UNITED STATES OF AMERICA
BEFORE THE
ATOMIC ENERGY COMMISSION

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

MEMORANDUM CONCERNING THE IMPACT
OF THE LOUISIANA POWER AND LIGHT COMPANY MEMORANDUM AND
ORDER ON THE PROPOSED MIDLAND LICENSE APPLICATIONS

This memorandum is written pursuant to the Hearing Board's Order issued verbally during a conference call October 15, 1973, regarding the impact on these proceedings of the Commission's Memorandum and Order in Louisiana Power and Light Company, Docket No. 50-382A (October 1, 1973). Because of time constraints, this statement is not meant to be exhaustive.

Especially at this stage of the proceedings, intervenors do not believe that the LP&L Order can be viewed as an expression by the Commission of a desire to narrow the grounds or extent of relief that should properly be granted. The LP&L Order does three things: (1) it affirms the Hearing Board's decision of the issues certified to the Commission in that

case; (2) it re-affirms the Commission intent that the AEC licensing process should not allow nuclear energy "to develop into a private monopoly via the AEC licensing process" (page 4); (3) it establishes that there should be a relationship between the operation of the licensed facilities and the relief sought by intervenors.

The LP&L Order confirms intervenors' entitlement to participation in the Midland units and to access to transmission and coordination services to make that participation meaningful. Thus, the Commission states (page 4):

> "As stated in our original Memorandum and Order, the requirement in Section 105 for pre-licensing review reflects a basic congressional concern over accessed power produced by nuclear facilities. The Commission's anti-trust responsibilities represent inter-alia a Congressional recognition that the nuclear industry originated as Government monopoly and is in great measure the product of public funds. It was the intent of Congress that the original public control should not be permitted to develop into a private monopoly via the AEC licensing process, and that access to nuclear facilities be wide-spread as possible. The Commission is determined strictly to enforce this Congressional intent, and to work with other responsible agencies ... to assure that AEC licensed activities accord with the antitrust laws and policies underlying those laws."

Nuclear energy was developed as a Governmental monopoly. It is becoming a significant, if not the major, new source of base load generation. As the available supply of useable fossil

resources diminishes, the value of the alternative source of nuclear energy is likely to take on increased significance. The intent of Congress, as recognized in the LP&L Order, is that nuclear generation not be a monopoly of the dominant investor-owned systems and that smaller systems be granted access to such power. Smaller systems such as those represented by intervenors cannot obtain power from the plant without use of Consumers Power transmission lines. It would not be economically or environmentally practical to duplicate the Consumers Power transmission system. Furthermore, rights of access to emergency, maintenance and coordinating power would be necessary in order to properly utilize this nuclear base load power source. When plants are shut down, Consumers Power, for example, relies upon its own other plants and power from other interconnected systems to obtain reasonably priced maintenance and emergency power. If the smaller systems are isolated from access to such coordination or from transmission services to obtain coordinating power, participation in or the ability to buy unit power from the Midland units would be of limited value to them. The question left open by the LP&L Memorandum and Order, however, is whether the Midland licenses should provide for ancillary relief which would more generally prohibit Con-

sumers Power from blocking intervenors from access to transmission services and coordination. Intervenors submit that such license conditions should be ordered. While the Commission's LP&L Order appears to view this as presenting factual questions (e.g., page 6), intervenors believe that, where basic facts are established, the question becomes one more of law and of policy. The LP&L Order certainly does not hold that such relief may not be appropriate.

If the Midland units are licensed, Consumers Power Co. will enjoy a nuclear generation monopoly within its service area. Additionally,in forming the Michigan Power Pool Consumers Power and Detroit Edison jointly dominate high voltage transmission and, indeed, large unit generation. Given this situation, under the LP&L Order, it is appropriate to look at the impact of granting the Midland licenses both from the vantage point of Consumers Power and of intervenors. If denial of the broader conditions that we seek is likely to increase the advantage to Consumers Power from owning and operating the Midland units compared with more limited conditions or, if through denial of broader conditions, intervenors are likely to be denied a similar benefit to that which would be obtained by Consumers Power, then the broader license

conditions must be ordered. If either Consumers Power obtains a greater benefit from owning and operating the plant due to its control of high voltage transmission facilities and its coordination agreements than it would otherwise, or if the benefits to intervenors obtained from granting access to the plant is limited because of the denial to them of the benefits of access to Consumers Power's high voltage transmission system and to coordination on fair and equitable terms, then a direct nexus between the building and operating of the plants and the relief sought by intervenors will have been established.

In judging this question, we would also suggest that the Trial Board look to the more general tests of whether the relief requested by intervenors is consistent with the policies of the antitrust laws and whether denial of such relief would permit a continuation of violations of those policies. We do not mean to imply that the Board must try an antitrust case or independently determine whether there is in fact a criminal or civil violation of particular antitrust statutes, although if such violations were established, certainly broad relief should be granted. Nor do we suggest that the Board should hear complaints of isolated antitrust violations and attempt to remedy them. However, where there has been a course of conduct or a series of related actions by Applicant to limit the ability of intervenors to compete, then there is a situation

inconsistent with the antitrust laws, which demands remedy. In determining the scope of appropriate relief in such situations, the Commission should look to the general purposes of the antitrust laws.

Just as it would be improper to sanction Consumers Power building and operation of nuclear plants to the exclusion of intervenors, so it would be only slightly less detremental to sanction its use of nuclear units as intregal parts of its generations and transmission system in conjunction with other invester-owned utilities, and to exclude municipal and cooperative intervenors from the full benefits of the development of nuclear power by allowing Consumers Powers Company to deny them access to transmission and coordination rights which are being used by Consumers Power Company and which make the generation from the Midland Plants more valuable. We point out to the Board the obvious fact that one does not build 800 megawatts units without adequate transmission and coordination to backup the units -- nor has Consumers Power done so. Thus, Consumers Power's system demonstrates the "nexus" between these services and the plants.

I. THE CONSTRUCTION AND OPERATION OF THE MIDLAND UNITS PROVIDE SUBSTANTIAL ADVANTAGES TO CONSUMERS POWER, WHICH CANNOT BE JUSTIFIED WITHOUT GRANTING ACCESS TO TRANSMISSION AND CO-ORDINATION TO INTERVENORS.

The following facts have been established (or we believe can be established) either from the application, published Federal Power Commission or other reports, deposition material, or from the record to be developed:

1. Consumers Power present peak generation capability is approximately 5,000 megawatts. In 1979, including Midland II (but not Midland I) it will be approximately 8,000 mw. The capability of the Midland units will be 1,630 mw. Palisades has a 700 mw capability and Big Rock has a 71 mw capability. Thus, not including the planned 2,400 mw of generation at Quanticassee, Consumers Power can be anticipated to have approximately 2,400 mw of nuclear generation. Including Quanticassee this figure would double.

2. Nuclear generation will have high unit capital costs, but low unit operating costs; peaking generation will have high operating costs, but comparatively low unit capital costs.

3. Within its area of service Consumers Power Co. will have a monopoly of nuclear generation and of high voltage

transmission. Within that general area of service, Consumers Power Company currently owns all transmission operated above 69 kv, although the Michigan Municipal and Cooperative Power Pool is planning 138 kv transmission (some of which is now in existence, but operated at 69 kv). None of the municipal or rural electric cooperative systems within its area of service own generation units larger than Lansing's 160 mw unit.

4. Consumers Power Co. has interconnection agreements and interchange arrangements with Detroit Edison, Indiana and Michigan Electric Co. and the Hydro-Electric Commission of Ontario ("Ontario Hydro"). It has agreements for joint use of facilities and/or interchange of power with Detroit Edison, Toledo Edison, Indiana and Michigan, Commonwealth Edison, Northern Indiana Public Service Company and Ontario Hydro.

5. Power generated from plants of Consumers Company and Detroit Edison Company are centrally dispatched in accordance with need and with the economics of generation on the combined systems, regardless of the ownership of an individual plant.

6. These interconnections and interchange agreements have allowed Consumers Power Company to take advantage of economies of scale through building larger size base load generation. At the same time the interconnection and interchange agreements have allowed Consumers Power to maintain a lower

level of reserves than would have been necessary with the same size plants. Interconnections and interchange arrangements provide for the use of larger plants while maintaining the same reserves proportimate to load and absent these agreements, Consumers Power would have had to either maintain larger reserves levels or build smaller plants. This would have resulted in a higher cost of generation. The interchange arrangements make provision for emergency and maintenance power, for use during periods of time when large units, such as the Midland units, cannot generate, thus, lessening the required amounts of reserves to support such plants.

7. Detroit Edison and Consumers Power jointly plan for system growth, which allows the building of larger plants.

. . . . . .

As a pratical matter, Midland Power will be intergrated into the combined Consumers Power - Detroit Edison systems, and will provide support and be supported by interconnected systems beyond the Michigan Power Pool. Whatever may be the potentialities of building and operating the Midland plants "isolated", Consumers Power and Detroit Edison in fact operate a joint system, which will support and be supported by the Midland units. Intervenors are excluded from these joint operations.

As outlined above, the Midland units will provide for base load power. That is, because of the high capital costs and low operating costs associated with nuclear power generation (and because of the large unit sizes necess ry to achieve economies of scale), large market areas and backup generation are necessary to make the Midland units economic. There need be sufficient markets to support the plants full-time generation. However, in addition, the plants are tied to a generation system with sufficient flexibility to allow for "intermediate" and "peaking" generation to provide power for periods of high demand. It would be uneconomic to use nuclear generation for peak load demands and have the plants sit idle during non-peak periods. Moreover, there must be substitute power availability during period s when the plant is shut down either because of periods of scheduled maintenance or forced outage.

The different generating sources that provide alternate and additional sources of the power which is intergrated with Midland power are connected by the transmission grid. This grid connects generating sources with each other and with market areas. Thus, absent having a high voltage transmission grid, either Consumers Power could not economically build plants the size of the Midland units -- or it would not have the same economic advantage to do so.

There is no question that the building of the Midland units will greatly advantage Consumers Power. When built, these units are expected to provide reliable sources of base load generation. Furthermore, nuclear generation will provide a substantial portion of Consumers Power's total base load generation. Since there is increasing question of the availability and price of fossil fuels, the availability of an alternative power source with anticipated fuel costs lower than any other source is of obvious advantage. However, because of the necessity for adequate reserves to "backup"units and to integrate the construction and operation of generation to provide for an optimal mix of low generation cost base load generation and low capital cost peaking generation, the building and operation of the Midland units is closely linked to a highly integrated generation and transmission system, including interties to other large investor owned systems. For the AEC to fail to give effect to these realities would relegate intervenors to a position of future disadvantage and uncertainty. To grant intervenors access to the plant without providing for the same coordination that Consumers Power itself has established with other utilities would be to allow the building of these units to solidify and continue the dominating position of Consumers Power. Indeed, it is of significance that Consumers Power itself recognizes that its coordination arrangements allow it

to take advantage of the economies of building large units.*/

The disadvantage to the intervenors from being blocked to direct access to obtaining power from the Midland units is obvious. Fuel uncertainty makes this more so. However, from the standpoint of the intervenors, if Consumers Power Company, Detroit Edison and other large investor owned utilities can build large units, integrate them into their systems, and continue to exclude intervenors from access to transmission services and coordination on terms equivalent to those agreed to between Consumers Power Company and other large investor owned utilities, the Midland units will be part of a pattern of combined operations allowing Consumers Power to use additions to its generation capabilities to the disadvantage of the intervenors. Indeed, the thrust of Gainesville vs. Flo ida Corp., 402 U.S. 515 (1971) is that municipals should not be interconnected "on terms more onerous than those required of other investor-owned utilities". Lafayette, Louisiana vs. SEC, 454 F2d 941, (CADC, 1971), affirmed sub. nom. Gulf States Utilities Co. vs. FPC, 411 U.S. 747 (1973).

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*/ See, e.g., Deposition of Harry R. Wall, page 70-82.

II. THE ATOMIC ENERGY ACT AND CASE LAW REFUTES THE CLAIM THAT IN CERTIFICATING THE MIDLAND PLANTS THE HEARING BOARD SHOULD IGNORE THE INTEGRATED NATURE OF CONSUMERS POWER GENERATION AND TRANSMISSION.

In judging the closeness of the relationship that should be shown between the relief claimed necessary and the operation of the plant, it should again be stressed that Consumers Power is operating an integrated system. Whatever the law would be in dealing with a plant being built by an isolated system or where a small nuclear unit is under construction, this is not the factual situation. Furthermore, Consumers Power has been engaging and continues to engage in series of anti-competitve activities, including direct take-overs or take-over attempts of competing systems, wholesale territorial agreements, discouraging municipal and cooperative generation efforts, refusals to deal, including refusals to sell transmission services and refusals to coordinate at all or to coordinate on an equalized reserves basis.

To the extent that a monopoly situation has been created or maintained by such practices, the construction and operation of nuclear units, such as the Midland units, makes that situation more feasible. The above listed activities have

a combined result of limiting intervenors' abilities to compete for bulk power and expanding Consumers Power's bulk power markets, which in turn allow it to build and operate 800 mw or larger units. In determining the relief to be granted, the anti-competitive activities of Consumers Company which have helped create the "situation inconsistent with the antitrust laws" cannot be ignored.

In interpreting the extent of the nexus that need be shown to grant relief, there are various reference points available to the Trial Board. First, is the language of the statute itself. The statutory language of a "situation" inconsistent with the antitrust laws is obviously broader than acquiring a monopoly over nuclear generation and does not limit itself to the operation of the plant. Atomic Energy Act, Section 105c, 42 U.S. C 2135. Indeed, the statutory terms are couched in language which refer to activities beyond the operation of the plant. See generally, "Reply of the Department of Justice on Issues Other Than Disqualification Raised by Applicants Answer of May 9, 1972" (June 9, 1972), which extensively briefs these issues.

Moreover, a determination of the scope of Commission jurisdiction should be viewed against the background of general antitrust laws, especially as applied to wholesale power transactions, and against the authority generally granted regulatory commission in conditioning licenses. The situation in this

case is that, contrary to agreements for settlement that have been reached by other major utilities, Consumers Power Co. refuses to deal in major areas of wholesale power transactions with smaller utilities systems within its area of service, or will do so only on discriminatory terms. Consumers Power Co. is vertically integrated. It refuses to permit intervenors access to purchasing power directly from the Midland plants, or participation in those plants; it refuses to sell transmission service (separate from the sale of wholesale power); it refuses to coordinate or will do so only on discriminatory terms. Its defense apparently is that it is willing to sell wholesale power and that this is sufficient.

Consumers Power refusal to provide access (1) to nuclear generation and (2) to transmission services is the type of refusal to deal long condemned by antitrust laws. A bottleneck monopoly cannot lawfully refuse to deal in bottleneck or attendant services. United States vs. Terminal Railroad Assoc., 224 U.S. 383 (1912); Associated Press vs. United States, 326 U.S. 1 (1945); Silver vs. New York Stock Exchange, 373 U.S. 341 (1963). Nor may a monopolist use the defense of refusing to deal in order to avoide competition in order to maintain his monopoly. Eastman Kodak Co. vs Southern Photo Co., 273 U.S. 359, 375 (1927); Lorain Journal Co. vs. United States, 342 U.S. 143 (1951). This is the precise holding of Otter Tail.

Otter Tail Power Co. vs. United States, U.S. 35 L.ed2d 359, 93 S. Ct. 1022 (1973). Consumers Power apparent claimed distinction that, unlike Otter Tail, it is not refusing to deal because it is willing to sell wholesale power, is totally lacking in substance. For the "bottleneck" cases -- and the antitrust law generally -- stand for the proposition that a vertically horizontally integrated company cannot refuse to deal in bottleneck or monopoly services. Nor can it use its control over these services to affect competition at other levels of service. E.g., Baltimore and Ohio Railroad Company vs. United States, 264 U.S. 258 (1924, "Chicago Junction Case"); United States vs. Griffith, 334 U.S. 100 (1948); United States vs. Aluminum Co. of America, 148 F2d 416 (CA2, 1945).*/

Similarly, the Consumers Power Company exclusive pool arrangements create "barriers to competition". United States vs. United Shoe Machinery Corp., 110 F. Supp. 295 344-345, (D. Mass. 1953), affirmed per curiam, 347 U.S. 521 (1954).

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*/ In one sense Consumers Powers refusal to sell unit power or participation in the Midland units or to sell transmission or forms of coordinating power sales directly is nothing more than a disquised "Tying" arrangement. Generation from nuclear plants and transmission is being sold as part of the sale of wholesale power and the costs of these transactions are included in purchased power costs. What Consumers Power will not do is sell these services separately.

See W. Montague Co. vs. Lowry, 193 U.S. 38 (1904); Associated Press vs. United States, 342 U.S. 143 (1951). As stated earlier, the Supreme Court has directly upheld Federal Power Commission action condemning discrimination in interconnections and interchange agreements. Gainseville vs. Florida Power Corp., 402 U.S. 515 (1971). See also Gulf States Utilities Co. vs. FPC, 411 U.S. 747 (1973).

In light of cases condemning activities of refusals to deal, such as those being engaged in by Consumers Power Co., the Trial Board should take a broad view to the appropriate relief that should be granted. This would be precisely the kind of factual situation, which under the LP&L Order would call for a scrutiny of Consumers Power Company's pooling and/interchange arrangements and of its blocking of access to small municipal systems and rural electric cooperatives. Where there is a violation of antitrust policy, as is the case here, there can be no public interest in narrowing the scope of relief.*/

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*/ . . . The Act is not be given a tight reading wherein every action of the Commission is justified only if referable to express statutory authorization. On the contrary, the Act is one that entrusts a broad subject-matter to administration by the Commission, subject to Congressional oversite, in the light of new and envolving problems and doctrines . . .

The statutory authority to issue certificates or permits on conditions implies broad authority to take effective

In determining the extent of the exercise of its power the Board should certainly consider that there is no public interest purpose to permitting a continuation of Consumers Power refusal to deal and refusal to coordinate on an equalized basis. Compare Colorado Antidiscrimination Commission vs. Continental Airlines, 372 U.S. 714 (1963); Southern Steamship Co. vs. NLRB, 316 U.S. 31, 46-49 (1942).

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*/ Continued

> action to achieve regulation in the public interest. We are mindful of the liberal interpretation of the Supreme Court has given similar provisions in other statutes as reflecting broad authority, and in appropriate cases a correlative duty, to effectuate the public interest . . .
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> Finally, we observe that the breadth of agency discretion is, if anything, at zenith when the action relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to achieve maximum effectuation of Congressional objectives. This source of discretion is available . . . where the agencies order, though having aspects determination of individual fault, is a denial to a wrong-doer of participation in a Government program generally extended to businessmen, for the purpose of maintaining the fairness, equity, and efficiency of the program. Here the case is stronger, for petitioner seeks a license or privilege. While that license may not be unreasonably or unlawfully withheld, it certainly need not be extended to an applicant not ready to redress his default by discharging the duty he should by rights have assumed without nudging."

Especially relevant is the host of antitrust cases holding that in the case of antitrust violations, courts or agencies should look to the transactions and violations as a whole and should not limit themselves to the isolated acts immediately complained. E.g., Swift & Co. vs. United States, 196 U.S. 375 (1905); Continental Oil Co. vs. Union Carbide Corp., 370 U.S. 690 (1962). See United States vs. Masonite Corp., 316 U.S. 265, 274-276 (1942).

Moreover, in determining the extent of its authority, the Board should also look to cases interpreting the general obligation of regulatory agencies in considering antitrust matters and cases establishing the scope of the conditioning authority which attaches to licensing or certificating authority. The power to condition licenses to protect the public interest has been held to be very broad. Indeed, even where a commission cannot command the alternative or where it may have no direct or limited regulatory authority over a subject matter, in licensing or issuing certificates it has been held that consideration must be given to national policy. E.g., FPC vs. Transcontinental Gas Pipeline Corp., 365 U.S. 1 (1961); Denver and Rio Grande Western Railroad Co. vs. United States, 387 U.S. 485 (1967), FMC Svenska Amerika Linien, 390 U.S. 283 (1963); City of Pittsburgh vs. FPC, 237 F2d 741 (CADC 1956);

Northern Natural Gas Co. vs. FPC, 399 F2d 953 (CADC 1968); See Udall vs. FPC, 387 U.S. 428 (1967); Scenic Hudson Preservation Conference vs. FPC, 354 F2d 608 (CA2 1965), certiorari denied sub. nom., Consolidated Edison Co. of New York vs. Scenic Hudson Preservation Conference, 384 U.S. 941 (1966); United Church of Christ vs. FCC, 359 F2d 994, 425 F2d 543 (CADC, 1966, 1969).

Considering the strong national policy underlying the antitrust laws*/, and the breadth of the conditioning power granted administrative agencies, it is difficult to perceive that in the situation presented here action of the Atomic Energy Commission to limit the scope of its jurisdiction would be considered lawful where an agency has given direct statutory authority to apply antitrust law. We do not think that the Commission intended otherwise in issuing the LP&L Order. We think that the Commission merely stated the proposition that the conditions ordered should have a reasonable relationship to activities to be licensed under the act based upon the facts of the various cases. The Commission stated its intent

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*/ E.g. Gulf State Utility Company vs. FPC, 411 U.S. 747 (1973).

to prevent its licensing from resulting in a private monopoly, Midland power will be used as part of an integrated generation and transmission network and in conjunction with supporting interconnection and interchange arrangements. Thus, there is a direct nexus between granting intervenors access to these arrangements and the building and operating the plants. Furthermore, as we have stated above, in determining issues of nexus both antitrust and regulatory law fully support the appropriateness of the conditions we seek.

Respectfully submitted,

Robert A. Jablon
Attorney for the Municipals of Coldwater, Grand Haven, Holland, Traverse City, and Zeeland; the Michigan Municipal Electric Association, Northern Michigan Electric Cooperative and Wolverine Electric Cooperative

October 19, 1973

Law Offices of:

Spieigel and McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

VERIFICATION

DISTRICT OF COLUMBIA, SS:

Robert A. Jablon, being first duly sworn, deposes and says that he is an attorney for the Municipals of Coldwater, Grand Haven, Holland, Traverse City, and Zeeland; the Michigan Municipal Electric Association, Northern Michigan Electric Co-operative and Wolverine Electric Cooperative; and that as such he has signed the foregoing Memornadum for and on behalf of said party; that he is authorized by the Municipals of Coldwater, Grand Haven, Holland, Traverse City, and Zeeland; the Michigan Municipal Electric Association, Northern Michigan Electric Co-operative and Wolverine Electric Cooperative so to do; that he has read said Memorandum and is familiar with the contents thereof; and that the matters and things therein set forth are true and correct to the best of his knowledge, information or belief.

Robert A. Jablon

Robert A. Jablon

Subscribed and sworn to before me
this 19th day of October, 1973.

Notary Public

My Commission expires September 30, 1974.