

required of those utilities which apply for nuclear reactor construction permits and operating licenses. Many of these issues are discussed in the Appeal Board's 432-page decision and, almost invariably, are resolved against the positions that have been espoused by applicant-utilities. The Commission has never addressed most of these issues.^{1/} ALAB-452 presents both an opportunity and a pressing need for it to do so now.

Immediate review of ALAB-452 will help to alleviate the present uncertainty about the Commission's antitrust authority and responsibility which currently prevails. Two other antitrust proceedings which raise these issues are awaiting review by the Appeal Board.^{2/} The Midland decision is subject to remand, and in fashioning license conditions the remand tribunal will be guided by ALAB-452 unless that decision is modified or reversed on appeal. If, as we believe, the Appeal Board's decision misconceives the mandate of Section 105(c), misreads the antitrust laws, and is misinformed about crucial aspects of the electric utility industry, the Commission's failure to correct these infirmities

^{1/} The only Commission discussion of its authority and responsibilities under Section 105(c) involved two proceedings at a prehearing stage which involved petitions to intervene and initiate proceedings. See Louisiana Power & Light Co. (Docket No. 50-382A), 6 A.E.C. 48 and 6 A.E.C. 619 (1973); Houston Power & Light Co., et al. (Docket Nos. 50-498A and 50-499A), 5 NRC 1303 (1977).

^{2/} Toledo Edison Co., et al. (Docket Nos. 50-346A, et al.); Alabama Power Co. (Docket Nos. 50-348A, 50-360A).

quickly will lead to further, time-consuming litigation in these ongoing proceedings. Thus, for example, were the Commission to defer review until after the remand proceedings in Midland and thereafter were the Commission to modify some of the findings of ALAB-452, another remand to consider license conditions appropriate to the modified order would be required.^{3/}

Deferral of review would needlessly waste not only administrative resources but also resources of lower Michigan's electric rate-payers. The Company and the intervenors herein are electric utilities whose costs -- including legal expenses to pursue the instant litigation -- are borne by their customers. A Commission decision to defer its review would therefore unduly burden these customers.

In addition, the nuclear industry needs to know as soon as possible whether ALAB-452 reflects the Commission's views about the nature and scope of its responsibilities under Section 105(c). In our view, ALAB-452 sanctions an overly-broad inquiry into irrelevant historical events, ignores important aspects of the present and future competitive relations among utilities, and establishes antitrust standards that no large investor-owned utility can satisfy

^{3/} As one antitrust licensing board has observed, "where the evidence does not prove inconsistency with the antitrust laws, no license condition is appropriate as to that aspect of the market situation." Alabama Power Co., infra, Initial Decision (Antitrust, Phase II) 5 NRC 1482, 1487 (1977) (appeal pending).

unless it agrees to actions which will jeopardize its ability to serve its customers reliably and economically. In planning its future generation needs and weighing the nuclear option, Consumers Power and other utilities are entitled to know whether their conduct and policies will be subjected to the type of review and sanctions which are reflected in ALAB-452. Particularly in the near future, when many utilities will be making final "go or no go" decisions whether to proceed with construction of presently-deferred nuclear units, the need for immediate Commission resolution of issues raised by ALAB-452 is acute. In these circumstances, deferring consideration of ALAB-452 until the completion of the Midland remand proceedings and almost certain further appeal board review processes -- which could consume several years -- would be contrary to the public interest.

B. The Remand Proceedings will not Moot or Otherwise Impact upon the Appeal Board's Decision in ALAB-452

In ALAB-452, the Appeal Board found that the activities of Consumers Power under the Midland licenses would maintain a situation inconsistent with the antitrust laws. In reaching this conclusion, the Appeal Board reversed numerous factual findings of the Licensing Board favorable to the Company and ruled that the Company had violated the "letter and spirit" of the antitrust laws (p. 420). This ruling is clearly ripe for review at this time.

The Appeal Board's decision that the Company violated the antitrust laws is final in the sense that it will not be subject to modification or reconsideration in the future remand proceedings which the decision contemplates.^{4/} Further, the Company's basic need to seek review of ALAB-452 will be unaffected by the outcome of the remand proceedings. The findings and conclusions of the Appeal Board did much more than "trigger" the Commission's right to impose license conditions under Section 105(c). These findings and conclusions besmirch the good name^{5/} of a company whose business requires the continued confidence of the public and the governmental institutions which regulate its affairs. They also may subject the Company to potentially onerous private treble damage anti-trust litigation. Thus, even were the instant remand proceeding to produce license conditions to which Consumers Power does not object, the injury to the Company wrought by ALAB-452 -- and its need to pursue administrative and judicial redress -- would remain.

^{4/} See Brown Shoe, Inc. v. United States, 370 U.S. 294 (1962). There, the Supreme Court held that where a trial court rules that the defendant has violated the antitrust laws, but has not yet specified the remedy to be imposed, the ruling is final and subject to appellate review. The Court stated that, under the "settled course of the Court's practice," it "has consistently reviewed antitrust decrees contemplating either future divestiture or other comparable remedial action prior to the formulation and entry of the precise details of the relief ordered." 370 U.S. at 309-310 (emphasis added).

^{5/} Until the Midland proceeding, Consumers Power had never been accused, much less found guilty, of violating the antitrust laws in any judicial or administrative forum.

Accordingly, ALAB-452 is not an interlocutory ruling which additional proceedings may render moot. The future proceedings envisioned by ALAB-452 will neither change its findings about the Company's alleged anticompetitive conduct nor affect the Company's need to seek review of those harmful (and, we believe, erroneous) findings. Hence, there is no reason to defer review of ALAB-452, and indeed every factor affecting the public interest calls for early Commission resolution of the basic legal, policy and factual issues generated by the Section 105(c) review process.

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January 27, 1978

CERTIFICATE OF SERVICE

I hereby certify that I have this 27th day of January, 1978, served a copy of the foregoing COMMENTS OF CONSUMERS POWER COMPANY IN RESPONSE TO COMMISSION ORDER OF JANUARY 13, 1978 by mail, postage prepaid, upon the following persons:

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