UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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

MEMORANDUM CONSIDERING THE EFFECT OF COMMISSION'S OPINION IN THE MATTER OF LOUISIANA POWER AND LIGHT COMPANY

Pursuant to this Board's Order of October 15, 1973, Applicant hereby submits a memorandum considering the meaning of, and effect on this proceeding of, the Commission's October 1, 1973 Memorandum Opinion in the Louisiana Power and Light Company proceeding.

I.

The LP&L order holds that the proper scope of inquiry under Section 105c is not the entirety of Consumers' generation, transmission, bulk power supply and retail distribution acitivites, but the lawfulness of specific arrangements for providing access to the power from the particular nuclear generating units. The Justice Department and intervenors have contended that because the Midland unit will become a part of Consumers' total electric utility system, every aspect of this system and its operation is subject to antitrust review in this proceeding. However,

the Commission's LP&L Order emphasizes that a nexus must be established between the operation of, and power generated by, the Midland units and any alleged antitrust issues which have been raised in these proceedings. (In the Matter of Louisiana Power & Light Co., AEC Dkt. No. 50-382A, October 1, 1973, Memorandum Order, p. 3) As the Commission states:

> "[105a] does not authorize an unlimited inquiry into all alleged anticompetitive practices in the utility industry. The statute involves licensed activities and not the electric utility industry as a whole. If Congress had intended to enact a broad remedy against all anticompetitive practices throughout the electric utility industry, it would have been anomalous to assign review responsibility to the Atomic Energy Commission, where regulatory jurisdiction is limited to nuclear facilities. It is the status and role of these facilities which lie at the heart of antitrust proceedings under the Atomic Energy Act." (at p.5)

Thus, it is clear at the outset that the Commission, in its first substantive statement on its new "antitrust" review proceedings, has rejected the basic Department of Justice and intervenor position. It remains to be considered what more limited rules or guidelines should govern the scope of these proceedings, under the teaching of the LP&L order. To that, we now turn.

The Commission's LP&L Memorandum and Order provides an authoritative construction of the scope of AEC "antitrust" proceedings in the light of the paramount Congressional purpose in enacting the 1970 amendments. The Commission emphasizes that focus must be placed on access to nuclear facilities, which it defines as access to power from the specific licensed facility at such time as it goes into operation. Any alleged inconsistency with the antitrust laws must have a sufficient "nexus" with the issue of future access to warrant AEC consideration.

While the Commission also emphasizes that the proper scope of review must be determined on a case by case basis, its order provides guidance by announcing certain governing principles, which can be set out as follows:

(1) The purpose of the 1970 amendments was to insure insofar as possible widespread access to "power produced by nuclear facilities" (Order p. 4). Alleged anticompetitive practices with no direct bearing or effect on the question of future access to the power of a particular licensed facility are irrelevant, and not subject to review.

(2) Matters such as pooling, wheeling, and interconnecting (involving access to transmission) are "more appropriate for consideration" in instances where the system in question was built in conjunction with the proposed nuclear facility, and not "long before" (Order p.6). The mere fact that alleged antitrust violation involves other aspects of the utility's operations (e.g. transmission or other generation) is not necessarily sufficient to bring it within the scope of the statute.

(3) The fact that a nuclear generating facility will be interconnected with other generating facilities as part of an integrated system, does not by itself supply a "nexus" to require review of alleged antitrust inconsistency not directly involving the "activities under the license," i.e. the construction and operation of the nuclear generating facility (Order p.7).

(4) There must be a "substantial," or "meaningful," or "reasonable" "nexus" or "connection" between the alleged antitrust inconsistency and the operation[1/]

1/ In this proceeding, as well as in every other of which we are aware, no antitrust issues have been presented regarding the construction per se of a nuclear power facility.

of the licensed facility (Order pp. 7-8). That is, an alleged antitrust violation which, even if established, could not prevent intervenors or others from obtaining access to power from the nuclear generating plant involved would be irrelevant. Thus, alleged past refusals to interconnect, to wheel power, or coordinate development of non-nuclear facilities, would be irrelevant, unless it could be shown that these alleged refusals would somehow block or prevent the complainants from adequate access to such power from the instant plant.

Applying the foregoing guidelines to the allegations and factual circumstances of the instant case, it is submitted that the only substantial and relevant question is what form of access to the Midland plant's power will be adequate and appropriate taking account of all pertinent laws and facts.

First, only two of the license conditions sought by the Department of Justice or the intervenors bear on this issue: namely, the demand for unit power purchases from the Midland units and/or the demand for equity participation in the Midland units. Applicant contends, and will seek to prove, that its regulated, wholesale rate (which incorporates automatically any and all benefits from large-scale nuclear power generation) provides a fully adequate form of access. It also contends that the forms of "access" sought

by the Department of Justice or the intervenors are not only not required by the Act, but are actually anticompetitive, unduly discriminating, wasteful and potentially unlawful. The Department and intervenors contend otherwise.

Restricting further proceedings to hearing and decision of this single issue will greatly reduce the scope and complexity, and hence the length and difficulty of this proceeding. Most of the voluminous discovery which has been obtained by the Department of Justice and intervenors against Applicant involved Applicant's relationship with neighboring utility systems over a past twelve year period, including alleged refusals to interconnect or coordinate development, and other allegedly anticompetitive practices.

None of these prior events, it is submitted, have a sufficiently "substantial," "meaningful" or "reasonable" connection or nexus to the foregoing issue of what <u>form</u> of access is required in the future to carry out the Congressional intent.

Second, the Consumers Power electric utility system is a mature, highly integrated bulk power and distribution network which long antedates the application here in issue. Addition of Midland will require the construction of only 28 miles of transmission lines compared with the 4661 miles which Applicant will have

in service.[2] The addition of the Midland units --given the large scale of the existing system-- cannot basically change the configuration or modus operandi of the system, nor can they substantially affect its interface with adjacent systems. Hence, applying the Commission's guideline that "denial of access to transmission systems would be more appropriate for consideration where the system were built in connection with a nuclear unit than where the systems solely linked non-nuclear facilities and had been constructed long before application for an AEC license," it can be seen that "no meaningful tie," in the statutory sense, exists between Midland and the alleged activities involving Applicant's existing transmission system (Order p.6).

The sole change required by the LP&L order in this Board's general statement of the issues in its Order of August 7, 1972 would appear to be the substitution of "access to power from the Midland units" for "access to coordination."[3] However, the actual savings in time

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[2] Affidavit of Eugene H. Kaiser, attached hereto.

[3] There are set forth in the Board's prehearing conference order dated August 7, 1972:

> 6. The basic thrust of Justice's case is that (a) applicant has the power to grant or deny access to coordination; (b) applicant has used this power in an anticompetitive fashion against the smaller utility systems; (c) applicant's said use of its power has brought into existence a situation inconsistent with the antitrust laws, which situation would be maintained by activities under the licenses that applicant seeks. Neither the intervening parties nor the Atomic Energy Commission's regulatory staff enlarge this scope. Hence, the scope of the relevant matters in controversy is as herein outlined.

and simplification to the Board and all parties would be very great. The following topics, inter alia[4/] which, otherwise, will be extensively treated in testimony and exhibits, would be no longer relevant, and evidence concerning them inadmissible:

(1) The nature of the original 1962 Michigan Pool agreement

(2) The amended 1973 Michigan Pool agreement

(3) Access to the Michigan Pool

(4) Applicant's interconnection agreements with Lansing, Holland and the Muni/Coop pool

(5) Applicant's interconnection agreements with Ontario Hydro and the MIIO Group

(6) Applicant's alleged refusal to interconnect, and required terms of interconnection

(7) Applicant's course of dealings with neighboring utilities, including agreements, understandings, MPSC rulings involving retail customer allocations, and related topics

(8) Most aspects of retail competition between Applicant and other utilities

(9) Most aspects of wholesale competition between Applicant and other utilities

(10) Applicant's alleged acquisition policies

4/ In the time available, counsel have been unable to make a definitive analysis, and other issues may also be excludable.

(11) All issues connected with wheeling, except issues possibly arising with respect to wheeling of a power entitlement from the Midland units

(12) Comparative costs of nuclear and fossil fuel generation -- future fuel availability

(13) The viability of self-generation as an alternative bulk power source for the intervenors.

The issues still germane and triable under the LP&L ruling would, as stated, all relate to whether Applicant's wholesale rate provides an adequate form of access to power from the Midland units, or whether a more specialized and preferential form, i.e. unit power purchase or equity participation, is required by the statute. The sub-issues would include, inter alia:[5/]

(1) Relevant market analysis, but only insofar as it is germane to the foregoing issue

(2) Physical and economic structure of the electric utility industry but only as it relates to the foregoing issue

(3) Competitive viability of Applicant's customers under its wholesale rate

(4) Costs of the Midland unit compared with makeup of Applicant's wholesale rate

(5) Adverse impact of unit power sales from the Midland unit on Applicant's other customers and the public interest

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5/ See footnote, p. 8 supra.

(6) Adverse impact of second party equity participation in the Midland units on Applicant's other customers and the public interest.

We believe that further steps in the proceeding must be restricted to the foregoing issues under the Commission's LP&L Order. Furthermore, this narrower scope will greatly facilitate hearing and decision of what was threatening to become an unmanageable proceeding under the Department and Intervenors' boundless view of the issues. However, if the parties are able to proceed expeditiously to reduce the scope of their evidence and argument, it will be necessary for the Board to rule clearly and decisively on what issues are and are not germane. It is submitted that the standards herein set out are plainly called for by the LP&L Order, and will serve to clarify and expedite the formidable administrative task assigned the Commission by the 1970 amendments.

II.

While the LP&L Order speaks for itself, its essential conclusion is a finding of Congressional purpose embodied in the 1970 amendments. This finding is amply conformed by the legislative history of those amendments which demonstrate at a minimum, that Congress did not

believe that it was assigning the AEC comprehensive antitrust review authority. The following brief account of that history is intended to assist the Board in interpreting the Order, and to confirm its essential conclusions.

1. Prior Antitrust Review Standards

The original Atomic Energy Act of 1946 broadly directed the Commission to maximize competition in the exploitation of nuclear technology. Congress' concern was that the nuclear industry, which had been created through massive Federal effort and expense, would not become dominated by a handful of monopolistic firms to the exclusion of comparatively smaller entrepeneurs. While the distinction is admittedly difficult to apply with precision, it seems clear that Congress was focusing not on competition in the industries in which nuclear technology might be applied but rather on access to the technology itself, which was not to become the proprietary preserve of the few. 6/

6/ The original Atomic Energy Act of ~~1964~~ 1946 provided:

> "Where activities under any license might serve to maintain or to foster the growth of monopoly, restraint of trade, unlawful competition, or other trade position inimical to the entry of new, freely competitive enterprises in the field, the Commission is authorized and directed to refuse to issue such license or to establish such conditions to prevent these results as the Commission, in consultation with the Attorney General, may determine." §7(c), 60 Stat. 764

The Commission's responsibilities were modified considerably by the 1954 Act. The statutory revision first proposed in that year by the Joint Commission on Atomic Energy would have eliminated entirely the obligation of the Commission to consider or apply antitrust policy in licensing proceedings.[7] Upon the protest of several JCAE members and the Department of Justice, an alternative proposal was advanced under which antitrust considerations would have continued to be controlling, but with the power to make the requisite antitrust determinations removed from the AEC and given to the Federal Trade Commission.[8] The version initially passed by the Senate was similar but would have made the Attorney General the final antitrust arbiter.

The feature common to all these proposals was extinguishment of the Commission's authority to decide antitrust issues. Yet as finally enacted, the 1954 statute did preserve an antitrust role for the Commission. The new statute required the Commission, in commercial-licensing cases, to obtain the views of the Attorney General as to "whether insofar as he can determine, the proposed license

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7/ H.R. 8862, 83rd Cong.; S. 3323, 83rd Cong.

8/ H.R. 9757, 83rd Cong.; S. 3690, 83rd Cong.

would tend to create or maintain a situation inconsistent with the antitrust laws. ..." 68 Stat. 938. The range of the Commission's inquiry thus was narrowed considerably, and its former duty to treat competitive considerations as dispositive was eliminated. But the statute still provided no explicit standards.

The 1954 provision, like its predecessor, was never invoked. No applications for commercial licenses were filed prior to the 1970 amendments, and the Court of Appeals held that neither the 1954 provision nor antitrust policy in general required the Commission to take account of the antitrust laws when issuing research licenses. Cities of Statesville v. AEC, supra.

2. The 1970 Amendments

Congressional dissatisfaction with the workings of the research-commercial dichotomy eventually led to the 1970 amendments to Section 105c. The three competing bills proposing changes in the Atomic Energy Commission's anti-trust review obligations were: S. 212 (the Anderson-Aiken bill); H.R. 8289 (the Holifield-Price bill); and the Atomic Energy Commission's bill, H.R. 9647 (also introduced in the Senate as S. 1883). Each of these bills eliminated the distinction between research licenses and commercial licenses.

Both the Anderson-Aiken and Holifield-Price proposals would have authorized the Attorney General to advise and the Commission to consider whether "activities under any license would tend to create a situation inconsistent with the antitrust laws." H.R. 9647, the Commission's bill, provided for the Attorney General to advise the Commission whether "issuance of such license or activities for which the license is sought would tend to create or maintain a situation inconsistent with the antitrust laws." The Department of Justice endorsed H.R. 9647, even though the bill specified no precise criteria for the Commission's application of antitrust principles. The Department testified merely that the bill "would assure the applicability of the antitrust standard to all significant nuclear utilization and production facilities," including supply arrangements for the proposed units. Hearings on Prelicensing Antitrust Review of Nuclear Powerplants Before the Joint Comm. on Atomic Energy, 91st Cong., 1st Sess. 119, 121. (Acting Assistant Attorney General Comegys.)

The apparent absence of guidelines for the Commission in the proposed legislation troubled the Committee. One member of the Committee staff noted:

> "[T]here apparently are no other statutes, and no court decisions based thereon, to which the AEC could look for guidance in implementing and interpreting Section 105(c). The only analogous statute as far as I am aware, is the one you [the Acting Assistant Attorney General] mentioned, the Federal Property and Administrative Services Act. For the reasons indicated earlier, it probably would not afford much guidance." Hearings, p. 125.

After the JCAE hearings on the bills concluded, but while the bills were still pending before that Committee, the subject again arose during hearings before the Senate Antitrust & Monopoly Subcommittee. Apparently in response to the criticisms such as the foregoing, the Acting Assistant Attorney General testified that while:

> "antitrust review would consider the contractual arrangements and other factors governing how the proposed plant would be owned and its output used *** [,n]o broader scope of review is contemplated, ***.
>
> "We do not consider such a licensing proceeding as an appropriate forum for wide-ranging scrutiny of general industry affairs essentially unconnected with the plant under review." Hearings, p. 366.

This testimony was put into the JCAE hearing record by the American Public Power Association, as part of its written response to questions propounded by the

JCAE. Hearings, p. 336. Also called to the attention of the JCAE by the Public Power groups was the testimony of the AEC's General Counsel that, under the pending bills, "the antitrust authority of Commission [sic] will be an appropriate complement to the authority of the Attorney General, and, it would seem, should not be used by the Commission to duplicate authority already held by the Attorney General." Hearings, pp. 365-66.

The intended scope of the Commission's Section 105c inquiry is further illuminated by the Justice Department's choice of specifics in giving an example of the kinds of antitrust issues the Commission would be expected to consider. Commenting upon "issues which are of particular concern to the electric utility industry at this time," the Acting Assistant Attorney General Comegys testified for the Department:

> "Specifically, the industry is now going through a considerable controversy over the extent to which, and the means by which, small systems should have access to large new generation and transmission facilities. As to this, I think antitrust law provides some general guidance. Companies acting together to create or control a unique facility may be required by application of the rule of reason, to grant access on equal and nondiscriminatory terms to others who lack a practical alternative." Hearings, p. 127-28.

Similarly, when the Justice Department was subsequently asked to comment on the bill reported by the JCAE, the Assistant Attorney General endorsed the bill and observed that it would enable the Commission to condition the license for a "joint venture" nuclear power plant -- that is, one owned by two or more companies. 116 Cong. Rec. S.19254 (December 2, 1970).

The central feature of this "joint venture" example is that it raised antitrust issues with respect to the ownership and access to the nuclear power plant itself without reference to the general system operations of any utility. By selecting joint venture facilities as an example of the problems to be considered by the Commission under the proposed antitrust review provisions of Section 105c, the Justice Department impliedly represented to the JCAE that it need not fear an open-ended interpretation of those provisions resulting in extension of the Commission's antitrust review authority to encompass the entire system of which the licensed facility would be a part.

A similar implied disclaimer that the proposed provisions would be made the vehicle for inquiry into the general characteristics of a utility's operations may be

found in the Department's comment on the implications of membership in power pools. When pressed as to whether the Department's purportedly narrow concern with joint ventures was broader than it seemed, by reason of the possible argument that the owner's membership in a power pool would make a joint venture out of a nuclear facility nominally under single ownership, the Department assured the JCAE that pool membership per se would not be seized upon to subject a single-owner facility to antitrust review as if it were a joint venture (Hearings, p. 134).

Thus, the consistent tenor of the Justice Department's assurances to the JCAE in urging enactment of this legislation was that its impact would be limited to antitrust issues inherent in the terms on which the licensed facility would be owned and its energy output taken. Broader inquiries were forsworn.

The bill (H.R. 18679) which ultimately emerged from the JCAE and was enacted, must be interpreted in the light of the various Department of Justice comments as to limited scope. The reported bill expressly restricted the Commission's inquiry to whether "activities under the license would create or maintain a situation inconsistent with the antitrust laws" -- a somewhat more limited standard

than that contained in the prior bills. Significantly, Senator Aiken, an advocate of broad review authority, commenting on the reported bill, asserted that the effort "to cut back on the scope of the AEC consideration of antitrust issues *** is reflected to some extent in this bill" (emphasis in the original).[9/]

After the JCAE compromise was passed by the House in reliance upon the Justice Department's reassurances, the Department sought to lay the groundwork for a broader interpretation by providing expansively worded letters to some Senators in the course of that body's deliberations. When these letters were introduced into the Congressional Record by Senate proponents of broad antitrust review, Rep. Hosmer (the co-author of the reported bill) rose on the House floor to remind the Congress that the language of the new legislation was a compromise, warning:

> "Thus, the views and opinions expressed in the letters from the Antitrust Division of the Department of Justice are not necessarily authoritative, and may or may not accurately represent the intent" (of the bill). 116 Cong. Rec. H. 11087 (Dec. 7, 1970).

9/ Proposed dissenting views on H.R. 18679, as reprinted in Justice Reply, Appendix A, p. 2.

The compromise middle-of-the-road nature of the legislation was brought directly to the Senate's attention as well. As Senator Pastore, the floor manager of the bill, told his colleagues:

> "The committee and its staff spent many, many hours on this [antitrust] aspect of the bill, and I can assure the Senate that we considered very carefully the considerable testimony, comments and opinions we received from interested agencies, associations, companies and individuals, including representatives from the Antitrust Division of the Justice Department, from privately owned utilities, and from public and cooperative power interests. The end product, as delineated in H.R. 18679, is a carefully perfected compromise by the committee itself; I want to emphasize that it does not represent the position, the preference or the input of any of the special pleaders inside or outside of the Government. In the committee's judgment, revised subsection 105(c), which the committee carefully put together to the satisfaction of all of its members, constitutes a balanced, moderate framework for a reasonable licensing review procedure." 116 Cong. Rec. S 19253 (December 2, 1970)(emphasis added).

Thus, the fact --previously relied on by the Justice Department in the present proceedings-- that Senator Aiken threatened to dissent if the JCAE adopted the proposals then being advanced by the investor-owned utilities, and that he ultimately concurred in the JCAE

recommendation, does not establish that his own broad-ranging proposal was adopted. To the contrary, the Senator expressly recognized that the opposing view "is reflected to some extent", and this, together with the willingness of his opponents such as Rep. Hosmer to accept the version ultimately adopted, establishes that the 1970 amendments were indeed a compromise rather than the total victory which the Justice Department and the intervening municipal and cooperative systems now claim.

Acceptance of this compromise by both sides was essential, moreover, to enactment of any amendatory legislation on the antitrust issue at all. Again and again in the hearings, in the Committee report, and in the floor debates on the 1970 amendments, JCAE members and other Senators and Representatives expressed their deep concern that the AEC licensing process should not become so protracted as to delay bringing nuclear generating facilities on stream which might otherwise be operating. The duration of a full-scale monopolization case is well known and, even in the context of judicial proceedings for the direct enforcement of the Sherman Act, has been widely deplored.

It is inconceivable that a Congress so hostile to delay in the licensing process would have authorized precisely such full-scale antitrust litigation, in which the "defendants'" proposed nuclear facility is not even the central fact but a mere jurisdictional basis for the proceeding.

We submit that the legislative history of Section 105c, taken as a whole, unmistakeably requires that the provision be read as a compromise. The bounds of that compromise are pricked out by the Justice Department's assurances to the JCAE.[10/] The Congressional intent revealed by this history requires that the AEC and its Hearing Boards limit their antitrust inquiries to issues arising directly from the operation of the nuclear power facility, and the LP&L Order has so held. In ordinary course, we have seen that the inquiry will be limited to the question whether competitors will be permitted adequate access to the power generated by the facility.

10/ Cf. Section 105(a); 116 Cong. Rec. H 9449 (September 30, 1970) (remarks of Representative Price).

Conclusion

For these reasons, we urge the Hearing Board to limit the future scope of this proceeding to the basic issue of the adequacy of the applicant's wholesale rate, and of the need for more preferential forms of access to the power from the plant. A definite ruling at this stage of the proceeding is clearly justified, if not required, by the LP&L Order, and will greatly minimize the burden on the Board and all parties in the hearing, briefing, and decision of this complex matter.

Respectfully submitted,

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October 18, 1973