UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
CONSUMERS POWER COMPANY	)	NRC Dkt. Nos. 50-329A
(Midland Plants, Units 1 & 2)	)	50-330A

REPLY BRIEF OF THE NUCLEAR REGULATORY COMMISSION STAFF

Joseph Rutberg
Chief Antitrust Counsel
for NRC Staff

Robert J. Verdisco
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This reply brief responds to the "BRIEF OF CONSUMERS POWER COMPANY" (CP BRIEF) which was filed on January 26, 1976. For the most part, the CP Brief is merely a restatement of arguments previously made by Consumers Power Company (hereafter sometimes referred to as Applicant or Consumers) and which have been responded to by the Staff in its "Brief in Support Of Its Exceptions". However, there are several arguments presented by Consumers which, in the opinion of the Staff, require specific comment.

A. Section 5 Of The FTC Act Is Fully Applicable To This Proceeding And Is Not Limited To Monopolization Charges

The Applicant, beginning on page 70 of its Brief, would have this Board and the Commission believe that Section 5 of the Federal Trade Commission Act (FTC Act) should be considered in this proceeding only in terms of monopolization. The Staff asserts that Section 5 is more broadly based and is the most appropriate standard to be applied in this proceeding. 1/

1/ See Staff's "Brief in Support of Its Exceptions", November 13, 1975, pp. 14-19.

The Atomic Energy Act of 1954, as amended (the Act), states that the Atomic Energy Commission [2/] (Commission) "shall make a finding as to whether the activities under a license would create or maintain a situation inconsistent with the antitrust laws as enumerated in section 105(a)." Those laws as specified in section 105(a) include the Sherman Act, the Clayton Act and the Federal Trade Commission Act: All equally applicable and all recognized as equally important in a Commission determination under section 105(c). [3/] Therefore, section 5 of the FTC Act cannot be ignored or limited in a section 105(c) proceeding. [4/]

2/ "Commission" also refers to the successor of the Atomic Energy Commission, the Nuclear Regulatory Commission.

3/ For the specific importance given to section 5 of the FTC Act by Congress see Report, Joint Committee on Atomic Energy, 91st Cong. 2nd Session, No. 91-1247 at pp. 14 and 15.

4/ See In the Matter of Kansas Gas and Electric Company and Kansas City Power and Light Company, (Wolf Creek Generating Station, Unit No. 1) (hereafter referred to as Wolf Creek), ALAB-279, NRCI, 75/6, 559 at 568, 569, where the Appeals Board, citing Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973); California v. F.P.C., 369 U.S. 482 (1962) and City of Pittsburgh v. F.P.C., 237 F.2d 741 (D.C. Cir. 1956), held "...even where regulatory agencies are not expressly required by the statutes they administer to consider the antitrust implications of cases before them, the courts have held them to be nevertheless obliged to take full account of those laws and their underlying policies before acting." The Appeals Board further stated that "...[a]nd where Congress has explicitly mandated the type of conduct to be screened for anticompetitive effects, attempts to limit the scope of that obligation by giving a narrow or artificial meaning to the statutory terms have been rejected.

The Supreme Court, beginning with FTC v. Cement Institute [5] has recognized that the Federal Trade Commission's mandate is indeed broadly based and goes well beyond the reach of the Sherman and Clayton Act. In the Cement case the Court held that:

> ...[A]lthough all conduct violative of the Sherman Act may likewise come within the unfair trade practice prohibitions of the Federal Trade Commission Act, the converse is not necessarily true. It has long been recognized that there are many unfair methods of competition that do not assume the proportions of Sherman Act violations. [6]

In FTC v. Motion Picture Advertising Service Company, Inc., [7] the Court held that even though no concerted activity was alleged and the complaint challenged only the legality of unilateral action by each respondent:

> The "unfair methods of competition" which are condemned under Sec. 5(a) of the Act, are not confined to those that were illegal at common law or those that were condemned by the Sherman Act ... Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business... It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act... to stop in their incipiency acts and practices which, when full blown, would violate those Acts ... as well as to condemn as "unfair methods of competition" existing violations of them. (Emphasis added). [8]

5/ 333 U.S. 683 (1948).

6/ 333 U.S. at 694.

7/ 344 U.S. 392 (1953).

8/ 344 U.S. at 394-395 (1953).

In Atlantic Refining Co. v. FTC [9] the Court, in upholding the FTC's proscription of practices (as unfair methods of competition) which have the same anticompetitive effect - market foreclosure - as exclusive dealing and tying arrangements, but which violated neither the Sherman Act nor the Clayton Act, held that:

> All that is necessary in §5 proceedings ... is to discover conduct that runs counter to the public policy declared in the act. [10]

In FTC v. Brown Shoe, [11] the Court recognized that the Commission power under section 5 was a:

> ...broad power... and is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws. [12]

And finally in FTC v. Sperry and Hutchinson Company, [13] section 5 was determined to have a substantive reach which permits the FTC to challenge practices not enumerated in the Clayton Act nor forbidden by the Sherman

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9/ 381 U.S. 357 (1965).
10/ Id. at 369.
11/ 384 U.S. 316 (1966).
12/ Id. at 321.
13/ 405 U.S. 233 (1972).

Act. The Court stated in that case that:

> [T]he Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws. 14/

Section 5 of the FTC Act establishes a framework which contemplates a competitive analysis well beyond consideration of only monopolization and its related effects. The facts in this case 15/ establish that Consumers has unreasonably used its dominance and control over generation, high voltage transmission and distribution facilities in its dealings with the smaller electric utilities in Michigan's Lower Peninsula. This is a situation inconsistent with the antitrust laws and the policies clearly underlying those laws as embodied in section 5 of the FTC Act as discussed above. This is true regardless of whether a "full blown" 16/ monopolization case has been established.

Accordingly, the full application of section 5 of the FTC Act must be considered in this proceeding and the Applicant's attempt to limit the application of section 5 is in error.

14/ Ibid. at 244.

15/ See Note 1, supra, beginning at p. 19.

16/ See Note 8, supra.

B. Consumers' Analysis Of The Legislative History Surrounding Section 105(c) Of The Act And Its Application To The Electric Utility Industry Is Misleading

The analysis of the applicability of section 105(c) to the electric utility industry on pages 58-69 of the CP Brief is misleading. Section 105(c) of the Act and the legislative history accompanying it require the Commission to determine "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws or the policies clearly underlying those laws as specified in section 105(a)." While Consumers acknowledges, at page 64 of the CP Brief, that its activities are not immunized from the antitrust laws by virtue of federal or state regulation, it attempts to limit the applicability of the antitrust laws identified in section 105(a).

Congress specifically developed the prelicensing antitrust review procedure as set forth in section 105(c) of the Act as the method to implement the Commission's antitrust review responsibility in the licensing area. As recognized by the Commission,

> [i]t was the intent of Congress that the original public control should not be permitted to develop into a private monopoly via the AEC license process, and that access to nuclear facilities be as widespread as possible. 17/

Congress, in addition to very clearly setting out the legal framework for a section 105(c) proceeding also firmly established that "any person" choosing to participate in and accept the benefits of nuclear power will be subject to antitrust review under all of the antitrust laws in section 105(a) of the Act. Congress, totally aware of the potential applicability of section

17/ Louisiana Power and Light Company (Waterford Steam Electric Generating Station, Unit 3) CLI-73-25, 6 AEC 619 at 620, emphasis supplied.

105(c) of the Act to the electric utility industry and the "regulation" surrounding it, chose very specifically to state in the Committee report that accompanied the 1970 legislation that [18/] designers, fabricators, manufacturers, or suppliers, were not intended to be subject to antitrust review unless the licensed applicant is culpably involved in activities of others that fall within the ambit of the standard. Electric utilities were not exempted from the review provided for in section 105(c). If the applicant's argument, that section 105(c) has very limited applicability to the electric industry, is accepted then the Congressional mandate under section 105(c) will become meaningless. As the Appeal Board stated in Wolf Creek:

> [T]here is of course, a settled presumption against imputing to Congress an intent to achieve an irrational result. [19/]

Im summary, the Staff believes that the Congressional intent with respect to the application of section 105(c) is clear and unequivocal. Section 105(c) applies to an applicant for a section 103 license, is governed by the antitrust laws enumerated in section 105(a) of the Act and its application to electric utilities has not been limited. [20/]

C. Consumers' Assertion That Section 105(c) Requires That "all license applicants be compelled to coordinate, wheel bulk power and grant unit access" Is Erroneous

Contrary to Consumers' assertions on pages 56, 57 and 58 of its Brief, the Staff does not contend that "...all license applicants be compelled to coordinate, wheel bulk power, and grant unit access." To date,

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18/ See note 3, supra, p. 31.

19/ ALAB 279, NRCI-75/6, 559 at 568, 569. See also note 5, supra.

20/ See Otter Tail Power Company v. United States, 410 U.S. 366 (1973).

there have been seventy-nine applications reviewed under section 105(c) of the Act. In approximately thirty-nine applications a hearing was not recommended by the Attorney General and no license conditions were considered appropriate.[21/] In approximately twenty-three other applications the Attorney General recommended no hearing if the applicants agreed to accept certain license conditions pertaining to antitrust questions and the Commission included them in any license that may be issued. The license conditions agreed to by the applicants with regard to these applications range from very limited license conditions[22/] to fairly extensive conditions as are being sought against Consumers Power Company in this proceeding.[23/]

The Staff is of the opinion[24/] that, in this particular proceeding, comprehensive license conditions as proposed by the Staff are necessary because Consumers Power has unreasonably used its dominance so as to maintain a situation inconsistent with the antitrust laws.

21/ For example, see Houston Lighting and Power Company (Allens Creek Nuclear Generating Station 1 and 2) Docket Nos. 50-460A and 467A.

22/ For example, see Northern Indiana Public Service Company (Bailly Generating Station) Docket No. 50-367A.

23/ For example, see Wisconsin Electric Power Company (Koshkonong Nuclear Plant, 1 and 2) Docket Nos. 50-502A and 503A.

24/ See Note 1, supra, beginning at p. 78.

D. Consumers' Argument That Pervasive Regulation Of The Electric Utility Industry Limits The Scope Of Section 105(c), Is Erroneous

Consumers' analysis of regulatory authority, beginning at page 76 of its Brief, is misleading and erroneous. Consumers completely confuses and equates regulation at retail with regulation at the bulk power level. The Staff's theory of this case does not deal with the retail market and therefore any regulation dealing with the retail market is irrelevant to an analysis of the Staff's position. 25/

Consumers' claims that with respect to bulk power regulation there is "pervasive" regulation. As evidence of this "pervasive" regulation, Consumers cites sections 202 and 205 of the Federal Power Act.

Under section 205 the Federal Power Commission has the power to set and control rates and charges with regard to wholesale power contracts, unit power arrangements, coordination power exchange agreements, and transmission arrangements, but it has recognized that it does not have the plenary authority, as Consumers claims, to order interconnections for bulk power supply purposes under section 202.

In 10 C.F.R. §32, (1975), the FPC has considered its power to order interconnections, and the only situation referred to with regard to ordering an interconnection is one relating to an emergency condition. The entire scope of the applicable sections of Part 32 are limited to sections 202 (c. d & e) (i.e., emergency service). Thus, it appears that the FPC specifically has determined that its power to order interconnections is limited to emergency service, and does not apply to other bulk power services.

25/ Id. at p. 82.

As pointed out by the Applicant, on pages eighty-two and eighty-three of its Brief, the FPC has ordered some types of interconnections in a limited number of proceedings. However, it is incorrect to argue that these cases stand for the proposition that the FPC can generally compel utilities to interconnect and coordinate thus limiting the applicability of section 105(c). Congress was fully aware of the scope of authority of the FPC at the time that it enacted section 105(c), and took no action to limit the AEC's authority. In fact, the suggestion, at that time, to expand the authority of the FPC was specifically rejected by Congress. 26/

Notwithstanding the FPC's authority under sections 202 and 205 of the FPC Act, Congress approved section 105(c) of the Atomic Energy Act, as amended, as a separate and distinct statute with its own standards to be applied. The standards and obligations of this agency are contained in the Atomic Energy Act of 1954, as amended (the Act) and it is to that Act, and not the Federal Power Act, that we must look for the authority to resolve the issues in this proceeding. Specifically, section 105(c)(6) of the Act empowers the Commission to issue a license with such conditions as it deems appropriate when it finds that issuance of an unconditioned license will create or maintain a situation inconsistent with the antitrust laws. 27/ Clearly, by conditioning a section 105(c) review on the antitrust laws enumerated in section 105(a), Congress contemplated that a section 105(c)

26/ See "Prelicensing Antitrust Review of Nuclear Powerplants, Hearings Before the Joint Committee on Atomic Energy, 91st Cong., 2nd Session, Part II', p. 318 (1970).

27/ The Supreme Court has also concluded that the electric utility industry is not subject to such pervasive regulation as to exempt it from antitrust scrutiny. See Otter Tail Power Co. v. United States, 410 U.S. 366, 372-375 (1973).

proceeding would include activities that are alleged to be inconsistent with the antitrust laws in this proceeding.

Accordingly, Consumers' assertion that "pervasive" regulation of the electric utility industry exists thereby limiting the scope of section 105(c) is erroneous.

E. Contrary To Consumers' Assertion, The "Bottleneck" Theory Is Applicable To This Proceeding

Contrary to the Applicants' assertion in support of the Licensing Board's finding,[28/] the "bottleneck" theory advanced by the Staff is legally appropriate within the factual framework of this proceeding.[29/] The theory advanced by the Staff is that Consumers' unreasonable use of its dominance and control of generation, transmission and distribution has created a "bottleneck" which constitutes an unfair method of competition under section 5 of the FTC Act thereby creating a "situation inconsistent with the antitrust laws" under section 105(c) of the Act.[30/]

28/ See CP Brief, beginning on p. 92 and LBP-75-39, NRCI-75/7, p. 78.

29/ See Note 1, supra, pp. 51-59.

30/ Id.

By enacting section 105(c) of the Act, Congress specifically recognized the "unique" characteristics of nuclear power. Consumers' assertion, on page 115 of its Brief, that nuclear generation capacity is not likely to be cheaper than fossil generation which the smaller systems can construct is irrelevant in light of the congressional mandate that no one, not even Consumers Power, should have the right to monopolize nuclear power facilities. Congress obviously recognized that there are many factors, including cost, which must be considered in determining whether or not a system should utilize nuclear power. If Congress had intended that a comparative cost analysis between nuclear and fossil plants was to be the determining factor for access to nuclear facilities it could have easily drafted such language. However, Congress did not.

In order to obtain meaningful access to nuclear power access to transmission services for the purpose of coordination is essential.[31/] Consumers' claim, on page 105 of its Brief, that it has committed itself on the record of this proceeding to a "wholly reasonable policy"[32/] concerning wheeling which makes available a broad range of bulk power supply alternatives is patently misleading.[33/] With regard to this claim, the Board found that "...the new policy [wheeling] is deemed to be timed to influence the Board in this proceeding and offer little assurance of a permanent change in policy..."[34/]

31/ Id.

32/ This policy is in reality totally unreasonable. See Staff's "Reply Brief", November 25, 1975, p. 19.

33/ The alternatives Consumers refers to are totally illusory. See note 1, supra, beginning at p. 51.

34/ NRCI-75/7, 29 at 92 (1975).

In addition, Consumers' mischaracterizes the Board's finding by stating that "Consumers Power has not always been willing to wheel firm wholesale power".[35/] In fact, the Board found that "Applicant's conduct amounted to a general refusal to wheel".[36/]

Therefore, the Applicant's assertion in support of the Licensing Board's finding that the "bottleneck" cases do not apply to this proceeding because the smaller systems can interconnect economically for coordination purposes[37/]

35/ CP Brief 105, f.n. 95.

36/ NRCI-75/7, 29 at 99 (1975).

37/ Consumers' contention, on page 125 of its Brief that the Staff concedes that the Company's wheeling policies facilitate coordination among the smaller systems is clearly incorrect. Consumers, in coming to this conclusion, cites page 74 of the Staff's Post-Hearing Brief. There is absolutely no relationship between Consumers self-serving statement on page 125 of its Brief and the Staff's analysis on page 74 of its Post-Hearing Brief. The questions and responses to and by Mr. Aymond on page 74 of the Brief merely indicate that Mr. Aymond recognizes the importance of small utilities being able to "work together" and that he thought that access to transmission services could be worked out for the systems. Consumers reading of this analysis and its conclusion that the Staff concedes that the Company's wheeling policy facilitates coordination among the smaller systems is not supported by the record.

is in error.[38]

Accordingly, the "bottleneck" theory advanced by the Staff is fully applicable to this proceeding.[39]

F. Contrary To Consumers' Assertion, "Wholesale" Purchases Do Not Provide Full And Appropriate Access To "Any Economies Attainable Through Nuclear Generation"

Contrary to Consumers' assertion and the Licensing Board's finding, "wholesale"[40] purchases do not provide full and appropriate access to the economies attainable through nuclear generation.[41]

"Wholesale" power service represents a composite of past management decisions and reflects the cost associated with many different generating sources and transmission facilities. Some of the management decisions may have been technically or economically incorrect thereby causing a financially unstable economic situation. Especially important and enlightening to this discussion is the fact that Consumers concedes, on page 103 of its Brief, that its financial condition is depressed and in serious jeopardy.

38/ NRCI-75/7, 29 at p. 98 (1975). For a discussion of the high cost of building transmission lines and the plight of the smaller systems see Staff's "Brief in Support of Its Exceptions", Nov. 13, 1975, beginning at p. 51 and Staff's "Proposed Findings of Fact and Conclusions of Law", October 8, 1974, p. 86.

39/ This is especially true in the context of a section 5 FTC Act case. See Section A above.

40/ A "wholesale" purchase is distinguishable from other types of "bulk power" transactions. See Staff's "Brief in Support of Its Exceptions", Nov. 13, 1975, pp. 4-5.

41/ See CP Brief, p. 120 and NRCI-75/7, p. 111. The Licensing Board held that "wholesale" purchases do provide adequate access to nuclear power for systems competing with Consumers. The Staff submits that, as is demonstrated by the evidence in this proceeding, the Licensing Board's finding is clearly incorrect.

A "wholesale" power purchase, as acknowledged by all parties to this proceeding, represents the cost associated with system operations rather than the costs associated with the operation of only the nuclear plant. Therefore, if the Company has made poor business judgments and has made bad management decisions, this will be reflected in the cost of its "wholesale" power which the smaller system must buy. The only alternative, as argued by Consumers and adopted by the Licensing Board, [41A/] is that the smaller systems can individually generate for themselves. Self-generation for the smaller systems is not a viable alternative. This is precisely why a "wholesale" power purchase does not represent full and appropriate access to the economies attainable through nuclear generation. [42/]

The "wholesale" purchase alternative, as envisioned by Consumers and the Licensing Board, is clearly illusory. Congress, neither in the statute nor in the legislative history, has indicated that it intended that a "wholesale" power purchase, which reflects system wide costs, would be full and appropriate access to nuclear facilities, as contempated under section 105(c) of the Act.

Accordingly, the assertion by Consumers and the finding by the Licensing Board that a "wholesale" purchase provides full and appropriate access to any economies attainable to nuclear generation are clearly erroneous.

41A/ NRCI-75/7 p. 112 and CP Brief, p. 114.

42/ See note 1, supra, pp. 66. See specifically, Muller, Prepared Testimony (PT), p. 35 and Gutman, PT, p. 28.

Conclusion

For the reasons set forth in this Brief, and the Staff's previous filings, the Staff submits that the continuation of the construction permits issued to Consumers Power for the Midland Plant, Units 1 and 2 without antitrust conditions would maintain a situation inconsistent with the antitrust laws.

Respectfully submitted,

Robert J. Verdisco
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 2nd day of March 1976.

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CERTIFICATE OF SERVICE

I hereby certify that copies of REPLY BRIEF OF THE NUCLEAR REGULATORY COMMISSION STAFF, dated March 2, 1976, in the captioned matter, have been served upon the following by deposit in the United States mail, first class or air mail, this 2nd day of March 1976:

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