregoing and SCEG's commitment to removing some restrictions in its wholesale contracts that Justice found to be "unnecessarily restrictive",[26/] the Justice Department recommended that no antitrust hearing need be held on the CP application. No one requested a hearing following publication of the advice letter, and none was held. A construction permit for Summer Unit 1 was issued to SCEG on March 21, 1973.

23/ Id., Col. 3.

24/ Id., Col. 2. It should be noted that ultimate ownership of generation and transmission facilities will reside in Santee Cooper. NRC Staff Response to Amended Petition of Central, March 19, 1979, p. 24 and citations therein.

25/ Id., Col. 3.

26/ Id. at 7267, Col. 1.

On July 9, 1973 two enactments of the South Carolina legislature relevant to this matter became effective. One, introduced on February 16, 1973, authorized Santee Cooper to participate as a joint owner in the Virgil Summer nuclear facility. The other, introduced close to the final passage of the joint ownership bill, restricted service territories. That legislation also contained various provisions relating to sales at wholesale and of loads exceeding 750 KWs.

On May 17, 1974, SCEG filed an application to amend its CP to add Santee Cooper as a co-owner and co-licensee, having executed a sale of approximately 1/3 of Summer Unit 1 to Santee Cooper on October 18, 1973. Some antitrust information concerning Santee Cooper was filed along with the amendment application; however, from the submissions of the parties it appears that complete Appendix L [27/] information about Santee Cooper was not sought or supplied.[28/]

On October 17, 1974, a Federal Register notice was published with respect to receipt of SCEG's amendment application.[29/] This notice offered an opportunity for members of the public to request a hearing and to file petitions for leave to intervene.[30/] No petitions were filed and on December 3, 1974, the amendment adding Santee Cooper as a co-licensee was issued.

27/ Appendix L enumerates the information the Attorney General requires for his antitrust review.

28/ See Staff's Attachment 2, SCEG's Amendment 21, May 17, 1974, p. 14.

29/ 39 Fed. Reg. 37088.

30/ No specific mention was made in the notice of rights to an antitrust hearing.

On December 10, 1976, SCEG filed its application for the Summer Unit 1 operating license and contemporaneously submitted additional antitrust information on both itself and Santee Cooper which it expanded in a February 24, 1977 filing. A Federal Register notice concerning receipt of the OL application was published on April 18, 1977.[31/] That notice related exclusively to the health, safety and environmental aspects of the OL application.

The NRC Staff then undertook its own review in order to determine whether or not "significant changes" had occurred. Staff declared that it "was in the final stages of assimilating its information and forming a recommendation as to whether 'significant changes' had occurred"[32/] when Central filed its original petition with the Commission on December 6, 1978.

Central, in its original and amended petition and other correspondence and pleadings,[33/] contends that SCEG illegally wielded monopoly power to condition its sale to Santee Cooper of a share of the Summer facility on Santee Cooper's agreement to join in asking for legislation to divide territories. As a result, Central argues, Santee Cooper is no longer a strong competitor in the South Carolina market. Further, according to Central, Santee Cooper has instituted

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31/ 42 Fed. Reg. 20203.

32/ NRC Staff Response to Amended Petition of Central, March 19, 1979, p. 9.

33/ Because our regulations do not explicate the nature of a significant changes proceeding nor the rules for response and reply, confusion existed among the parties that led to an unusually large number of correspondence and pleadings. Although some pleadings were somewhat repetitive, we decided to accept them all in the interest of having the full facts and claims before us.

an anticompetitive dual rate structure in its supply of power. Central complains also of SCEG's unwillingness to make power transmission arrangements other than on an ad hoc basis and Santee Cooper's refusal to permit Central to share ownership.[34/] As evidence of anticompetitive intent, Central relates a merger offer from Santee Cooper which Central asserts would result in the removal of Central as a market force.[35/]

SCEG and Santee Cooper responded by urging that Central's petition be dismissed as untimely. In the alternative they urged in essence that the changes alleged did not occur in the relevant time period, did not occur at all, or are shielded from our antitrust scrutiny by well accepted exemptions from the operation of the antitrust laws.

Staff takes the position that Central's petition should be allowed, that the changes alleged occurred within the allowable time frame, but that as a matter of law certain changes may not be considered by us and that no changes alleged are "significant" within the meaning of the act.

III. RESOLUTION OF ISSUES

Timeliness

Before attempting to unravel the complexities of the issues before us, we deal with the threshold issue of timeliness.

34/ Central's amended petition, p. 46.

35/ Id. pp. 46-47.

Our regulations do not specify a period during which requests for a significant change will be timely. 36/ SCEG invokes the criteria of 10 CFR 2.714(a)(1); however, those criteria related to a late plea to intervene in a hearing and are not necessarily directly applicable to the threshold determination we have before us.

We have also nad our attention directed to the Congressional intent embodied in the legislative history that a potential intervenor not be permitted to stand by and raise at the OL stage matters that could have been brought at the construction stage. However, this objection to Central's alleged "untimeliness" is in our view precluded by the requirement that a "significant change" must be one that has occurred since the antitrust review of the CP stage. We will pursue this matter further below.

The relevant question in determining timeliness is whether Central's request has followed sufficiently promptly the OL application. Our affirmative response rests on two facts. First, the significant changes decision was still pending. By its own admission, Staff had not finally determined the nature of its recommendation regarding the significant change determination. Second, it appears to us that there was not earlier an unambiguous notice of opportunity for antitrust comment. 37/ In consequence, fairness dictates that the Central

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36/ Our new procedures include notification by publication in the Federal Register of an invitation to interested members of the public to comment on antitrust aspects of an OL application. They also provide that in the event there is a determinatior that there have been no "significant changes", that determination will be published in the Federal Register with notice that any request for re-evaluation of that decision should be made within 60 days.

37/ Federal Register notices invited comment specifically on health and safety issues, and could be therefore read to exclude an opportunity for antitrust comment. Also, we think staff stretches when it characterizes its May 3, 1977 letter to Central's lawyer William Crisp (Attachment 9 to Staff's

(Continued on following page)

petition be considered timely. And, it was useful for Staff to have before it all of Central's comments when reaching its conclusions. It should be recalled that we have said "[i]n dealing with antitrust issues, the NRC's role is something more than that of a neutral forum for economic disputes between private parties." Florida Power and Light Company (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 989 (1978). Paralleling Staff's obligation to present a complete picture of the competitive situation to the Licensing Boards that we described in St. Lucie, Staff has an obligation to comprehend the complete picture when it advises, or now initially determines, whether or not there have been significant changes.

37/ (Continued from preceding page)

March 19, 1979 submission) as an invitation to comment. That letter has one substantive paragraph which states in its entirety:

> To date, the Applicant's antitrust information [at the operating license stage] has been submitted pursuant to Rule 9.3, but the Federal Register notice reflecting that submission has not yet been published. The notice, as I understand it, does not formally invite comments. However, I would imagine that comments would be considered if they were received by our Staff or the Commission's Antitrust and Indemnity Group.

Among the implications a reader might draw from that statement is one that a Federal Register notice on antitrust matters could be expected. We have been referred to none.

Whether the change or changes have occurred since the previous antitrust review of the licensees

The Attorney General's only advice letter concerning licensing of the Summer facility was issued on March 31, 1972. That letter recommended that no hearing was necessary on SCEG's application for a construction permit, and none was held.

All of the changes alleged by Central have occurred or were alleged to have occurred on dates subsequent to March 31, 1972. Therefore, those changes on their face meet the criterion that they have occurred since the previous antitrust review of the licensees unless (1) some later antitrust review than the Attorney General's took place and should be considered the benchmark in this matter, or (2) the alleged changes were anticipated by the Attorney General so that their review was in effect already undertaken and included in the earlier advice.

In our order of January 26, 1979 we solicited assistance from the parties in determining whether or not some date other than the Attorney General's past advice letter should be the operative date and whether the Attorney General's advice anticipated the changes in arriving at a no hearing recommendation.

Both Central and Staff agree that the appropriate date from which to analyze significant changes is March 31, 1972, the date of the Attorney General's letter. We concur, having found no subsequent antitrust review that would authorize a subsequent date nor any indication that the Attorney General anticipated the matters of which Central complains.

SCEG and Santee Cooper would have us look to the date of amending the construction permit to include Santee Cooper as a co-licensee. In considering antitrust matters relative to licensing the Enrico Fermi facility, it was determined in 1978 that the addition of a co-owner as a co-licensee was in effect an initial application of the co-owner and as such required formal antitrust consideration. 38/ That decision was based on the necessity for an in-depth review at the CP stage of all applicants, lest any applicant escape statutory antitrust review. Implementation of Fermi was prospective only. Consequently, Santee Cooper, added as a co-licensee by amendment in 1974, avoided the formal antitrust review process. Applicants should not be permitted to bootstrap that omission into a shield from antitrust scrutiny at the OL stage, as they would do if they prevailed in their claim that the operative "previous [antitrust] review" date is the date of the license amendment admitting Santee Cooper. The anomalous nature of the result urged by Applicants is obvious when one considers that they are in effect arguing that the license amendment date is the operative one because there might have been antitrust review even though none took place. Furthermore, the date urged by applicants would not serve the statutory purpose of providing for consideration of any changes not previously considered in depth by the Commission or Department of Justice but not allowing the same ground to be ploughed twice. It would leave the year between the Attorney General's letter in 1972 and the amendment in 1974 unable to be ploughed at all.

Nonetheless, it would be equally inconsistent with the Congressional intent if contemplated changes that had been subject to anticipatory antitrust analysis

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38/ Detroit Edison, et al. (Enrico Fermi Atomic Power Plant, Unit No. 2), 7 NRC 583, 587-89 (1978), aff'd ALAB-475, 7 NRC 752, 755-56 n.7 (1978).

triggered OL stage antitrust review simply because the actual time of effecting the anticipated changes followed the completion of their antitrust review.

We therefore review the response of the parties to the question whether the Attorney General's advice letter anticipated the changes now alleged by Central. Central complains not of the sale, which was anticipated, but of Santee Cooper's changed competitive role, which was not. Staff agrees with Central that the letter does not contemplate the alleged anticompetitive changes, although Staff believes that some consideration should be given to the "explicit awareness of the Attorney General ... of South Carolina's ongoing legislative plan designed to restrict retail competition among private utilities and electric cooperatives enacted in 1969." 39/

Both SCEG and Santee Cooper also view the Attorney General's consideration of similar prior territorial legislation to be significant, while admitting that it was obvious that the Attorney General could not have had under consideration the 1973 enactments. Santee Cooper notes that the Department of Justice had "actual knowledge" that negotiations between SCEG and itself were underway concerning its participation in the Summer facility and also that "it was a matter of public record that SCEG and the Authority were then negotiating as to service areas as well." Cited for that proposition are a Santee Cooper press release of February 3, 1972 and an article in the Columbia, South Carolina newspaper on February 6, 1972. There is no suggestion that the Justice Department was advised or had knowledge of either the release or article at the time of writing the advice letter issued on March 31 of that year.

39/ NRC Staff Response, p. 13-14.

The point is made that the Department of Justice discussed and accepted anticompetitive aspects of the 1969 amendments similar to the 1973 amendments. Whether the Department of Justice will view the 1973 enactments, their effects and the resultant relationships among the parties substantially as it viewed the 1969 enactments or in any manner that would imply that there had been no significant changes in the competitive picture is a matter that is relevant to a significant changes determination. But any purported similarity between the 1969 and 1973 legislation is not relevant to the standard that alleged changes must have occurred since the previous antitrust review.

We can find no evidence that suggests the Department of Justice contemplated the changes alleged by Central at the time it issued the advice letter.

In light of the foregoing we find that the changes alleged by Central have occurred since the last antitrust review.

Whether the Change or Changes Are Reasonably Attributable to the Applicants

While there were changes alleged by Central that have no obvious relationship to the 1973 enactments of the South Carolina legislature and for which at least one of the Applicants could be held clearly to be answerable, 40/ an issue has arisen of whether for 105c purposes the applicants may be reasonably held responsible for changes resulting from the South Carolina legislation. Resolution of this issue is of utmost importance because it seems to be generally conceded

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40/ Whether we ultimately determine that the allegations of dual rates or refusal to share transmission ownership or to make ongoing transmission arrangements have any significance, there is no suggestion that neither applicant is to be held responsible or answerable for the factual situation that exists.

by all parties that the legislation establishing territorial limitations and the activities stemming from that legislation resulted in substantial changes in the competitive situation in South Carolina, and that those changes are at the heart of Central's complaints.

There appears to be no dispute of fact among the parties that the territorial legislation was in the main 41/ presented and actively sought by the applicants.42/ The question is whether this kind of involvement on the part of applicants is sufficient to satisfy the legislative intent of 105c(2) that second antitrust review should occur only when the changes are reasonably attributable to the applicants. We find that it is.

In enacting Section 105c(2), Congress steered a careful course between the alternatives of antitrust review only at the CP stage and automatic antitrust review at both the CP stage and the OL stage. Given the NRC's mission to assure that use of nuclear power would be consistent with the procompetitive policies underlying the antitrust laws, it would not have been unreasonable to require in all cases a second look at the total competitive picture within the relevant

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41/ An amendment to the legislation as originally submitted was apparently requested by Central, although this fact did not come to light in Central's petition.

42/ There is dispute whether Santee Cooper freely joined SCEG in seeking the legislation or whether SCEG used its monopoly position to require Santee Cooper to join in the quest for territorial limitations in return for an ownership share in the Summer facility. Our decision here does not depend on a resolution of that matter. It is a fact that the South Carolina legislature considered and passed the legislation and the parties are entitled, as we shall develop more fully below, to conform their behavior to it. Proof establishing that one of the parties committed an antitrust violation in preparing to petition for the legislation would not serve to repeal that legislation.

markets at the time of granting an operating license. On the other hand the disadvantages of such a regime were obvious -- both in terms of wasted time and resources and in the element of unfairly creating uncertainty in the planning of licensees. The course chosen eschewed both alternatives and resolved the problem by providing for OL antitrust review only when significant changes had occurred in "the activities or proposed activities of the licensees."

The report of the Joint Committee clarifies the intent by stating as follows:

> The term "significant changes" refers to the licensee's activities or proposed activities; the committee considers that it would be unfair to penalize a licensee for significant changes not caused by the licensee or for which the licensee could not reasonably be held responsible or answerable. 43/

The expectation was that licensees would maintain the situation that existed at the time of the grant of the construction permit. 44/ If they did not, they were to be subject to additional scrutiny at the operating license stage, providing other conditions were met. The Joint Committee considered that fairness dictated where there had been changes, otherwise significant, they should not trigger antitrust review when the changes occurred independent of the action of the license applicant.

43/ 3 U.S. Code, Congressional and Administrative News, 91st Cong., 2d Sess., 4981, 5010 (1970).

44/ See the colloquy between AEC General Counsel Joseph F. Hennessey, Chairman Holifield and Representative Hosmer, Hearings before the Joint Committee on Atomic Energy or Prelicensing Antitrust Review and Nuclear Power Plants, 1st Sess., 1969, pp. 72-73.

The language of the report, "changes ... for which the licensee could not reasonably be held responsible or answerable", provides the latitude for a common sense determination of when it is or is not fair to subject particular licensees to a second review. We judge that here Applicants' involvement in securing the changes was sufficient to make it fair to consider how those changes affect the competitive situation. We thus find this criterion is met. This can not be an instance where the licensees are caught off guard by figuring in an anticompetitive situation, if one is found to exist, which has been thrust upon them unknowingly. Santee Cooper and SCEG actively and successfully sought to change the situation that existed at the time of the earlier antitrust review.

We note in passing that the Noerr-Pennington [45/] doctrine does not govern our limited causation-type determination here. The Noerr-Pennington doctrine stands for the principle that the antitrust laws' prohibitions of combination in restraint of trade do not intend to catch in their net combinations that seek government action even though the action sought be anticompetitive in intent or effect. Noerr-Pennington does not address problems of causation; in finding that the changes from the state legislation may reasonably be attributed to applicants we find no antitrust violation.

45/ The Noerr-Pennington doctrine results from a line of cases, of which the principal case is Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L.Ed.2d 464 (1961), holding combinations to urge legislation that will have the effect of restraining trade are not combinations in restraint of trade under the Sherman Act. And accord, United Mine Workers of America v. Pennington, 381 U.S. 657, 14 L.Ed. 626 (1965), holding in this regard, a concerted effort to influence public officials is shielded by the Sherman Act regardless of antitrust intent or purpose.

Our determination that the changes resulting in this instance from state legislation are reasonably attributable to the licensee should not be read as comment on the cause, purpose or independence of the South Carolina legislature in enacting that legislation. Our result is limited to a view that the applicants' independence of the changes legislated by the state was insufficient to excuse them from additional antitrust review on the grounds that the "reasonably attributable" criterion had not been met.

Whether the changes have antitrust implications that would be likely to warrant Commission remedy

This criterion focuses on the meaning of the word "significant"; it fleshes out the statutory provision that only the Commission's determination that "significant changes have occurred" shall initiate antitrust review at the OL stage. As we explained above 46/ our understanding of the meaning of "significant" in the 105c(2) context comprehends the threshold nature of the determination and the nature of the inquiry that such a determination initiates. In brief, it is our view that this criterion requires us to take a sufficiently hard look at the same matters that would be addressed after an affirmative significant changes decision in order to make a preliminary judgment whether there is a genuine likelihood that the outcome of antitrust review, were it to occur, would be a greater than inconsequential alteration or adjustment in furtherance of the policies underlying the antitrust laws. Otherwise stated, we

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46/ See supra p. 8.

believe it was intended that we not undertake the process without an expectation that it would have greater than de minimis results.

Like other threshold tests that require a prediction of outcome, this criterion requires us to take an early look at both the facts and the law. We address two distinct questions (a) whether an antitrust review would be likely to conclude that the situation as changed has negative antitrust implications, and (b) whether the Commission has available remedies.

To review the background:

Central alleges significant changes in the activities and projected activities of the Applicants under the Summer license.[47/] Central discusses the authorization by state law of Santee Cooper's purchase of a share of Summer and addition as a co-licensee as a major change since the last antitrust review. Yet, it is clear to us that this change is not in itself the subject of Central's concern. Central, as well as the Department of Justice, was aware of negotiations toward that end, and such a result appeared to be satisfactory to Central when Central perceived itself as strongly aligned with Santee Cooper and saw Santee Cooper as a strong competitive force in the market. The gist of Central's complaint is Santee Cooper's subsequent realignment with SCEG and termination of its role as a strong competitor vis-a-vis SCEG in the market. Central objects to territorial limitations on the operations of each of the Applicants that were enacted by the State, and attests to an attempt

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47/ In footnote 42, supra, we have disposed for the purpose of this determination of Central's allegation of a Sherman Act section 2 violation by SCEG in allegedly using its monopoly position to coerce Santee Cooper into joining its effort to secure territorial limitations.

by Santee Cooper to remove Central by merger or absorption from its role as an active participant in the power marketplace.

Also, as we have noted earlier, Central complains of an inability to make satisfactory arrangements for power transmissions and of an application by Santee Cooper of dual rates for bulk power supply to Central. These complaints are made independently of the realignment complaint, but are consistent with and support that complaint.

Central has made several assertions regarding power exchange services. The gist of the matter is that Central, following its perception of a realignment of competitive interest, proceeded to seek bulk power supply alternatives; however, as Central points out, the key to participation in the bulk power market is access to power exchange services and facilities. Central alleges that it therefore sought ownership interest in transmission from Santee Cooper and power exchange agreements from SCEG. It alleges that Santee Cooper has refused to permit it to share ownership and that SCEG has agreed only to wheel discrete amounts of power between discrete points on a case-to-case basis. While there is disagreement about the implications, the parties do not dispute either Santee Cooper's refusal to share ownership or SCEG's unwillingness to contract other than on a case-to-case basis.

Regarding Central's allegation that "dual rates" have been imposed by Santee Cooper, it appears to cite only one instance to support this allegation -- the so-called Pee Dee contract contained in an amendment to Central's and Santee Cooper's contract for power to be supplied by Santee Cooper. While the contract provision is not in itself in dispute, the interpretation to be put

upon it is. Other facts that bear on the issue are that Santee Cooper operates pursuant to a State mandate to provide power at "cost of service;" and Central's requirements contract enables it currently to receive power at a fixed price even though that price may be less than cost.

"State action doctrine"

The facts reveal that state action since the last Attorney General's letter is a significant ingredient of the mix that makes up the competitive situation in South Carolina as it currently exists. And we have found that a determination on both the issues we address in this section -- negative antitrust implications and available remedies -- involves an understanding of the nature and extent of the role of the "state action doctrine"[48/] in the Commission's performance of its antitrust functions. Therefore, we turn our attention to this subject.

There can be no doubt that the Commission takes the antitrust laws as it finds them. "The Commission must 'apply principles developed by the Antitrust Division, the Federal Trade Commission, and the Federal Courts, to [the nuclear] industry.' Houston Lighting & Power Co. (South Texas Project, Units 1 & 2, supra, CLI-77-13, 5 NRC at 1316." Davis Besse, supra, 10 NRC at 272.

48/ The "state action doctrine" is otherwise known as the Parker v. Brown doctrine, Parker v. Brown, 317 U.S. 341 (1943), which held immune from Sherman Act prohibitions California's regulatory scheme to control the supply of raisins in order to enhance prices. The process of carving out the limitations of that immunity is a continuing one. In California Retail Liquor Dealer's Association v. Midcal Aluminum, Inc., ___ U.S. ___, 48 U.S.L.W. 4238 (March 3, 1980) the Court built upon the Parker analysis to deny state action immunity to a California program of resale price maintenance and price posting statutes for the wine business. In that case a state regulatory scheme failed to meet the second of two essential requirements. While (1) it was clearly and affirmatively articulated, the policy was not (2) actively supervised by the state itself.

Just as it gives full force to the antitrust laws and to the policies underlying those laws in order to assure the maintenance of competition, it must equally credit the exemptions and immunities specifically established by legislation or carved out by the judicial process. Where there is an overall plan of state regulation the state plan is exempt as are the activities of those conforming to that plan. Parker v. Brown, supra. Conversely the antitrust laws are not displaced where there is no overall plan of economic regulation,[49/] where the state has no discernible legitimate interest,[50/] or where the actions taken are unsupervised actions.[51/] When there is immunity for state action and activities of private parties pursuant to state requirement, the antitrust laws are displaced only insofar as necessary to make the state scheme work. Lafayette v. Louisiana Power and Light, 435 U.S. 389 (1978). Conduct that occurs beyond the requirements of a regulatory arrangement established by the state continues to be subject to the antitrust laws. St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531.

Thus it is clear that the mere existence of state regulation of the electric utility industry, by itself, is not sufficient to displace NRC's statutory antitrust responsibilities. The antitrust laws give way only if there is found to be a "plain repugnancy between the antitrust and regulation provisions." United States v. Philadelphia National Bank, 374 U.S. 321, 351 (1963). Were no antitrust considerations able by law to survive the establishment of a state regulatory scheme, our construction permit stage review would in many states be futile and meaningless. But on the contrary, by statute, we review each CP application to

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49/ See, e.g., St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1979).

50/ Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).

51/ Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Schwegmann Bros. v. Calvert Corp., 341 U.S. 284 (1951).

ensure that insofar as possible activities under the license will be consistent with antitrust laws and the policies underlying them. What this means is that the Commission with the aid of the Department of Justice must choose the course of accommodation. Respect must be shown for a state's regulatory plan where it exists; however, procompetitive policies must be furthered when they are not in conflict with the state plan.

Although determinations of the extent to which the antitrust laws may be accommodated by state regulation must be made with sensitivity on a case-to-case basis, certain questions will serve as a litmus paper test in many situations. In evaluating whether activities or proposed activities conflict with the antitrust laws, the following tests are relevant. Has the licensee a free choice with respect to the activity in question, in the sense that the state is neutral with regard to the course chosen? Does the chosen course follow so naturally from activities required by the state that to apply an antitrust standard would work an unfairness on the licensee? In deciding whether a proposed procompetitive license modification is repugnant to the state scheme, variations of the preceding questions should be asked: Could the licensee properly choose this course of action without conflicting with the state regulatory scheme? Would the modification if required be so unnatural in the regulatory setting as to work an unfairness on the licensee?

With this view of the law and the tests for applying it, we return to the issues before us.

a. Whether an antitrust review would be likely to conclude that the situation as changed has negative antitrust implications

Having determined that changes occurred within the relevant time and were sufficiently causally linked to Applicants to satisfy the causation criteria,

we must make a threshold analysis of the competitive situation. In order to predict the outcome of review, we look to the same factors that would be analyzed during a full scale review after a significant changes determination had been affirmatively made.

In this posture, we seek the comment of the Department of Justice whether its threshold analysis of this matter leads it to believe that it would recommend a hearing were it to conduct a statutory OL Summer license review. We note that the legislative history reflects the Congressional intent that we consult with the Department of Justice 52/ in reaching our significant changes determination. We think Justice's proper role in the threshold process parallels what its role will be in the review process when a review is held. In the review process the analysis and recommendation of the Attorney General are critical to the decision of whether to hold a hearing and weigh heavily in the Commission's determination of what license conditions may be warranted. We ask the Attorney General, on the basis of our memorandum and order and the record in this matter that we forward herewith, to provide us with his tentative views on whether a hearing would be required. We request this advice by 60 days from the date of this order.

In turning to Justice for its assistance, the Commission expresses the following views on the merits. It is beyond cavil that South Carolina has adopted a regulatory scheme in the power supply market, and that the Parker v.

52/ Report of Joint Committee, supra, p. 29.

Brown doctrine is properly invoked.[53/] On the other hand, Applicants seem to possess considerable freedom of choice under the state regulation. They may choose whether to allow Central to participate in the facility itself and such a choice appears to have a neutral effect on the state plan. Similarly, Applicants seem to have considerable freedom in arriving at terms for transmission services.[54/] Using our test, we find then that were activities in these areas to have anticompetitive implications, they could be properly considered by us and would require a determination as to whether the Commission has available remedies that it could require as license modifications were careful analysis to reveal that procompetitive policies would be aided thereby.

b. Are there available remedies?

As we have indicated earlier in this memorandum, we believe that the Congress did not intend for us to go forward with OL stage antitrust review without the likelihood that it would result in greater than de minimis license modifications. Consequently an inquiry must be directed toward resolving the

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53/ An issue was raised by Central whether the state's "authorization" of Santee Cooper's purchase of an interest was sufficient to invoke Parker v. Brown immunity in light of authorities holding that state command is essential. Where, as here, a public utility responsive only to direct legislative enactment is authorized to take action by the State legislature, that authorization is tantamount to command. Cf. Princeton Community Phone Book v. Bate, 582 F.2d 706 (3d Cir. 1978). However, since no claim appears to be made that the purchase of a share is in itself an anticompetitive act, this determination is not essential to our conclusions.

54/ Based on the information before us we tentatively conclude that Central's dual rate claim is not meritorious, and that State requirements appear to preclude Santee Cooper's setting rates higher than their actual cost of service, so that no anticompetitive activity may be found here.

question whether activities with anticompetitive implications that are revealed are susceptible to our remedy. In the case of any significant changes determination such an inquiry is required; however, in most cases it is to be presumed that the Commission will be able to tailor some relief. See, e.g., Davis Besse, supra. Where there is a state regulatory plan, Parker considerations require us to inquire whether the relief we would provide would be repugnant to the state plan or would be so unnatural under the plan as to work some other unfairness. If it would, it must be considered to be unavailable.

For the present, suffice it to say that the parties' representations that there have been negotiations for arrangements regarding participation in the facility and power transmission facilities are strong indications that there is sufficient flexibility in the overall plan to accommodate at least some significant remedial modifications that the Commission might consider implementing were they determined to be warranted.

State of the Record

In referring these matters, by way of consultation, to the Department of Justice, we are aware that the record is stale. Most particularly because of Staff's and the Applicant's repeated reliance on assertions that good faith negotiation was proceeding and that offers were anticipated, we invite the parties to provide information with regard to any new developments to us and to the Department of Justice.

Furthermore, because we have established the criteria for a significant changes decision in our analysis of the instant matter, we request that the

parties and the Attorney General provide us with any comment they might have on those criteria and how we have applied them in this memorandum. Comments should be filed within 30 days from the date of this order. We will consider such comments as well as the Department of Justice predictive comments on the merits before reaching a final decision.

Commissioner Gilinsky abstained from this memorandum and order.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.
this 30th day of June, 1980.