9/9/75

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of:	)	
	)	Docket Nos. 50-329A
Consumers Power Company	)	50-330A
Midland Plant (Units 1 and 2)	)	

EXCEPTIONS OF MICHIGAN CITIES AND COOPERATIVES
TO THE INITIAL DECISION OF THE
ATOMIC SAFETY AND LICENSING BOARD

Michigan Cities and Cooperatives ("Intervenors") 1/ hereby appeal to the Atomic Safety and Licensing Appeals Board of the Nuclear Regulatory Commission by filing the following exceptions to the Initial Decision ("I.D.") of the Atomic Safety and Licensing Board in the above-entitled proceeding:

1. The ruling that the burden of proof rests with Justice, Staff and Intervenors rather than on the Applicant (I.D., 31-31).

2. The analogy drawn between a patent and a license granted by the Nuclear Regulatory Commission. (I.D., 22-29)

3. The ruling that creation of a situation inconsistent with the antitrust laws was not an issue (I.D., 22-29).

1/ Michigan Cities and Cooperatives include the Cities of Coldwater, Holland, Grand Haven, Traverse City and Zeeland, Michigan, the Michigan Municipal Electric Association, the Wolverine Electric Cooperative and the Northern Michigan Electric Cooperative.

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4. The undue restriction of the concept of nexus, (e.g., I.D. 60-61, 98).

5. The analogy drawn between the statutory exemptions of labor from the antitrust laws and a license granted by the Nuclear Regulatory Commission.

6. The conclusion that "Activities under a license issued by the Commission pursuant to statute cannot per se create or maintain a situation inconsistent with the antitrust laws" (I.D. 61).

7. The conclusion that "Activities under a license issued by the Commission pursuant to statute, can create or maintain a situation inconsistent with the antitrust laws, if, and only if such activities constitute a material element and a substantial factor in a scheme or conspiracy the purpose or effect of which is to cause the creation or maintenance of a situation inconsistent with the antitrust laws." (I.D. 61)

8. The conclusion that "if the question is creation of a situation inconsistent with the antitrust laws; then the alleged situation and the alleged misuse of activities under the license must occur after the grant of the license. The only relevant and material facts or record will be those tending to provide or disprove the existence of a scheme or conspiracy to create such situation by said misuse" (I.D. 62).

9. The conclusion that "if the question is the maintenance of a situation inconsistent with the antitrust laws; then the alleged situation must be in existence on the date the record is closed and the alleged misuse must occur after the grant of the license. The relevant and material facts of record will be those tending to prove or disprove

the existence of an alleged scheme or conspiracy to maintain such situations by said alleged misuse" (I.D. 62).

10. The conclusion that "the allegation of misuse is related to future activities under the operating license which had not been granted prior to June 20, 1974 [the close of the antitrust evidentiary hearing]" (I.D. 62-63).

11. The treatment of the "present jurisdiction of the FPC" and of its ability to prevent "renewed anticompetitive contract provisions" as a factor tending toward a finding of mootness (I.D. 65-66).

12. The determination that the law imposes as a requirement for coordination that each party receive a net benefit and imposes a duty upon the management of the Applicant to seek such benefits and the rejection of the position that all that is required is that Applicant receive its costs plus a reasonable return (I.D. 67-72).

13. The legal conclusion that "the management of Applicant is forbidden from entering into alleged coordination agreements which said management believes will result in a net detriment to Applicant (I.D. 72).

14. The refusal to find that each system engaging in reserve sharing "should maintain reserves in the same proportion to system load as the combined system must maintain reserves in relation to the combined system load" (the "Gainesville formula") or on any other formula that does not discriminate against smaller as compared to larger utilities (I.D. 72-77).

15. The use of extremely hypothetic . and unrealistic examples in an attempt to demonstrate that under certain conditions application of the Gainesville formula would mean that the difference in reserves would not be split so that each system received some benefit (I.D. 74-76).

16. The conclusion that "any approval of a coordination agreement should be determined after careful study by the agency with the jurisdiction in the area: the Federal Power Commission [and not the Nuclear Regulatory Commission]" (I.D. 81).

17. The conclusion despite the facts of record, "as a matter of law that unilateral refusal to assist competitors per se [through refusal to coordinate] is not anticompetitive conduct and is not a scheme of conspiracy the purpose or effect of which is the cause of the creation or maintenance of a situation inconsistent with the antitrust laws" and the further conclusion that "such refusal causes no injury to the competitor. . . . [since] the utility has no duty to benefit its competitor by alleviating the competitor's injuries resulting from extrinsic causes" (and the failure to recognize that such injury results from the Applicants' anticompetitive practices) (I.D. 85-86 .

18. The conclusion despite the facts of record, "that unilateral refusal to enter voluntarily into coordination agreements with competitors per se is not anticompetitive conduct and is not a scheme of conspiracy the purpose or effect of which is to cause the creation or maintenance of a situation inconsistent with the antitrust laws". . . . [since] such refusal causes no injury to the competitors. The utility has no legal duty to benefit its competitors by alleviating injury from

extrinsic causes. Such refusal would not give rise to a situation inconsistent with the antitrust laws" (I.D. 86) when the facts of record demonstrate that the Applicant's anticompetitive activities are the cause of the injury to its smaller competitors.

19. The failure to find that the Applicant had an anticompetitive scheme such as monopolization and its unilateral voluntary refusal to coordinate with its actual of potential competitors was a material element and a substantial part of such scheme, thus making its refusal to coordinate unlawful and giving rise to a situation inconsistent with the antitrust laws (I.D. 86-87).

20. The determination that the Applicant was not a monopolist refusing to deal as part of a scheme to illegally extend or prolong its monopoly (I.D. 87-88).

21. The failure to find that the Applicant and other utilities had entered into coordination arrangements and conspired to prevent other utilities from entering such coordination arrangements with the intent to injure such other utilities in violation of Section 1 of the Sherman Act (I.D. 88).

22. The conclusion "as a matter of law that the bottleneck situation applies only to conspiracies and hence, is in applicable to a unilateral refusal to wheel" (I.D. 95).

23. Rejection of the Otter Tail case as authority for the proposition "that a refusal to wheel by a utility having most if not all of the high voltage transmission in [the] relevant geographic market is illegal monopolization" (I.D. 95).

is unilateral (I.D. 117).

32. The failure to recognize the unique qualities of nuclear power (I.D. 119).

33. The failure to find that Applicant entered into contracts with provisions which prevented coordination (I.D. 125-127).

34. The finding that if Applicant had the contracted power to grant or deny coordination "there is no evidence that Applicant ever experienced such power" (I.D. 127).

35. The finding that "if Applicant ever had the alleged power [to grant or deny coordination by contract] and if Applicant ever used it in an anticompetitive fashion and if such use brought into existence the situation inconsistent with the antitrust laws; the power, the use of such power and the resulting situation have all ceased" and the conclusion as a matter of law that "no such situation exists." (I.D. 127).

36. The conclusion as a matter of law that "there is no nexus between the activities under the license even on the assumption that contractual provisions gave and were used by Applicant to deny coordination (I.D. 127).

37. The conclusion that Applicant's refusal to enter into negotiation for coordination in 1964 with representatives of Northern Michigan and Wolverine, its similar denial in 1967 of Wolverine's request for coordination, its 1968 denial of coordination with Traverse City and its 1972 refusal to enter into a coordination agreement with Edison Sault Electric Co. were all situations in which true coordination with benefits to both parties was not feasible and that as a matter of law

"the Applicant's management had a duty to its customers and stockholders to refuse such alleged operational coordination" (I.D. 129-31).

38. The finding that the coordination agreements which had been negotiated between Applicant and the Members of the M-C POOL, with the City of Lansing and the City of Holland reflected factual differences and the skills of the negotiators without recognition that they involved illegal use of Applicant's monopoly power (I.D. 132-33).

39. The finding that "save for the smaller utilities with which Applicant is coordinated, the record shows no smaller utility in the relevant geographic market which has adequate reserves to support a coordination agreement" (I.D. 133).

40. The finding that Applicant has never refused operational coordination with a smaller utility in the relevant geographic market and that Applicant has operational coordination agreements with every small utility in the relevant geographic market capable of coordinating (I.D. 133).

41. The finding that "there is no evidence that Applicant has ever used in anticompetitive fashion its power to grant or deny voluntary operational coordination between Applicant and the smaller utilities" and that "there is substantial and convincing evidence to the contrary" (I.D. 133).

42. The conclusion as a matter of law "that there is no situation inconsistent with the antitrust laws arising out of Applicant's alleged refusal to voluntarily operationally coordinate with the smaller utilities" (I.D. 133-134).

43. The finding "that assuming arguendo that there is, or could be, a situation inconsistent with the antitrust laws arising out of Applicant's alleged denial of voluntary operational coordination between Applicant and the smaller utilities; there is no evidence of an anticompetitive scheme or conspiracy" having a nexus between activities under the license and the assumed situation (I.D. 134).

44. The finding that "there is no evidence that Applicant has ever exercised such power [to exclude the smaller utilities from the Michigan Pool] in an anticompetitive fashion . . ." (I.D. 136).

45. The conclusion "as a matter of law that there is no situation inconsistent with the antitrust laws arising out of Applicant's alleged use of its power to exclude the smaller utilities from the Michigan Pool (I.D. 136).

46. The conclusion that "assuming arguendo that there is, or could be a situation inconsistent with the antitrust laws arising out of Applicant's alleged exclusion of the smaller utilities from the Michigan Pool; there is no evidence of an anticompetitive scheme or conspiracy" having a nexus with the proposed license (I.D. 137).

47. The failure to find that the Applicant's transmission system is a unique facility without which the small systems cannot coordinate among themselves (I.D. 138).

48. The finding "as a fact that Applicant does not have the power to grant or deny operational or planning coordination between or among the smaller utility systems capable of coordination" (I.D. 141).

49. The finding that "assuming arguendo that Applicant does have the power to grant or deny coordination between or among the smaller utilities by refusal to wheel power for them. . . . [that] there is no evidence that Applicant's refusal to wheel was part of a larger scheme or conspiracy to bring into being a situation inconsistent with the antitrust laws" (I.D. 141-142).

50. The conclusion "as a matter of law that there is no situation inconsistent with the antitrust laws arising out of Applicant's refusal to wheel to the smaller utilities".

51. The finding that "assuming arguendo that there is, and could be, a situation inconsistent with the antitrust laws arising out of the inability of the smaller utilities to coordinate with each other because of Applicant's refusal to wheel, there is no evidence of an anticompetitive" scheme or conspiracy having a nexus with activities under the license (I.D. 142-143).

52. The finding that "the grant of access to either unit power or a joint venture [arrangement in Midland Plant, Units 1 or 2] would result in a detriment and a financial burden to Applicant" and hence would not be proper (I.D. 146).

53. The failure to find that Applicant must share with its small competitors the benefits which it possesses due to its larger size, greater financial assets and monopolistic position (I.D. 147).

54. The finding as a fact that Applicant's refusal to grant to the smaller utilities an option to participate in Midland by purchase of unit power or by joint venture was

not a refusal to enter into developmental coordination with the smaller utilities (I.D. 147).

55. The finding that "there is no evidence that Applicant has ever exercised its power to refuse to enter into voluntary developmental coordination with the smaller utilities" and "the conclusion as a matter of law that there is no situation inconsistent with the antitrust laws arising out of Applicant's alleged use of such power to prevent developmental coordination between Applicant and said smaller utilities" (I.D. 148).

56. The finding that "Applicant proposes to use the activities under the license and the very manner under the very purpose which the license grant was authorized by statute. Such conduct is not anticompetitive." (I.D. 148).

57. The finding that "assuming arguendo that there is, or could be, a situation inconsistent with the antitrust laws arising out of Applicant's alleged refusal to enter into developmental coordination, there is no evidence of an anticompetitive scheme or conspiracy" having a nexus with activities under the license (I.D. 148).

58. Despite the fact that Applicant's goal was found to be "to acquire all the smaller utilities in the relevant geographic market" and that this was an "anticompetitive scheme to monopolize. . . . forbidden by Section 2 of the Sherman Act" and the further finding that the scheme still exists and the matter is not moot", the conclusion that "because the evidence totally fails to show the power to carry out the scheme no situation inconsistent with the antitrust laws

arose out of the scheme (I.D. 150-156).

59. The determination that the acquisition program of the Applicant was not within the relevant matters in controversy and not within the scope of the proceeding (I.D. 156).

60. The finding that even "assuming arguendo that there is, or could be, a situation inconsistent with the antitrust laws arising out of Applicant's acquisition policy and assuming that some way can be found to bring the situation within the scope of this proceeding, there is no evidence of an anticompetitive scheme or conspiracy having" the requisite nexus with the licenses under consideration (I.D. 157).

61. The failure to find evidence of "a situation inconsistent with the antitrust laws arising out of boundary agreements" (I.D. 162).

62. The finding that "assuming arguendo that each boundary agreement is a conspiracy in restraint of trade or, alternatively that the sum total of the boundary agreements is an industry-wide conspiracy and restraint of trade, and assuming further arguendo that a situation inconsistent with the antitrust laws arises out of each or all of such boundary agreements, no such situation has any connection with the relevant matters in controversy. . . . [and therefore] no such situation is within the scope of this proceeding" (I.D. 162).

63. The finding that "assuming arguendo that there is, or could be, a situation inconsistent with the antitrust laws arising out of boundary agreements and that some way can be found to bring such situation within the scope of this proceeding, there is no evidence of an anticompetitive scheme or conspiracy" having the requisite nexus with the activities under

the licenses (I.D. 162-163).

64. The failure to find that Applicant, because of its monopolistic position must provide the smaller utilities wheeling so as to give them a wider choice of wholesale power and the ability to buy and sell from the regional power exchange market (I.D. 165).

65. The determination that if the smaller utilities have a right to wheeling in order to be able to exchange wholesale power with utilities other than Applicant which right was found not to exist and the further conclusion that if such a right did exist this proceeding is the wrong forum for the enforcement of such a right (I.D. 166).

66. The determination that if the smaller utilities have a right to use Applicant's transmission system to exchange wholesale power with other utilities "this is the wrong forum for the enforcement thereof" (I.D. 166).

67. The determination that "the alleged right to such wheeling [in order to exchange wholesale power with other utilities using Applicant's transmission system] is not within the relevant matter in controversy and hence is not within the scope of this proceeding (I.D. 166).

68. The determination that "assuming arguendo that there is, or could be, a situation inconsistent with the anti-trust laws arising out of Applicant's refusal to wheel in the regional power exchange market, and assuming that some way can be found to bring such situation within the scope of this proceeding there is no evidence of an anticompetitive scheme or conspiracy" having the requisite nexus with the license (I.D. 167).

69. The conclusions summarized at page 168 of the Initial Decision as follows:

"1. The record in this proceeding does not disclose substantial evidence of any fact or facts within the relevant matters in controversy which constitute a scheme or conspiracy the purpose or effect of which is to cause the creation or maintenance of a situation inconsistent with the antitrust laws.

2. Applicant's activities under the Midland licenses are not a material element and significant factor in any actual or alleged scheme or conspiracy the purpose or effect of which is to cause the maintenance of a situation inconsistent with the antitrust laws.

3. No nexus exists between Applicant's activities under the Midland licenses and any actual or alleged situation inconsistent with the antitrust laws."

70. The failure to find that "it is not economic to build nuclear units below a size to large to be built by smaller utilities, either alone or in a joint-venture" (I.D. 172-174) and the finding that a 7[illegible] mw plant is now an efficient facility for the commercial production of electric energy (I.D. 176).

71. The finding that "adequate access to nuclear power is provided to both the citizens and the competing utilities by the sale of power by Applicant at its retail and wholesale rates (I.D. 177).

72. The failure to impose any antitrust conditions upon the granting of permits to Consumers Power Company for construction of the Midland Plant, Units 1 and 2 (I.D. 182-183).

73. Failure to adopt intervenors proposed license conditions (I.D. 182-183). These conditions are attached as Appendix A to this document.

Although we are aware that some of the following exceptions may be duplicative of those already raised out of an access of caution we hereby state them:

74. The failure to find that the Applicant's domination of the bulk power facilities in the lower Michigan pennisula has resulted in the situation inconsistent with the antitrust laws because inter alia. (a) Applicant dominates bulk power generation and transmission facilities, (b) Applicant's coordination arrangements provides a market for power transactions from which Intervenors are illegally excluded, (c) Coordination with the smaller Michigan systems should not be on a discriminatory basis, and (d) Applicant, in an anticompetitive manner, has used its domination over the bulk power facilities to its advantage and against its smaller competitors.

75. The failure to find that Applicant's refusals to deal on reasonable terms with the smaller Applicants have created a situation inconsistent with the antitrust laws because

(a) the bottleneck monopoly cases plainly establish the obligation of Applicant to grant intervenors direct access to its bulk power generation and transmission facilities and

(b) by refusing to sell wholesale power services separately, including transmission, Applicant has "tied" its sells of power, created barriers to entry and forced exclusive dealing arrangements.

76. The failure to exercise the broad authority the Atomic Energy Act gives the Commission to regulate all operations flowing from the activities of the licensee that would maintain or create anticompetitive situations.

77. The failure to recognize that there is neither a legal or policy justification for the refusal to order the license conditions that intervenors requested because of the jurisdiction of the Federal Power Commission.

78. The failure to recognize that the activities complained of constitute per se violations of the antitrust laws.

79. The failure to condition the licenses as proposed by the Staff of the Commission (Proposed Findings of Facts and Conclusions of Law at pp. 148-151).

80. The failure to condition the licenses as proposed by the United States Department of Justice (Brief and Proposed Findings of Fact of the United States Department of Justice at pp. 251-52).

81. The failure to follow the precedent of this Board in its decision dated June 30 in Kansas Gas and Electric

Company and Kansas City Power and Light Company (Wolf Creek Generating Station Unit No. 1), Docket No. 50-482A.

Respectfully submitted,

Robert A. Jablon

Robert A. Jablon

Daniel I. Davidson

Attorneys for Cities of Coldwater, Holland, Grand Haven, Traverse City and Zeeland, the Michigan Municipal Electric Association, the Wolverine and Northern Michigan Electric Cooperatives

September 8, 1975

Law offices of:

Spiegel & McDiarmid
2600 Virginia Avenue, N.W.
Suite 312
Washington, D.C. 20037

UNITED STATES OF AMERICA
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the foregoing document upon the following persons by depositing a copy thereof in the United States mail, with first class or air mail postage affixed, this 8th day of September, 1975:

Honorable Hugh K. Clark
Nuclear Regulatory Commission
Post Office Box 127A
Kennedyville, Maryland 21645

Honorable J. Venn Leeds, Jr.
Nuclear Regulatory Commission
Post Office Box 941
Houston, Texas 77001

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20545

Chairman, Atomic Safety and
Licensing Appeals Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20545

Mr. Abraham Braitman, Chief
Office of Antitrust and Indemnity
U.S. Nuclear Regulatory Commission
Washington, D.C. 20545

William W. Ross, Esquire
Keith S. Watson, Esquire
Wald, Harkrader & Ross
1320 - 19th St., N.W.
Washington, D.C. 20036

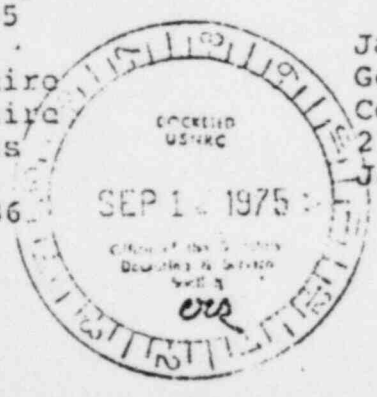
Harold P. Graves, Esq.
V.P. and General Counsel
Consumers Power Company
212 West Michigan Ave.
Jackson, Michigan 49201

Joseph Rutberg, Esq.
Benjamin H. Vogler, Esq.
Antitrust Counsel for AEC
Regulatory Staff
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20545

Mr. Frank W. Karas, Chief
Public Proceedings Branch
Office of the Secretary of
the Commission
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20545

Forrest Bannen, Esq.
Department of Justice
Antitrust Division
Washington, D.C. 20036

James B. Falahee, Esq.
General Attorney
Consumers Power Company
212 West Michigan Avenue
Jackson, Michigan 49201



Honorable Frank Kelly
Attorney General
State of Michigan
Lansing, Michigan 48913

Joseph J. Saunders, Esq.
Department of Justice
Antitrust Division
Washington, D.C. 20530

Robert A. Jablon

Robert A. Jablon

Attorney for Cities of Coldwater, Holland, Grand Haven, Traverse City and Zeeland, and the Michigan Municipal Electric Association and the Wolverine and Northern Michigan Electric Cooperatives

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Law offices of:

Spiegel & McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20037