UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-329A
CONSUMERS POWER COMPANY	)	50-330A
	)	
(Midland Plant, Units 1 and 2)	)	

REPLY BRIEF FOR THE AEC REGULATORY STAFF

Robert J. Verdisco
Counsel for AEC Regulatory Staff

November 25, 1974

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MISCELLANEOUS

Report, Joint Committee on Atomic Energy, No. 91-1247, 91st Congress, 2d Session, September 29, 1970, pp. 14 and 15 (1970).

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ATOMIC ENERGY COMMISSION

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REPLY BRIEF FOR THE AEC REGULATORY STAFF

This reply brief is filed by the AEC Regulatory Staff (Staff) in answer to Consumers Power Company's (hereafter sometimes referred to as Applicant) "Brief in Support of its Proposed Findings of Fact and Conclusions of Law" (Brief) and its "Proposed Findings of Fact and Conclusions of Law" (Findings or Conclusions). It is directed principally to arguments and authorities raised by the Applicant that were not addressed in the Staff's Brief.

I. Consumers Power Company Mischaracterizes The Staff's Theory Of This Case

Consumers mischaracterizes the Staff's theory of this case (C.B. pp. 2 and 79). 1/ The Applicant would narrow the Staff's position in this proceeding to such an extent that in effect monopolization of bulk power supply in violation of Section 2 of the Sherman Act (C.B. p. 2) would be the legal standard that must be applied in this proceeding. The Applicant, in pursuing its position, states that with minor exceptions the other parties have relied upon a theory of "monopolization" and in effect have charged the Applicant with a violation of Section 2 of the Sherman Act (C.B. p. 79). These contentions are not consistent with the Staff's position.

1/ Throughout this reply references to the Consumers Brief will be designated as C.B. p.

In its Brief (C.B. p. 79, F.N. 2), the Applicant makes reference to the fact that the Staff appears to rely in part upon Section 5 of the Federal Trade Commission Act (FTC Act). The Staff not only appears to rely upon Section 5 of the FTC Act but has, on numerous occasions, including its pretrial brief, affirmatively and clearly indicated that it is relying on Section 5 of the Federal Trade Commission Act for the purposes of establishing an inconsistency with the antitrust laws in this proceeding.

The Staff, while recognizing that there are several "antitrust laws" which the AEC affirmatively considers under Section 105a of the Atomic Energy Act, believes that the granting of an unconditioned license would maintain a situation inconsistent with the FTC Act. 2/ The Staff has referred to cases decided under the Sherman Act and the Clayton Act in order to establish the policies that have developed under these laws and to set a framework for the Staff's dominance theory. While the evidence developed during the hearings in this matter may amount to a violation of the Sherman Act it is the Staff's position that such a determination is not necessary for the finding of an inconsistenty under the "unfair methods of competition" standard of Section 5 of the Federal Trade Commission Act (See pp. 160-186 of the Staff's Brief).

The Staff submits that the standard of proof required under Section 5 of the Federal Trade Commission Act is significantly different than that required under Section 2 of the Sherman Act. Congress, in enacting Section 105 of the Atomic Energy Act as amended, gave no indication that Section 5 of the FTC Act should be given less consideration than any of the other

2/ See the Staff's pre-trial brief, p. 46.

antitrust laws enumerated in Section 105a of the Atomic Energy Act in determining whether or not inconsistencies with the antitrust laws exist. The Staff requests that this Board and the Commission understand that the characterization of the Staff's position is not correct and that the correct Staff position with respect to the applicability of Section 5 of the FTC Act is as stated in our Proposed Findings at pps. 16, 17, 160-182 and above.

II. Consumers Power Company Has Distorted The Scope And Purpose Of Section 5 Of The Federal Trade Commission Act

Consumers Power Company's analysis of the Federal Trade Commission Act distorts the scope and purpose of Section 5 of that Act (C.B. pp. 50-57 and Proposed Conclusion of Law 2.08). Consumers asserts that the AEC "...should limit its reliance on this statute [Section 5 of the FTC Act] to the parameters of the section established by the Federal Trade Commission", and "[T]hat the Commission has held the unfair competition provision of Section 5 contravened only where the activity in question would have violated the Sherman Act or Clayton Act but an essentially technical element of violation was absent". These assertions are patently erroneous.

The Supreme Court, beginning with FTC v. Cement Institute [3/] 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

3/ 333 U.S. 683 (1948).

> 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. 4/

In FTC v. Motion Picture Advertising Service Company, Inc., 5/ 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). 6/

In Atlantic Refining Co. v. FTC 7/ the Court held that:

> All that is necessary in §5 proceedings ... is to discover conduct that runs counter to the public policy declared in the act. 8/

4/ 333 U.S. at 694.

5/ 344 U.S. 392 (1953).

6/ 344 U.S. at 394-395 (1953).

7/ 381 U.S. 357 (1965).

8/ Id. at 369.

In FTC v. Brown Shoe, 9/ 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. 10/

And finally in FTC v. Sperry and Hutchinson Company, 11/ 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 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. 12/

Indeed, Section 5 of the FTC Act, because of its broad coverage, gives the Atomic Energy Commission a broad basis for antitrust analysis which is consistent with Section 105 of the Atomic Energy Act (See Staff Brief, pp. 160-165).

9/ 384 U.S. 316 (1966).

10/ Id. at 321.

11/ 405 U.S. 233 (1972).

12/ Ibid. at 244.

Consumers also would have this Board believe that the statutory authority to apply Section 5 of the FTC Act is limited "because of the FTC's unique Section 5 expertise, other tribunals have declined to intrude [or have been barred from intruding] into the same area" (C.B. p. 52). The Staff while finding no reference in the legislative history of Section 105 that would so limit the AEC also has been unable to find any precedents to support such a conclusion. The staff urges that such was not the intent or purpose of Congress in including the Federal Trade Commission Act as one of the antitrust laws to be considered by the Commission.

In support of this contention Consumers relies upon United States v. St. Regis Paper Co. [13/] and Halloway v. Bristol-Meyers Corp. [14/] (C.B. pp. 53-54). Neither of these cases is relevant in determining what is or is not inconsistent with Section 5 of the Federal Trade Commission Act. In addition, they are incorrectly cited as support for a limitation on the statutory authority of the AEC to apply Section 5 to 105 proceedings.

The St. Regis case involved a complaint by the Attorney General for civil penalties under the FTC Act. The FTC had already issued a consent cease and desist order prohibiting St. Regis from engaging in certain concerted practices. Subsequently the Attorney General brought suit to recover civil penalties under the FTC Act. The appellant contended that the Attorney General had no power to proceed under Section 5 absent an FTC certification. The court concluded that it must look at the legislative intent and purpose of the FTC Act. It concluded that Congress intended §16 of the FTC Act to be jurisdictional, not directory, and that its

13/ 355 F. 2d 688 (2d Cir., 1966).
14/ 485 F. 2d 986 (D.C. Cir., 1973).

requirements must be satisfied by the FTC prior to the commencement of a civil penalty suit by the Attorney General under Section 5(1). 15/

This case has absolutely no meaningful connection to this proceeding. The AEC statutory standard established by Congress is clear, explicit and affirmative. The AEC's "...focus for the Commission's finding will, for example, include consideration of the admonition in Section 5 of the Federal Trade Commission Act..." 16/ (See pp. 5 and 20 of the Staff's Brief). There is no question that under Section 105a and 105c(5) of the Atomic Energy Act that the Atomic Energy Commission may review the antitrust impact of nuclear power plant applications in light of Section 5 of the FTC Act.

Even less helpful to Consumers is the Halloway case which deals with private actions to vindicate rights asserted under the FTC Act. Consumers attempt to analogize the legitimacy of private actions under the FTC Act with the affirmative statutory mandate of the AEC to consider Section 5 is without merit. It is clear from a reading of the two cases cited that the Applicant's conclusions are erroneous.

In conclusion, the Applicant has failed to present a convincing argument against the use of Section 5 of the FTC Act as proposed by the Staff in its Brief. The cases relied on by the Applicant not only distort the scope and purpose of Section 5 of the Federal Trade Commission, but to the contrary, each of the cases cited by Consumers supports the Staff's theory of this case under Section 5 of the Federal Trade Commission Act.

15/ 355 F. 2d at 699.

16/ Report, Joint Committee on Atomic Energy, No. 91-1247, 91st Congress, 2d Session, September 29, 1970, pp. 14 and 15 (1970).

III. The "Bottleneck" Theory Advocated By The Staff Is An Appropriate Theory In The Context Of This Proceeding

Consumers Power Company erroneously contends that the "bottleneck" theory is inapplicable to the facts in this proceeding. The Applicant characterizes "as novel" the Staff's thesis that because Consumers owns most of the high voltage transmission lines and all of the nuclear generation units in the geographic market, it should be deemed to possess monopoly power under a "bottleneck" or "unique resource" theory (C.B. p. 146).

Applicant claims that (1) it has never denied reasonable access to nuclear generation or transmission (wheeling) services (2) nuclear generation and transmission services are not "unique" or "essential" resources (3) the Company's wheeling policies, set forth for the first time during the course of this proceeding, constitute access to wheeling services subject to only a few reasonable terms and conditions and (4) the Company does not possess monopoly power over nuclear generation or transmission services because there are other adequate substitutes for these resources available to small systems in the relevant bulk power market - namely self-generation, wholesale purchases from Consumers, and under appropriate circumstances, coordination power (C.B. 145-151; Findings 3.24 and 4.65 thru 4.71). In addition, Consumers claims that it has not engaged in practices or policies whose purpose or effect is anticompetitive or otherwise unreasonable (Consumers' Findings 4.13, 4.51).

Based on these claims the Applicant concludes that the "bottleneck" theory is inapplicable to this proceeding (Consumers' Conclusion 4107). The Staff submits that this conclusion is factually and legally erroneous. In particular, the Staff has shown the following:

(1) High voltage transmission is an essential resource in developing and operating an economical bulk power supply system.

(2) The alternative sources of bulk power available to small systems that are cited by Applicant are not adequate substitutes in the light of the commercial realities of the situation.

(3) Nuclear power has "unique" characteristics.

(4) Without access to high voltage transmission, access to nuclear power and effective coordination of such power is prohibited.

(5) Applicant owns, or controls access to, all the nuclear power and almost all the high voltage transmission in the relevant geographic market.

(6) In view of (1) through (5), a bottleneck situation exists in which the Applicant occupies the strategic position and thereby dominates the bulk power services market.

(7) The "bottleneck" theory advanced by the Staff is legally applicable to the facts in this proceeding.

(8) Applicant's dominance in conjunction with its operating policies regarding these essential resources constitutes a situation inconsistent with the antitrust laws based on the reasonable probability standard of proof.

A. High Voltage Transmission Service Is An Essential Resource

Contrary to what the Applicant would have this Board and the Commission believe, access to transmission services is an "essential" resource. Transmission service is essential in order for electric utilities to fully and freely participate in the establishment of an economical bulk power supply system and to assure the availability of a full range of bulk power supply options. Moreover, these services are necessary in order to insure that small systems in the relevant geographic market have access to the benefits and economies associated with nuclear technology.

These conclusions are based primarily on the fact that the effective use of alternative sources of bulk power supply is dependent upon access to a transmission system. Without such access a system is forced into a situation in which its opportunities to consider the full range of alternative sources of bulk power supply, including nuclear power, and its opportunities to compete for wholesale customers are limited. In addition, competition within the relevant geographic market is substantially restricted when one entity maintains control over high voltage transmission. (Staff Finding XI-15 thru 44; XI-5). In particular, the controlling entity has the ability to (1) determine new entry into the bulk power market by neighboring systems, (2) eliminate potential alternative suppliers, and (3) dictate which options a small system will be able to consider in planning for load growth (Staff Findings XI-34 through 40).

The uncontradicted record shows that Consumers owns and controls approximately 98% of the high voltage transmission and all extra high voltage transmission in the relevant market (C.B. 145-146; Staff Findings VIII-12-18 and IX-1-4). The costs associated with high voltage transmission effectively prohibit the construction of such lines by small systems (Staff Findings XI-42-43). As a result, Consumers through its control of transmission, is able to effectively control access to bulk power in the relevant market (Staff Findings XI-15-40).

B. Nuclear Power is a "Unique Resource"

Nuclear power has unique characteristics. The importance of these unique characteristics has been recognized by the Applicant. According to Consumers' President, nuclear power will be the lowest cost power available in the foreseeable future (Staff Finding X-3). Access to nuclear power is equally important in considering environmental problems and the unavailability of fossil fuels (Staff Finding XI-26). In order to enjoy the benefits of nuclear power and the economies of scale associated with it, nuclear power must be built on a large scale (Staff Finding X-1-2). Smaller systems cannot independently participate in nuclear generation because they cannot afford the costs associated with it and do not have the load it requires (Staff Findings X-4-9). In addition to being a "unique resource" nuclear power participation requires that a system have access to a high voltage transmission system (Staff Finding XI-25). As stated above a small system, because of the costs associated with building a transmission network, is effectively prohibited from constructing its own

high voltage transmission lines. Therefore, it is effectively denied access to the benefits of nuclear power.

C. In Order to Assess the Impact of Applicant's Control Over High Voltage Transmission and Nuclear Power, a Relevant Geographic Market Which Reflects the Commercial Realities of the Situation Must Be Identified

In order to determine the existence of bulk power supply options, an analysis of alternatives within a geographic market must be undertaken. Section 7 of the Clayton Act is particularly significant to such an analysis because it is concerned with the impact upon market structure and is the basis upon which the staff analyzes the facts in this case (Staff Brief pp. 21-35).

The Staff maintains that the relevant market should include the full range of alternatives to bulk power supplies as permitted by the "commercial realities" in this proceeding. Similarly, the Applicant contends that, for antitrust purposes, relevant markets should be defined to reflect the "commercial realities" of the products sold and the geographic area in which such products are exchanged (Consumers' Conclusion 3.01). However, the Staff takes issue with the limited and restrictive analysis of Applicant's view of the "commercial realties" of this proceeding, through the device of artifically segmenting the bulk power services market (Consumers' Conclusions 2.56 thru 3.09).

Consumers' expert economic witness, Dr. Joe Pace, has concluded that the relevant product market for the purposes of this proceeding "... is bulk power supplied to electric utilities for distribution and resale to ultimate customers" (Pace Prepared Testimony p. 33). Dr. Pace further testified:

> To sum up, the evaluation of any power supply activity should be couched in the bulk power supply market and should consider all available alternative sources of bulk power supply including self-generation, interconnections and total or partial wholesale purchases (Pace Prepared Testimony p. 35).

The Staff is in substantial agreement with Dr. Pace's definition of the product market.

The Applicant further contends that products are in the same market if they are 'reasonably interchangeable' and that interchangeability is measured in terms of options readily available to most customers in the market place (Consumers' Conclusion 3.02). The Applicant would have this Board and the Commission view three [16a/] "so-called reasonably interchangeable" sources of bulk power within the framework of an artificial geographic market, created by Consumers' through its control of high voltage transmission services (Staff's Findings VIII-12 thru VIII-18 and IX-4). The Board would be viewing a situation in which some small systems generate bulk power and others purchase bulk power from the Applicant. What the Board will not see is the potential for these systems to purchase power from or coordinate power with systems other than Consumers or to freely coordinate power needs among themselves (Staff's Findings XI-31 and XI-32). Likewise the Board will not see the potential situation in which these small systems could become realistic competitors for the Applicant's wholesale customers (Staff Proposed Findings XI-4 -

16a/ These sources of power allegedly available to small systems include self-generation, wholesale purchases from Consumers, and under appropriate circumstances, coordination power (C.B. p. 151).

6, XI-29 thru XI-32 and XI-36).

Applicant defines the geographic market as "that market in which the Company's small neighbors look for their bulk power supply requirements". (C.B. p. 81; Finding 3.16). However, careful reading of several Supreme Court decisions under Section 7 of the Clayton Act demonstrate that this definition falls considerably short of completeness. 17/ For example, in U.S. v. Philadelphia National Bank the Court held that:

> ...the area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates and to which the purchaser can practicably turn for supplies. 18/

As the evidence indicates, small systems in the relevant geographic market could and would practically turn to alternative sources of bulk power were it not for Applicant's unreasonable use of its control over high voltage transmission (Staff Findings XI-34 thru 40). For example, the president of Alpena stated that:

> "If Alpena had access to Consumers' high voltage transmission system it would have the alternative of going in with a group of smaller utilities or. . . we could go to Detroit Edison, I&M, anybody, and ask them for wholesale power. (Staff Proposed Finding IX-31).

17/ See also Brown Shoe v. United States, 370 U.S. 294 (1962); United States v. Aluminum Company of America, 377 U.S. 271 (1964)

18/ 374 U.S. 321 at 359 (1962).

Such a broadening of alternatives is consistent with what Applicant believes is good business practice (Staff Findings XI-15 and XI-16).

Were Applicant's definition of a relevant market deemed to be proper, this Board would be forced to study a small, self-contained microcosm, bounded and determined only by the Applicant's private interest. Adoption of this definition would preserve the stranglehold that Applicant maintains over competition. Applicant could continue to dictate the bulk power supply relationships that evolve and will clearly adopt those policies which best satisfy its interests rather than the public interest.

As noted by the Board in the October 24, 1974 Louisiana Power and Light Memorandum, the assumption that Applicant has the right to determine and decide what is appropriate for other entities is erroneous (Waterford Memo, October 24, 1974, p. 26).

Therefore, the Staff submits that the outer boundaries of the geographic market must be measured not by the artificial supply situation as it presently exists, but rather by the bulk power supply system that could practicably be turned to by the small systems if they had access to high voltage transmission services. (Staff's Proposed Finding III-4). In this way the geographic market will include those utility systems who are "commercially realistic" potential sources of bulk power. With this geographic market in mind, the Board can properly evaluate Applicant's contention that small systems have access to a number of alternative sources of bulk power supply.

D. Applicant's Claim That Substitutes for Access to High Voltage Transmission and to Nuclear Power are Available, Is Not Supported By the "Commercial Realities" in this Proceeding

The Applicant attempts to defend its control over high voltage transmission by arguing that even though this control is evident, small systems in the relevant market have access to an appropriate number of alternative sources of bulk power supply. Specifically, the Applicant contends that self-generation, wholesale purchases from Consumers and under appropriate circumstances coordination of power, are adequate substitutes for access to nuclear power and to full and unlimited opportunities to coordinate development and operations through access to transmission services. The Applicant further contends that in any event appropriate access to transmission and nuclear power is available through the Applicant's wholesale service (Consumers' Finding 3.30). While these three alternatives are theoretically interchangeable and could, under some circumstances, meet a specific need or needs of a small system, they are, under the "commercial realities" of this case, illusory (See Section III-C, infra).

First, economically baseloaded self-generation, including nuclear generation, is not a viable alternative to a small system without access to transmission services. Consumers' contentions (Consumers' Finding 2.65) that managers and consulting engineers of the small systems in Lower Michigan often conclude that self-generation is their most economical source of bulk power is illusory for, in most cases, as described below, it is their only "choice" (Staff Findings XI 4-6; 21-28; 34-40).

Second, wholesale power purchases may or may not be the lowest cost alternative to a small system. A small system needs to contemplate the possibility of all possible alternatives if it is not satisfied with being a wholesale customer and receiving service from the Applicant under its standard terms and conditions for such service. In addition, wholesale service reflects all system characteristics. For example, wholesale power service represents a composite of past management decisions and reflects the costs associated with many different generating sources and transmission facilities. Some of these decisions may have been technically or economically incorrect. Therefore a small system would be forced to pay a penalty for any erroneous company decision when purchasing the "bundle" of services offered in a wholesale package (Staff Findings XI-29-30; Muller, Prepared Testimony, p. 35).

Third, coordinated power under circumstances envisioned by the Applicant is an illusory alternative in that the Applicant can dictate the terms and conditions of such coordination through its control of access to high voltage transmission. Without access to this essential coordinating medium,choice of coordinated development and operations by the small systems with either Consumers, systems other than Consumers or among themselves is effectively prohibited (Staff Findings XI-32-44).

As an indicator of the adequacy of these alternatives, Applicant points to the viability of the neighboring small systems. Applicant contends that there is no evidence that these systems require direct access to nuclear generation or transmission facilities, since the lack of such access has not threatened their financial or competitive viability (Consumers' Findings 3.30).

Staff submits such claims are not material to this case. It has been recognized that illegal activities do not become legal merely because they have been directed against a successful competitor. 19/

Therefore, the Board should conclude that the Applicant's control of high voltage transmission in light of the "commercial realities" in this proceeding is inconsistent with the policies underlying the antitrust laws.

E. Applicants' Policies Effectively Deny Access to the Benefits of Nuclear Power and High Voltage Transmission

Given a bottleneck situation, the operating policies of Applicant regarding access to essential resources is significant in the Board's determination.

Consumers, contrary to its contentions, has, through announced policies and its failure to define other policies, denied access to transmission services and nuclear power and has engaged in anticompetitive conduct. (Staff's Findings, XI-47 through 87). Applicant assumes that it has the right to decide what bulk power supply options are appropriate for other neighboring entities. Such a view has recently been rejected (Waterford Memo, October 24, 1974, p. 26).

19/ Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967). The Supreme Court held that "...the Court of Appeals placed heavy emphasis on the fact that Utah Pie constantly increased its sales volume and continued to make a profit. But we disagree with its apparent view that there is no reasonably possible injury to competition as long as the volume of sales in a particular market is expanding and at least some of the competitors in the market continue to operate at a profit" 386 U.S. at 702. See also the Waterford Memorandum of October 24, 1974, p. 26.

Moreover, Consumers' contention that its new wheeling policies, announced for the first time during the course of this proceeding, constitute a commitment to provide neighboring systems access to its transmission system subject only to a few reasonable terms and conditions (C.B. 146-147; Findings 4.66 thru 4.71) is patently unreasonable.

Condition number three, which assures that Consumers will not lose existing load, completely negates freedom of access to transmission service by small systems and permits the Applicant to retain its dominant role as to who and to what extent a small system can participate in the bulk power market (Staff Findings XIII-58-60; C.B. 147, Finding 4.68).[20/] Consumers claims that it should be able to veto transactions which result in a significant loss of existing load. Obviously competition may result in such a loss. However, Consumers, like Otter Tail Power Company [21/] should not be able to use the promotion of self-interest as a shield against competition. The antitrust laws assume that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency. [22/] Consumers' theory, like that of Otter Tail, collides with the policies underlying the Sherman Act (a fortiori Section 5 of the F.T.C. Act) as it is seeking to substitute for competition anticompetitive uses of its dominant economic power. [23/]

20/ Applicant's third condition under finding 4.68 and its fourth condition on page 147 of its brief are the same.

21/ In Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), District Court, found, and its findings were adopted by the Supreme Court, that Otter Tails' refusal to sell at wholesale or to wheel were solely to prevent municipal systems from eroding its monopolistic position (410 U.S. at 378).

22/ 410 U.S. at 380.

23/ Ibid.

F. A "Bottleneck" Situation Exists In Which Applicant Occupies a Strategic Position And, Therefore, Dominates The Relevant Market

By virtue of its transmission stranglehold the Applicant is able to determine who, to what extent, and in what form a small system will be able to participate in the bulk power market. Through its control of transmission services, as discussed above, Applicant, while contending that the small systems have three alternative sources of bulk power supply, effectively limits participation by small systems in the bulk power market to wholesale purchases from Applicant's system. Thereby, it can and does determine the extent to which competition in the bulk power market will emerge.

Any limitation by the Applicant on the ability of a small system to obtain alternative sources, and types, of bulk power supply in order to select the most economical one, is directly contradictory to the standard the Applicant applies to itself. Such a broad need for alternatives in order to make use of the most economical source is fully recognized by the Applicant's President and General Supervisor of Commercial Electric and Government Sales (Staff Findings XI-15-16). The only conclusion that can be drawn from this situation is that Consumers' control of high voltage transmission and the use of that control to limit the alternatives of potential competitors and customers is done in order to preserve the market held by the Applicant and insulate it from competitive erosion.

G. The "Bottleneck Theory Advanced By the Staff is Legally Applicable to the Facts in this Proceeding

Contrary to the Applicant's contention, the "bottleneck" theory advanced by the Staff is legally appropriate within the factual framework of this proceeding.

Applicant contends that because there are substitutes available for transmission services in the bulk power market it considers relevant, it does not possess "bottleneck" control over that resource (C.B. 151). This contention is incompatible with the factual situation in this proceeding. The relevant geographic market advanced by the Applicant is artificial and unduly restricts the range of bulk power alternatives the Board should consider given the "commercial realities" of this proceeding. The relevant geographic market which is commercially realistic is that market to which small systems could practicably turn for alternative sources of bulk power supply if they had access to Consumers' high voltage system (See Sections III - C and D, supra).

As stated above, Consumers owns and controls approximately 98% of the high voltage transmission in the relevant geographic market thereby giving it the ability to foreclose competition (See Section III-A, supra). Accordingly, it is within the framework of this control in the relevant geographic market that a legal analysis must be made.

A 98% control of an essential resource constitutes dominant power under the "reasonable probability" standard of Section 7 of the Clayton Act. 24/

Use of dominant power over a facility which cannot be practically duplicated by would be competitors is an illegal restraint of trade. 25/

Accordingly, Consumers' 98% control over high voltage transmission in the relevant market coupled with the inability of small systems to gain access to such essential transmission on reasonable terms constitutes an illegal "bottleneck" within the "commerical realities" of this proceeding as applied to established legal precedents and is inconsistent with the policies underlying Section 5 of the Federal Trade Commission Act.

24/ In International Boxing Club v. U.S., 358 U.S. 242 (1959) and United States v. Grinnell Corporation, 384 U.S. 563 (1966) 81% and 87% of the respective markets presumptively indicates monopoly power. A 90% share of the aluminum market constitutes monopoly power (U.S. v. Aluminum Company of America, 148 F. 2d 416 (1945); 30% of the commercial banking (U.S. v. Philadelphia National Bank, 374 U.S. 321 (1963) and a 65% market share, with the balance of the market divided among 50 other companies, particularly where the industry was dominated by the defendant's manufacturing process (U.S. v. Besser Manufacturing Process 343 U.S. 444 (1952) were held to be presumptively monopolistic. See also United Banana Company v. United Fruit Company, 362 F. 2d 849 (1966) and American Tobacco Company v. U.S., 328 U.S. 781 (1946).

25/ See U.S. v. Terminal Railroad Association, 224 U.S. 386 (1912); Associated Press v. U.S., 326 U.S. 1 (1945); Gamco, Inc. v. Providence Fruit Produce Building, Inc., 344 U.S. 817 (1952); Lorain Journal v. U.S., 342 U.S. 143 (1951). See also Staff Brief, pp. 170-181.

Respectfully submitted,

Robert J. Verdisco
Counsel for AEC Regulatory Staff

Dated at Bethesda, Maryland
this 25th day of November, 1974.

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ATOMIC ENERGY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of REPLY BRIEF FOR THE AEC REGULATORY STAFF, dated November 25, 1974, in the above captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 25th day of November:

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