UNITED STATES OF AMERICA
BEFORE THE
ATOMIC ENERGY COMMISSION

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

BRIEF ON PROPOSED FINDINGS OF MICHIGAN CITIES AND COOPERATIVES

October 8, 1974

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INTRODUCTION AND SUMMARY OF ARGUMENT

1. This brief on proposed findings is written on behalf of the Cities of Coldwater, Grand Haven, Holland, Traverse City and Zeeland, the Northern Michigan Electric Cooperative, ("Northern") the Wolverine Electric Cooperative ("Wolverine"), and the Michigan Municipal Electric Association, ("MMEA") whose membership consists of nearly all of the municipal electric utilities in Michigan ("Interveners").

2. While there may be variations in their operations, these systems are all dependent upon (and surrounded by) far larger neighboring utilities for wholesale power supply and/or coordination of their own generation. Thus, in one way or another, they depend upon dominant utilities who function as both suppliers and competitors. */

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*/ Compare Richmond Power & Light v. FPC, 481 F. 2d. of 490, 493 496-497. (CADC, 1973), cert. denied sub. nom. Indiana and Michigan Electric Co. v. Anderson Power & Light, ___U.S.___ 38 L. Ed. 2d.

3. The intervenors' request that, if the Atomic Energy Commission licenses Midland Units I and II, they be granted (1) a right to direct ownership participation in the units; (2) the ability to purchase "back-up" power from Consumers Power Company ("Applicant") for their ownership interest; (3) the ability to participate in coordination and interchange transactions with Applicant on an "equalized" reserves basis and (4) transmission services priced at nondiscriminatory rates, terms and conditions, which do not exceed the costs for the services involved. Such relief would provide them rights equivalent to those provided between Consumers Power Company and the other dominant utilities in the state. We attach a copy of Intervenors' proposed license conditions as Appendix A. We note that our proposed license conditions are general, leaving much of the implementation to the Federal Power Commission or, if necessary, to enforcement hearings.

4. Interveners are faced with many problems. Some are not at all unique to themselves, such as rising fuel costs and uncertain availability or needs to harmonize their actions with environment. However, the Intervener systems also are faced with the additional problems stemming from Consumers Power Company's domination of its area of service.

5. Consumers Power Company has over 1,180,000 electric customers. It has annual electric revenues over close to five hundred million dollars and operating revenues of nearly eight hundred thirty-five million dollars. Its utility plang is valued at over three billion dollars of which electric is close to two billion

dollars. 1973 Annual Report to Stockholders, p. 1,20. Furthermore it serves nearly the entire lower peninsula of Michigan, excluding the Detroit area and the extreme southwest portion of the state.

6. Consumers Power Company is electrically coordinated with other utilities of equally large size. It closely integrates its operations with Detroit-Edison Company. Further, it has coordination or interchange arrangements with the Hydroelectric Commission of Ontario ("Ontario-Hydro"), and the major utilities to the south, including Toledo-Edison, Indiana & Michigan and Northern Indiana Public Service Companies. "Prehearing Brief for Applicant," pp. 2-3. (November 20, 1973). Indeed, it has a coordination arrangement for Luddington power with Commonwealth Edison Co., as far away as Chicago. Ex. 11, 118. As the Consumers Power Company stated in one of its applications to the Federal Power Commission, its interconnection and coordination with other utilities has an impact on power supply in Michigan, Indiana, Illinois, Ohio, Ontario and indirectly, into New York State. See generally, The Matter of the Applications of the Detroit Edison Company and Consumers Power Company, Docket Nos. E-7206, E-8308, especially, pp. 7-11 (June 12, 1974). The Company has generating units as large as 800 mws. and in conjunction with other utilities is constructing 765 kv transmission to further coordinate its activities.

*/ Generation capacity statistics of individual units are reported in the 1973 Annual Report of Consumers Power Company to the Federal Power Commission, p. 432. They are also contained in Ex. 1001, pp. 3-9.

7. Especially in the context of the control of Consumers Power Company of the dominant bulk power generation and transmission facilities, the relative size differences between Consumers Power and the Interveners create obvious problems for the latter. As Consumers Power Company readily agrees, economic power supply requires coordination.*/ Indeed, the almost universal coordination among large investor-owned utilities including Consumers Power Company establishes its value. Perhaps, most of all, an availability of alternatives is a prerequisite to obtaining economic power supply. (E.g., Gutmann, pp. 7-8, 14-18, 20-22; TR. 4664).

8. As we hope to develop more fully, there are two kinds of restrictions on access to alternative power supply faced by Intervenors. The first is technical in nature. They do not own or control any bulk power generation and transmission facilities of the size or magnitude of Consumers Power Company. To the extent they are denied access to Consumers Power Company's high voltage transmission and large "base load" generation facilities, their ability to achieve economies of scale and access to bulk power supply alternatives is limited. Therefore, they must rely on more

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*/ See Slemmer, pp. 6-7. See generally Ex. 1005, Deposition of Harry R. Wall, which outlines the advantages of coordination and of Consumers Power Company's coordination agreements and Ex. 1004, pp. 167-172 (Aymond). We also refer generally to the testimony of intervenor witnesses Gutmann, Chayavahanangher, Rogers, Department of Justice Witnesses Mayben and Wein and AEC staff witness Muller. We believe this point is not disputed and, indeed, the record taken in its entirety is a testament to coordination advantages.

costly smaller units or purchased power from the Applicant. Moreover, by being blocked from access to transmission, they cannot obtain access to sufficient external coordination to support large base load generation or transmission facilities on their own system to achieve similar economies of scale to those Consumers Power Company can achieve internally because of the large size of its system. (E.g., Gutmann, p. 12, 14, 29, 34-35; 44-64; Chayavadhanangkur: 10-17: 50-90). */

9. The second restriction faced by Intervenors is contractual. There are many ways wholesale power is bought and sold. These include "emergency" power, "maintenance" power, sales from particular units, sales or exchanges of "economy energy", transmission services and a host of other individualized types of transactions. (E.g.,5518-5531. See generally Ex. 1005; Mayben, beginning 2538). However, analagous to a stock exchange or commodities exchange, these transactions are operated within the context of legal "interchange" or "pooling" agreements. (5531-5532; 5549-5550; Gutmann, 5-8: 4464). Being barred from nondiscriminatory interchange agreements, they are barred from the markets where such power transactions are conducted.

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*/ Citations to the direct testimony, incorporated into the record, are cited as above. Other record references generally omit witness designations.

10. By its control of bulk facilities for generation and transmission and the related contractual control of access arrangements, Consumers prevents the Interveners from developing the same economies of scale it has already achieved. The following are specific examples of Consumers' anti-competitive conduct, which are supported by the record:

(1) Refusal to grant access to its nuclear facilities through the sale of a portion of the plant or "unit power" from it;

(2) Refusal to transmit power from other bulk generating facilities other than Consumers;

(3) Denial of access to nondiscriminatory coordination in the manner which Consumers coordinates its own activities;

(4) Tying the sale of power services available to interveners so that their choice of individual services is limited unlawfully;

(5) Requiring excessive reserve capacity, as a condition for coordination beyond that which Consumers maintains for its own system;

(6) Maintenance of unlawful wholesale territorial agreements;

(7) Systematic attempts to acquire smaller systems or limit their development.

11. Psychoanalysis of legislative intent is an often hopeless task. However, the 1970 amendments to the Atomic Energy Act are a clear Congressional response to Statesville. */ Statesville affirmed a grant of an atomic energy license unconditioned as to its anticompetitive impact on grounds that the units involved were "experimental." Congress strengthened the Atomic Energy Commission's antitrust review commanding the Agency to determine whether new plants will "create or maintain a situation inconsistent with the antitrust laws" and further confirmed the Agency's conditioning power, where it found such an anticompetitive "situation" to exist. Atomic Energy Act, §1056, 42 U.S.C. §2135 (c). The statute focuses the Atomic Energy Commission on a problem (the "situation inconsistent") and grants it the power of correction.

12. The major situation that is inconsistent with the antitrust laws in Michigan is Consumer Power Company's control of the bulk power facilities of generation and transmission and the related contractual control of interchange arrangements to bar Intervenors from nondiscriminatory access from large-scale generation, transmission and coordination. The building of large new nuclear units and attendant new 345 kv transmission will do nothing to diminish this control.

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*/ The case makes plain that a contrary result would have followed had the Court found the proposed nuclear plant to be "commercial", as is Midland. City of Statesville v. AEC, 441 F. 2d 962 (CADC, 1969).

13. Indeed, its control of essential transmission services, Consumers Power Company controls the access of Interveners to alternate sources of supply. If Consumers refuses to transmit power from suppliers outside its service area, the Interveners are effectively denied access to alternative markets.

14. A bottleneck is also created if Consumers is allowed to develop nuclear power without giving access to smaller utilities who lack the funds to develop nuclear energy on their own. In view of the projected shortage of fossil fuels, nuclear power may soon become an essential source for an electric utility that seeks to maintain competitive rates.*/ Nuclear power has been developed with public funds, so their is no special ownership interest Consumers has in nuclear technology. By its refusal to acquiesce to investment by Interveners in the Midland plants, Consumers is using public property, namely nuclear technology, to develop an essential source of supply for itself, while refusing access to smaller systems with a greater need for alternate sources of supply.

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*/ The Federal Power Commission's National Power Survey reveals that in 1990, nuclear power will account for one-half the energy production of the nation's major utilities. Ex. 1001, JC-1, p. 5.

15. The Applicant does argue a number of "defenses," ranging from the allegation that its conduct has been innocent in a sense of legal scienter to that in the economic nature of things Consumers Power Company's domination of power supply alternatives justified. It further argues that since the Intervenors can survive without access, they are not entitled to it. However, Consumers Power Company ignores that is its the size of domination of the Lower Michigan Peninsular which allows it to build large power plants, including Midland,to build and maintain high voltage transmission, to have access to coordination, and to exercise the power to exclude. It is because of its control of the bulk power generation and transmission that Consumers Power Company and not Petoskey is applying for a nuclear license. */ Its arguments for denying relief based on economics or ownership rights are arguments to continue the situation inconsistent.

16. As to the claim of innocence, Consumers Power Company ignores that the antitrust laws have a practical purpose. These laws are a means of limiting unbridled economic and often associated political power. A classic test has been market "domination." Thus, in Alcoa Judge Hand long ago rejected the contention of the

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*/ Comparative generation data and information concerning the relevant size of the applicants and intervener systems on contained in Ex. 1001; 5131-5133. They are also found in the Company's annual "Form 1" report to the Federal Power Commission (1973), especially pp. 432-444. Compare Gutmann pp. 12, 19:4664. The coordination agreements are extensively analyzed in the record, especially by witnesses Mayben and Gutmann and Ex. 1005. See also, e.g., D.J. 1, 18-21, 73-73a, 74-78, 227.

unconscious acquisition of monopoly power. A giant corporation does not just happen. United States v. Aluminum Co. of America, 148 F2d 416 (CA 2, 1945). Accord, United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 344-346 (D. Mass., 1953, Wyzanski), affirmed per curiam, 347 U.S. 521 (1954).

17. The making of license applications, contracts, interchange agreements and expansion plans inevitably lead to a result. Indeed, direct proof of intent to control often is difficult because the expansion process is contained in a myriad of small transactions and only sporadically is the overall design articulated. It does not need to be. Besides, Consumers Power Company's economic justifications for its anticompetitive conduct in this case admit the knowledge and, indeed, the purposeful process of obtaining and maintaining dominant control over the bulk power facilities in Michigan's lower peninsula.

18. In the electric industry, the smaller systems can achieve similar economies through coordination as larger systems can achieve through sole ownership. In fact, coordination is a method of operating independent utilities akin to a single operating entity, without requiring sole ownership. Thus, coordination allows for the opportunity to obtain both operating efficiencies and independent decision making. It is this latter alternative Consumers Power Company seeks to avoid. Indeed, like Otter Tail, ultimately, Consumers Power Company's main defense is that through coordination

the smaller systems can grow and prosper (to the alleged detriment of Consumers Power Company) and it is this that ought to be stopped.

19. However Consumers Power Company may interpret Otter Tail */ and the "bottle-neck" monopoly cases, **/ these cases establish that, if a business concern chooses to control a facility that can "bottle-neck" competition, it must grant equal access to potential users of that facility. Indeed, even if this proposition were not valid as applied to all companies, in the case of utilities having public service obligations, ***/ and broad franchise rights, ****/ equity would demand it be applied here. The courts have so ordered.

20. The bottleneck monopoly rule is not new. In various forms, the requirement that one who possesses an essential facility has obligations to serve is rooted deep in Anglo-Saxon law. The innkeeper in King Richard's day could not refuse service to the tired traveler; nor can the railroad which controls the path under the river discriminate against other railroads. The principles apply to Consumers Power Company.

*/ Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

**/ See cases cited Section II, infra.

***/ See, e.g., Munn v. Illinois, 94 U.S. 133 (1877), FPC v. Idaho Power Co., 344 U.S. 17, 23 (1952).

****/ Pace, P. 14-15, 19-20: 7239.

21. As in many other fields, various Federal and State agencies have some jurisdication over Consumers Power Company. Relief can be readily fashioned to allow for an exercize of their judgments. However, the law does not intend mutiple jurisdictions to create stumbling blocks for each other -- or a shell game for litigants to find the "right" agency. This too is a teaching of Otter Tail.*/

22. Consumers Power Company has no complaint if this Commission conditions a granting of a nuclear power license on its doing what

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*/ In Otter Tail, the defendant was arguing that there was a "primary jurisdiction" in the Federal Power action so that the Court should stay its hand in ordering "wheeling". Brief for Appellant, Otter Tail Co., No. 71-991, O.T., 1971, pp. 22, 25-45. This position of Otter Tail was in marked contrast to a general industry position before the Federal Power Commission, that that Commission does not have jurisdiction, or has limited jurisdiction, over the subject matter. For example, until recently Consumers Power Co. refused to concede the Commission had any jurisdiction over its wholesale power business. The Supreme Court viewed the problem practically and affirmed the District Court mandate that Otter Tail had to "wheel". However, the Supreme Court also later affirmed a D.C. Circuit decision in Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973), stating that the Federal Power Commission had to consider anticompetitive impact in reviewing financing applications under Section 204 of the Federal Power Act. Finally, in United States v. ElPaso Natural Gas Co., 376 US 658 (1969), the Supreme Court ordered the Federal Power Commission not to interfere in the exercize of its certificate jurisdiction with what could be the result of a then pending District Court suit. The thread in each of these cases, and many others, is that an agency or court entrusted with a jurisdiction should exercize its jurisdiction in recognition of the general body antitrust law and that the claim of potential jurisdiction vested in other agencies or courts will not allow a shield to protect against enforcement. Eg., Northern Natural Gas Co. v. FPC, 399 F. 2d 953 (CADC, 1968); Municipal Electric Association of Mass. v. SEC, 413 F. 2d 1052, 419 F. 2d. 757 (CADC, 1969), Panhandle Eastern Pipeline Co. v. Public Service Commission 332 U.S. 507 (1947).

another agency or court might also command. The question of potential "conflict" is not whether another agency can order similar remedial relief, but whether such action is likely to conflict with an order the second agency must make in the exercise of a superior jurisdiction. Certainly, if a proper order of the Atomic Energy Commission might lead to a greater competitive market structure, there is no excuse for not doing so because the Federal Power Commission or some court might not go so far. Nor is there any demonstration of superior Federal Power Commission jurisdiction. Otter Tail Power Co. v. United States, supra.

23. The Atomic Energy Commission's conditioning power is not limited. Section 105c addresses itself to a practical problem of the pre-existing domination of the electric market by certain large investor-owned utilities and the likelihood that, if unchecked, the unconditioned licensing of nuclear power plants to such entities would only make the situation worse. While in its pre-trial brief, Consumers Power Company has argued for a narrow construction of the Atomic Energy Commission Act, the conditioning power of the Commission is not limited. Nor is there any public interest reason why it should be. As the company itself agrees, the Midland units are part of and supported by an integrated system of generating plants tied together by transmission facilities, whose operations are made feasible by broad coordination agreements. (Slemmer, pp. 13-14:8837; Accord, Chayavadhanangkur, pp. 16-17:5090; Rogers, 5522; 5525-5529).

24. Specifically, because of its size, Consumers Power Company can economically take advantage of nuclear power development, largely Government financed. However, it has an attendant obligation to allow participation by smaller systems to prevent their being frozen from the opportunity of obtaining access to this major form of generation. Further, in recognition that the Midland units are to be part of an integrated network of coordinated units, Consumer Power Company has an obligation not to bar access by Intervenors to its transmission facilities and coordination agreements on equivalent terms and conditions to those made available to itself and its coordinating partners. The obligation stems from the use made of such physical facilities and legal arrangements by Consumers Power Company itself.

25. As we discuss infra, nuclear power will have a profound impact on Applicant's system. Its value will be enhanced by the Company's ability to operate it in conjunction with coordinated units on its system and other systems due to broad operating agreements between Consumers Power Company and other utilities. In view of the value of such coordination to it, Consumers Power Company cannot lawfully continue to freeze Intervenors from equal advantages. Thus, while Consumers Power Company resists antitrust license conditions, it ignores that the Midland units themselves are being constructed in the context of the Company's transmission and

and coordination availability. To foreclose Intervenors from equal access to transmission and coordination and ability to integrate Midland power into their systems--or substitute for it--will allow the licensing of Midland to result in undue economic advantage to Consumers Power Company, a situation Congress explicitly sought to avoid.

26. Agencies without explicit antitrust jurisdiction have been reversed for viewing their function narrowly. See Section 3B, infra. Here the Commission has been given a jurisdiction to license facilities basic to the electric power industry, which facilities may affect the economic structure of the entire industry.*/ The Commission cannot fail to resolve the problem presented by Consumers Power Company's domination and be true to the responsibilities given it.

27. To conclude this introductory statement, Intervenors would state that they recognize that wholesale power coordination has developed into the means whereby utilities can take advantage of economies of scale. From an operational standpoint, this requires cooperative effort. In this context Intervenors regret

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*/ For example, it is estimated that by 1980 the industry will be 28% nuclear and by 1990 it will be 49% nuclear. This figure understates Consumers Power Company's projected nuclear dependence. Ex. 1001 JC-1, JC-3.

that settlement has not been reached. However, they are constrained to point out to the Board that failure to reach settlement, the far preferable course, would appear to have been influenced, judging from its pleadings, by the failure of Applicant to accept the basic propositions that Otter Tail and other cases clearly mandate it to deal with Intervenors on similar terms as it deals with other utilities (i.e., not to deny access to its own advantage). Indeed, its legal position is that it may take advantage of its superior bargaining position (or economic situation) to exact extra benefits from Intervenors as a price for coordination.

28. As we explain later, as a matter of law we believe the Atomic Energy Commission may have to reach the details of coordination agreements and rates to assure non-discriminatory access to nuclear generation and attendant facilities (or the opportunity to substitute for such access). However, the Intervenors believe that these details can likely be worked out among the parties, providing the Board establishes a clear declaration of obligations, such as are contained in our proposed license conditions or the A.E.C. staff guidelines. It is the absence of a clear understanding of the existence of such obligations that frustrates negotiations regarding specific terms and conditions. In other words, if the Board affirms rights of access to the Midland units, transmission

and coordination on equal terms as Consumers Power Company now possesses, it well have equalized the bargaining position of the parties, which is now woefully unequal due to Intervenors' dependence upon Applicant for meaningful coordination.

29. Finally, Intervenors would again comment on the alternate jurisdiction question, since it is so often raised. We believe any government agency has an obligation to solve problems in a practical manner. Otherwise, the task of smaller entities attempting to assert rights against larger ones becomes almost impossible. Intervenors are aware of some judicial bodies having potential jurisdiction over some or all of the problems here presented. At least some of them are considering a District Court action, which could deal with questions of damages for past action and other litigation to secure full transmission and coordination rights. However, Intervenors submit that they ought not to have to embark on litigation before courts and other agencies to establish basic principles, most likely to be met with the argument that the Atomic Energy Commission has "primary" jurisdiction. Furthermore, such actions are costly and may make more difficult settlement of any one action. Therefore, they urge on the Board that administrative efficiency demands reaching issues raised in this proceeding. We also suggest that in the long run a simple declaration of rights will establish a framework for agreement among the parties.

I. CONSUMERS POWER COMPANY'S DOMINATION OF THE BULK POWER FACILITIES IN THE LOWER MICHIGAN PENINSULA HAS RESULTED IN A SITUATION INCONSISTENT WITH THE ANTITRUST LAWS

A. Consumers Power Company Dominates Bulk Power Generation and Transmission Facilities.

30. Consumers Power Company dominates electric service in the lower Michigan Peninsula outside of the Detroit area. Each of the individual Interveners (including the Michigan Municipal and Cooperatives Power Pool, "MMCPP") are surrounded by and dependant upon this dominant electric system for coordination and in the case of purchasers, for service. And, as we shall discuss, infra, in its operating arrangements, the Company is closely tied to Detroit Edison Company. The Company also operates natural gas distribution facilities throughout the lower Michigan Peninsula.

31. Consumers Power Company's 1973 load was 4,394 mw. Its 1972 nameplate ratings were 2846.0 mw fossil steam, 886.7 mw nuclear, 68.0 mw hydro-electric and 496.9 mw other, or 4,297.6 mw total generation. Its 1982 projections shortly after Midland should be on the line total 11,994.7 mw of which 4,568.0 mw will be nuclear. */ Ex. 1001, JC-3.

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*/ These figures may vary depending upon reapplication for the Quanticassee units and the timing of their being put into service. 1973 generation statistics are contained at pp. 432-442-A of its Annual Report to the Federal Power Commission, which has been supplied the Board by Consumers Power Co.

32. In 1973, Consumers Power Company had approximately 1,180,800 electric customers and 936,300 gas customers. Its total electric sales were 24,102,000 mwh or $495,723,000 of annual revenues. Total revenues were $834,954,000. The Company has total assets of $2,844,847,574 and an electric utility plant of $1,909,907,524.*/ By contrast, the total loads of Interveners are less than the power to be generated from the Midland units alone. Apart from Lansing, the Interveners own no generating units of more than 30 mw and Lansing has no unit greater than 160 mw. Gutmann, p. 12:4664. The Midland units, are proposed at approximately 1,300 mw of base load power and associated energy, one of the units to provide 800 mw of power. Application. Chayavadhanangkur, See p. 3:5090. Ex. 1001, JC-3, JC-4 for interveners' loads. In addition, Consumers Power Company now has a number of units of above 500 mw on the line. See 1973 Annual Report to Federal Power Commission p. 401 h.

33. Through an examination of Exhibit 1001, the Board can readily examine the size differences between Interveners and Consumers Power Company. Thus, Consumers Power Company has existing generation of 4298 mw. Annual Report to Federal Power Commission, supra. Holland has less than 100 mw. Coldwater, Hillsdale and

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*/ These figures are from the 1973 Consumers Power Co. Annual Report, which has been supplied the Board by Applicant. See Ex. 21.

Marshall each have less than 20 mw. The combined generation of the MMCPP, including Northern, Wolverine, Traverse City and Grand Haven, as well as Wolverine's satellites, is less than 250 mw. Even Lansing, which is the largest municipal system in the state, has only 631 mw of existing generation as against a 1972 load of 321 mw. */ This is far less than could support even one nuclear unit. Ex. 1001, JC-3 2694-2695.

34. Because of the economies of scale in the electric industry, there are clear advantages to having access to large scale generating units. E.g., 2556-2558, 2651-2652. Nuclear generation is becoming an increasingly important source of base load generation, so much so that it is projected by the Federal Power Commission's 1970 National Power Survey that in 1990, nuclear power will account for one-half of the energy production of the nation's major utilities. Ex. 1001, JC-1, p. 5. In applying for the Midland licenses, Consumers Power Co., "anticipates that the power produced from the units will produce as low, if not lower, costs in energy for base load purposes as any other alternative." Chayavadhanangkur, P. 3, quoting Aymond, Ex. 1004, pp. 225-226. Moreover, the Company itself recognizes the importance of the availability of alternatives,

*/ The disparity of Lansing's generation and load also illustrates the difficulity of independent systems in the lower Michigan peninsula. Thus, due to the requirements forced upon it by Applicant, Lansing has been forced to operate with almost 100% reserve capacity. And Lansing is not typical of the others. Compare DJ-1, DJ-20. Gutmann; pp. 19, 29-30: 4664, Ex. 1004, pp. 181-182. See 1008, 295-300.

underscored by the uncertain availability of fossil fuels and the needs for environmental compatibility. Chayavadhanangkur, pp. 3-10.

35. Because of their size, Intervenors or other small systems cannot build nuclear units themselves. 2694-2695, 2808. Chayavadhanangkur, pp. 10-12:5090. Therefore, unless they can directly buy portions of nuclear generation or power specifically assigned from them (unit power), they will be barred from access to a major source of generation and perhaps from independent generation as well. Moreover, as witness Mayben and others testify, especially in view of increased fuel costs and decreased fuel availability, the installation of small units is becoming less and less economic. (2806-2808). Congress did not intend that they be foreclosed from such a major source of technology developed at government expense. */ (See 2797-2798, 2802, 2823-2826). See pp. 75-88, infra.

36. Not only does Consumers Power Company own all large base-load generators in its service area but as has been testified to on this record--and is agreed to by Consumers Power Company--it is this control of high voltage transmission facilities which

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*/ The issue is not whether nuclear ownership is preferable to other forms of ownership or purchased power as an objective matter (assuming this can be determined with any degree of certainty), but whether the smaller systems shall have the opportunity to make that decision. The ultimate decision and responsibility for power supply should be that of the individual system and, in making this decision, small systems should not be foreclosed from nuclear access. It is noteworthy that, as evidenced by their actions, dominant utilities, such as Consumers Power Company, believe this right is important.

allows for integrating its generation with its markets. This in turn allows for obtaining economies of scale. E.g., Pace, P. 38: 7239; Ex. 1005 P. 31-47,77; Ex. 1004, 166-167. For cost, environmental and market reasons, the smaller systems cannot duplicate Consumers Power's transmission network. E.g., 2811-2817. Through high-voltage transmission lines large amounts of power can be transmitted without substantial line losses. Thus, for example, 345 kv lines integrate the Midland units into the Consumers Power - Detroit-Edison systems. */ Moreover, for transmitting power over long distances (apart from coordination) high-voltage transmission is necessary. Ex. 1005, supra, Chayavadhanangkur pp. 16-19, 21-22:5090. Gutmann, pp. 13-22, 29-20:4664. **/

37. As is fully supported by the record, without access to such transmission the smaller systems are denied the opportunities to obtain alternate power sources and to coordinate with other systems, thereby depriving them of the type of economies of scale and of operational efficiencies possessed by Consumers Power Company. Absent its large markets (or coordination with other systems having large markets) a utility cannot build large, efficient base load units. Without such markets, it cannot obtain financing for

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*/ We refer to the systems jointly, because they dispatch power jointly and for practical purposes their systems are a unit.

**/ For example, a 230 kv line costs approximately 1.6 times a 115 kv line, but can carry 2.5 times more power. Id. Their "wheeling" serves environmental as well as engineering needs. E.g., Chayavadhanangkur. P. 26:5090. See Ex. 1004, Pp. 181-182.

such units. Nor, can it sell enough power to pay for the carrying charges and expenses of units such as Midland. See references above. Ex. 1005, pp. 36-38, 77-78.

38. While to the extent that the general public consideres transmission facilities in any functional sense, it undoubtedly thinks of them as a vehicle for moving power analogous to a railway track bed or highway, transmission lines perform other distinct functions. Their greatest importance is to maintain systems reliability.*/ High-voltage transmission is necessary to transmit the power from large base load plants to market and to back-up such plants. For example, if a large 1,000 mw plant goes on or off the line, an electric surge will result. There must be sufficient transmission capability available to absorb this surge. Similarly, the transmission lines connect varying generation sources. If one plant goes off the line, transmission facilities must be adequate to both absorb the loss of power from that plant and to instantaneously receive the equivalent amount of power from other generating facilities.

39. Apart from loss of units, on a day-to-day basis transmission

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*/ For example, in a settlement approved by the Federal Power Commission last month, 60% of the costs ascribable to transmission were allocated to "reliability" purposes and only 40% to "transmission of power" purposes. Florida Power Corporation, FPC Docket No. E-7679 (5432). See Ex. 1004, P. 167, 169-170.

facilities allow for the operation of the most efficient plants available to meet generation requirements. (2565-2566) It is the transmission network which allows computerized dispatching of power from the lowest cost unit available.

40. Transmission lines also "back-up" themselves. If a transmission line is placed out of service due to overloading or to damage from external sources (or simply due to construction or other planned service interruptions), other paths of power must be available. */

41. Even in the function of transmitting power, there are functional differences, higher voltages being necessary to transmit power great distances throughout entire regions and the lower transmission and subtransmission voltages being necessary to serve specific classes of loads or specific loads in local areas. The transmission facilities also make possible the receiving of power purchased by Applicant from other sources, including receiving and delivering interchange power. While functionally this may seem (and to a certain extent is) similar to the function of delivering power, it is the capacity in the large transmission lines, which allows

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*/ The various functions served by transmission to integrating systems and the relative efficiencies of higher voltage lines are found repeatedly in the record, including citations above. See generally the following references: Ex. 1004, 168-169, 181-182, 1005, 44-47, 64-49, 1008, 214-215, Chayovadhanangkur, 16-19, 21-22:5090 Gutmann, 13-22, 29-30:4664; 5430-5432. Mayben, 2556.

Consumers Power Company to interchange power with Detroit Edison Company, Ontario-Hydro or the M-I-I-O Companies to the South. Transactions may include the transmission of firm power on a long-term, intermediate or short-term, or "when available" basis. It includes emergency power and economy exchange. The availability of transmission to facilitate such transactions allows both the building of larger units and taking advantages of economies of scale (because of the making available of markets to sell excess power and the providing of "back-up" when the larger units are out of service).

42. We break down the functions of transmission in detail to underscore the importance of Consumers Power Company's domination on transmission to its ability to control power supply. */ The situation of a Coldwater, for example, which is denied access to coordination or interchange power even from other small systems underscores the importance of Consumers Power Company's control. First, if in order to take advantage of economies of scale--or

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*/ The example is obvious in the case of a nuclear plant. A nuclear plant may have an investment of anywhere from $500 - $1,000 kw. However, operating costs may be from less than 2 mills to 4 mills kwh. On the other hand, large fossil fuel units may have capital costs as low as $150 kw. However, especially in the light of higher fossil fuel costs, operating costs may be well over 2¢ kwh. At the present time oil has been selling at $12/bbl and coal as high as $51/ton, which equates to energy costs of over 2¢ kwh. At the present time oil has been selling at $12/bbl and coal as high as $51/ton, which equates to energy costs of over 2¢ kwh. If a system can run a high capital cost nuclear plant continually, the high capital costs can be ammortized and total power costs/kwh will be a less than conventional plants. However, if nuclear plants must remain idle for substantial periods of time, the plant becomes uneconomic and the system must use smaller less efficient units. Chayavadhanangkur, 2, 5-10:5090, Ex. 1005.

simply to expand its market--Coldwater desires to build a large plant even in relationship to its load, it cannot do so. It presently has a load of less than 20 mw (5426). Moreover, to sell bulk power to other systems and thereby allow for building larger units Coldwater must be able to purchase transmission services. If Consumers Power Company either refuses to sell transmission services or places unreasonable conditions upon such sales, Coldwater is restricted in the size of the units it may build. Similarly, if it wishes to take advantage of a large plant to be built by another system--say with the intention of its building an equally large plant sometime in the future--it cannot do so. Gutmann: 17-18, 22:4664.

43. Consumers Power Company itself covers such a wide service area that for itself the problem does not arise. DJ-19. If it builds a plant at any available site on its system, it can use its own transmission to bring the power to market, including to its wholesale power customers who cannot do the same.

44. Assume that a Coldwater does build a relatively large unit and desires to tie into plants of other systems. It can do so only through use of the existing transmission facilities, again owned by Consumers Power Company. Thus, except to the extent that Consumers Power Company will permit it to do so, Coldwater well not have access to emergency or maintenance power to back-up its plant; nor can it coordinate its operations among a number of plants so

that it can generate from the most efficient units related to its load curve. Pace; p. 35-68:7239. The transmission facilities give control.

45. And Coldwater provides an apt illustration of the detriments from not having access to coordination. Although having small plants, at the same time that Coldwater had 16.5 mw of generation and a 16.7 mw maximum load it was paying Consumers Power Company for an additional 71.2 mw months */ of capacity through wholesale purchases. Ex. 1001, 5426. Thus, it either owned or was purchasing capacity equal to 35% of its load. Alternatively, an independent system, even the size of Lansing, which does not desire to purchase power from Consumers Power Company had 631 mw of generation to serve a 321 mw load; Holland had 77.3 mw of generation to serve a 49.3 mw load. **/ (Chayavadhanangkur, pp. 20-21:5090). Contrast the situation of the gigantic Consumers Power Company which had 1972 main system peak demand of 4,080 mw and nameplate capacity of 4,298 mw or reserves of 5.3% of load. Ex. 1001, JC-3, 1972 Annual Report "Form 1" to the Federal Power Commission, p. 431-B. See

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*/ A mw month represents the capacity charge in megawatts on a monthly basis. This equates to an average annual purchase of 5.9 mw, although in some months it would be higher.

**/ It should be noted that Consumers Power Company is fond of using reserves figures much higher than it maintains. Thus, it will talk of reserves over 20%. Such figures are usually "planning" figures. Indeed, even its installed reserves figure usually do not include allowances for out-of-service plants, such as Palisades. See 5523-5524.

also pp. 54-66.

46. Because of its ownership of transmission facilities throughout the Lower Peninsula, Consumers Power Company can achieve the internal coordination that Intervenors have to ask for--or beg for--or litigate for. E.g., Ex. 1005, pp. 19-22. Chayavadhanangkur, pp. 10-12:5090. Gutmann, p. 29:4664; see Pace, p. 38:7239. See also 5525-5530 (Rogers) testifying concerning Midland's impact on the Consumers Power system.

47. Not only are Intervenors faced with a large utility, Consumers Power Company, surrounding them and isolating them, which can achieve internal self-coordination, but this utility finds it necessary and desirable to enter into complex coordination arrangements with utilities of equal size who equally dominate their service areas. */ This coordination provides for electrical operations on multiple systems similar to those that would occur on a system that was subject to sole ownership. Thus, through coordination and interchange, Consumers Power Company achieves the economic advantages of having access to generation and power supply facilities throughout Michigan and the Midwest. See Statement and Summary of Argument, supra.

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*/ It is impossible to bring together all record references to the advantages of coordination. However, we call to the Board's attention the coordination agreements themselves (e.g., DJ-67, DJ-71-78) and the testimony of the Department provided by Witness Mayben explaining them. Witness Rogers capsulizes these advantages at 5515A. Also Witness Chayavadhanangkur at pp. 12-19:5090. The deposition of Harry R. Wall, Ex. 1005, discusses these extensively. Accord, Aymond, Ex. 1004, pp. 167-172.

B. Consumers Power Company's Coordination Arrangments Provide a Market for Power Transactions from which Interveners are Excluded.

48. Pooling and interchange agreements provide a framework analogous to a market where varied power transactions can take place. Gutmann, pp. 5-7:4664; 5550-5554. Thus, for example, if an independent system (assuming the existence of adequate interconnection facilities) loses a unit, it would have to negotiate for power as a separate discrete transaction. Assuming the power was transmitted, the economic terms would be such that the system would be economically compelled to attempt to maintain large amounts of excess capacity either through purchase or ownership to avoid such transactions. This would lead to less efficient operations because of the necessity to have more idle capacity (i.e., reserves) compared with load and/or smaller, less efficient units. However, an existing interchange arrangement especially under terms of joint dispatch, provides in advance for the most economic power transactions. See previous footnote.

49. Power pools or interchange contracts are formal methods whereby individual systems enter into individual transactions to buy and sell various types of power as the need may arise. Access to the stock exchange gives the opportunity to buy or sell stocks at the best available terms. Access to the supermarket provides an ability to buy a variety of fruits, or vegetables, or meats, as

the need arises. Similarly, if a utility has access to the power pool, it can buy or sell emergency, maintenance, economy exchange, short-term or seasonal power, and a panoply of other specialized power services. If it is barred from this market, it must either be self-sufficient (at great cost), or buy and sell in a much more limited market and at less favorable terms. Thus, just as a holder of stock excluded from access to the New York Stock Exchange might be able to sell or buy but at less advantageous prices due to inadequate access to fewer buyers and sellers, so a utility excluded from the pool can enter into particular power transactions with access to power from fewer units and smaller markets.

50. A utility will purchase emergency power, for example, from the lowest cost available unit. If it has access to units on only one system, its incremental costs for power at any particular time may be twice the cost of the lowest cost unit in an area. For most of the smaller power systems in Michigan the market for buying and selling power is Consumers Power Company. Since they cannot obtain transmission, that Company can set the terms of sale. Or as Henry Ford once said, you can buy any color car you want so long as it is painted black. */

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*/ The MMCPP is a coordinated group consisting of Grand Haven, Traverse City, Wolverine Electric Company. Since the largest unit on any of these systems is less than 30 mw (and total generation less than 250 mw), by interchanging with each other, they are still barred from access to large low-cost bulk power units. Gutmann, p. 12: 4464; Ex. 1001, JC-3. Having total loads of less than 250 mw, for the MMCPP to build substantially larger units it would have to depend upon Consumers Power Company for transmission, coordination, etc. (See 7885)

51. As Consumers Power Company witnesses attest, its coordinatio arrangements are of great advantage to it. Through establishing an access to a broader power market, they give the Company the ability to tailor its power supply to its demand. If it needs only emergency power for short periods of time when its units are down, it can obtain that type of power at a price specifically geared for the service. It can obtain such power from Detroit-Edison or Ontario-Hydro or Toledo Edison or Indiana and Michigan or even Intervenors, depending upon the most favorable price. On the other hand, if Coldwater wants emergency power, it must purchase partial requirements power at a rate based upon the cost of supplying total power needs, including an annual demand charge. Thus, if Coldwater uses such power for only one hour, it will have to pay charges for an entire year. See previous references to advantages of coordination, p. 28, n.1, supra. In addition, see discussion of a ratchet clause as to partial requirements customers. TR. 5113-5119.

52. Thus, Coldwater's charges for power are based upon its maximum monthly demand. For each succeeding month it must pay a demand charge based upon a fraction of its highest monthly usage during an integrated 30 minute period for the 11 preceeding months or the full amount of the demand charge based upon its highest use during the month, whichever is higher. Id., Appendix C. This is analogous to the situation that would exist if one had access to

automobile rentals as well as taxi cabs, busses and subway service, but another had access only to annual car rentals. If the first person has to rush to a hospital, he can take a cab; the latter would have to pay car rentals for a year. */

53. There is a relationship between sizes of generating units, economies of scale, necessary reserves and reliability of service. 2553-2555. As has been stated before, there are substantial economies of scale to the building of large generating units. 2558. See p. 20, supra. Total base load power costs produced from them are cheaper than smaller units. However, because of the necessity for a continuous electric power supply, a system must have adequate alternative capacity available when its units are out of service. Moreover, in attempting to advance technology and to build larger units, there is greater probability of these larger units going out of service than smaller ones. In his deposition, Harry R. Wall testified to this greater unreliability of larger units and the Company's

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*/ Not only is the requirement for Coldwater to pay annual demand charges based on the maximum power purchases (including emergency power) anticompetitive, but it distorts power use, creating additional "barriers to entry." Once a system creates a demand, it is economic for it to purchase energy throughout the year. Analogously, in the car rental situation, one might choose not to save the milage charges by driving a rented car when he is already committed to pay the weekly or annual base charge. While Coldwater can avoid paying Consumers Power Company energy charges by not purchasing from it, it will choose not to if it is already required to pay the annual demand charge for the entire year based upon the highest single use.

experience with Palisades is an obvious example of this. Thus, there is a trade-off between the economies of operation that can be achieved from larger units and the greater amounts of reserve capacity which may result from their use. Ex. 1005, pp. 72-73, 74-77. */

54. Internal or external coordination makes available both contractual and operational reserve capacity which results from a great number of units necessary to serve a large area. **/ E.g., 2563-2567-2580. Consumers Power Company can construct and operate large units such as Midland, thereby achieving the advantages of scale, because it has available access to the reserve capacity in

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*/ The Michigan Power Pool has large units, which would be considerably less reliable than smaller ones. For example, Palisades has been out of service for months. (5446). Ex. 1004, pp. 76-76. Company Witness Pace states that in view of the higher costs associated with "relatively small generating units," "base load self-generation by small systems generally is an alternative only if those systems have the benefit of substantial government subsidies." Of course, while large amounts of reserve capacity are desirable from a reliability standpoint, reserves represent idle capacity (and financial investment) and therefore increased costs of operation. Ex. 1004, p. 167.

**/ While, as a matter of law, Intervenors do not believe the rights to relief are affected whether Consumers Power Company's advantages come from its own internal operations and the internal coordination thus achieved or the parallel advantages achieved through coordination with other systems. Consumers Power Company is coordinating with other systems. The Midland units are being built in context of such coordination. In this situation, Consumers Power Company cannot legally deny the same coordination to Intervenors that it has with other independent systems.

the units not only on its own system, but owned by Detroit-Edison, Ontario-Hyrdo and the MIIO systems. Ex. DJ 66-78. Because of the ability to plan maintenance schedules jointly and the reduced probability of concurrent multiple outages, the necessary reserves supporting such large units are reduced as a result of the company's coordination. This broad coordination gives Consumers Power Company the advantages of the ability to build large units and to reduce its reserves requirements, hopefully leading to the most efficient generation mix. E.g., See generally Ex. 1005, especially pp. 1-65 Chayavadhanangkur, pp. 12-17;5090.

55. Moreover, coordination (internal or external) results in reduced risk to building larger units. A system having a large number of units on its own system or available through interchange can more readily risk building a larger unit than a smaller system that has less baskets in which to place its eggs. Ex. 1005; p. 21, 2561. Since there are substantial economies of scale in electric generation, the opportunity to build or acquire access to larger units results in substantial savings for a smaller system. E.g., 2553-2555.

56. Internal and external coordination gives Consumers Power Company more flexibility. Varied evidence has been placed in the record of predictions concerning the probable costs tothe Company or to Interveners under certain hypotheses.*/ There can be no question that a large system, especially one having broad co-ordination opportunities, has more alternatives available to it and, therefore, more choices in case one type of unit should become technologically or otherwise outmoded. Ex. 1005, p. 21-23. For example, at the present time Consumers Power Company has a balance of nuclear power, coal fired generation, gas and oil units, pumped storage hydro-electric power as well as other hydro-electric power and a different mix of large base load units, intermediate size units and smaller peaking units. Additionally, these units are of various vintages. Ex. 1001, JC-3. Obviously, a smaller system does not have access to this type of flexibility and must rely on the smallest units.

57. The recent oil shortages and change in fossil fuel prices and environmental concerns give dramatic proof to the dangers of systems which does not have access to alternative sources of power.

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*/ Interveners view such evidence -- on all sides -- as being irrevelant to the issues in this case, although to the extent such issues are held to be relevant we rely on DJ-200-203. However, what type of generation a system should obtain and the mix of generation are managerial decisions. Indeed, such choices may provide the essence of allowing for competitive alternatives.

Ex. 1005, p. 19-21, 105-108; Chayavadhanangkur, pp. 3-5:5090; 5455-5488. Gutmann, p. 36:4664. The President of Consumers Power Co. testified "that nuclear power is quite important" because of limited fossil fuel availability. Ex. 1004, p. 138,166. Regulatory changes in application rate-making principles provide another example of cost uncertainties. 5110-5103, 5119-5121.*/

58. Greater number of units allow for greater reliability of service. As is stated above, coordinated operation allows for operation at any one time of the most efficient units consistent with the total demand for power on the coordinated systems E.g., Chayavadhanangkur, pp. 11-12:5090.

59. There are additional advantages to coordination. Coordination makes capital investment for better transmission facilities more feasible. It allows utilities with hydro-electric plants to take advantage of stream flow diversity between drainage basins. It also

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*/ The Board is aware of recent changes in methods of determining "just and reasonable" rates by the Federal Power Commission and of criticisms of that agency, which have been marked, among other things, by a sense of notable Court reversals. E.g., Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973); Richmond Power & Light v. FPC, supra, 481 F. 2d. 490; Burrough of Lansdale v. FPC, 494 F. 2d 1104 (1974); See "U.S. Acting to A.d Electric Utilities", Washington Star News, pp. 11 (July 3, 1974), See also "Quick State Action on Utility Rate Rises Urged by Simon and other U.S. Officials", Wall Street Journal, p. 12, Col. 2, (September 12, 1974). Cf., Comptroller General, Need for Improving the Resalation of the Natural Gas Industry and Management of Internal Operations (September 13, 1974). The point raised is not whether rate regulation is effective, but that in interveners can well determine that they desire the control of owning their own generation in whole or part to avoid the uncertainties of regulation or because they do not desire regulation effective. The Board should not deny access because it disagrees and believes regulation to be effective. This is clearly a matter of managerial choice. Consumers Power Company's purpose in developing nuclear includes recognition of both the short and long disabilities of nuclear fuel.

*/ E.g., DJ-67 with DJ-91-92; 99-103. See DJ-47-49, DJ-170-172, concerning keeping out "undesirable third parties".

allows utilities to coordinate maintenance programs. Wein:3974-75. */ It allows for management contact and exchange of information. It allows for coordinated development in units to place optimal size units on the line (through purchases or sales of power during interim periods before, or after, a system's own load is capable of absorbing the capacity of the unit size in question). Absent coordination, because of its demands for power, a system might have to build smaller than optimal size units or have idle capacity in a larger unit. After it builds a unit it might still have excess capacity which because of lack of coordinated operations it may not be able to sell.

60. Coordination also allows for financing advantages by giving flexibility in terms of the timing of new units. Consumers Power Company's decision to postpone building Quanticasse due to a tight money situation would doubtless have been less possible absent its coordination agreements.

61. In summation, coordination allows for access to forms of alternative power supply arrangements and for maximumized use of available power supply. The difference between a dependent and non-dependent electric system in obtaining low cost power supply can be summarized as the availability of alternatives. Indeed, this is true of any business.

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*/ Additional benefits from Midland are that it can be integrated with the Company's Luddington pumped storage plant. Inexpensive energy from Midland can be used to pump water to the Luddington reservoirs used to generate electricity during peak periods. Unlike Detroit Edison or Commonwealth Edison PD-72, DJ-227 Intervenors were not offered participation in Luddington. Indeed, in disposing of hydroelectric sites the Company restricted such sites from electric generation use so that they could not be used by Intervenors. See DJ-146

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C. Coordination with the Smaller Michigan Syste[illegible] Should Not be on a Discriminatory Basis.

64. While stating that coordination is a matter of [illegible]gaining, as the discovery and common sense attests,*/ Consumers Po[illegible] Company has much to say about the types of interchange arrangeme[illegible] it has with other companies. These arrangements almost uniform[illegible]y provide mutual access to transmission capacity and their reserve [illegible]ormulas result in equal reserves requirements proportionate in l[illegible]s and a shared savings from the interconnected operation. DJ-[illegible], 71-78. Thus, for example, high voltage transmission is necessa[illegible] to allow for interchange power transfers among major utilities o[illegible] long distances. The basic MIIO agreements (and for the mos[illegible]rt Consumers Power Company's interchange arrangements) provi[illegible]for no charge by any party for the use of the interconnected [illegible]nsmission facilities. DJ-76. Ex. 1005, 64-66. Similarly, what[illegible] the contractural formulation, in practice each utility eithe[illegible]as responsibility to maintain adequate reserves as based upon [illegible] own judgment or, where there is a reserves requirement, it wo[illegible] out to a

proportional percentage of loads. See agreements, supra. Thus, use of transmission capacity is encouraged to facilitate power transfers; specialized power transactions, such as emergency power, will be bought and sold at incremental costs without requiring disproportionate reservations of capacity by one system or another and without providing for special additional charges for one system or another. If one system can operate a unit not in service more cheaply than a unit on another system, the lower cost utility will operate its generation and the two systems will split the amount of money saved. Such arrangements obviously benefit all parties to them. Agreements, supra.

65. By contrast an examination of the interchange contracts between Consumers Power Company and the smaller systems within its service territory show the following. First, there is no provision for joint use of transmission capacity or even for the purchase or sale of such capacity.*/ See agreements, generally, e.g., DJ-104-105.

*/ One exception, not a matter of record, is a recent transaction between Detroit Edison Company and the MMCPP, providing for transmission over Consumers Power Company's lines. This transaction may well be a result of this proceeding. However, it is noteworthy that in order to obtain such transmission, the MMCPP is paying 15% of energy charges for the power transmitted as well as a demand charge.

66. The second item of note is that such arrangements have uniformly provided for larger reserve dedication by the smaller isolated systems. The formulas have invariably based on some kind of "largest unit" formula, which results in far greater reserves requirements by the smaller systems as a proportion of their load, even though there is no showing that such systems' units have lesser reliability. They also inhibit the ability of the small unit system to install the largest and more efficient units. DJ-99-105. Chayavadhanangkur. p. 10-22:5090.

67. Such agreements have been entered into only with Lansing, Holland and the MMCPP. Lansing and Holland have had large amounts of excess capacity, which could only be sold to Consumers Power Company.**/ Consumers Power Company has insisted that large reserves be maintained by those systems and, at the same time, through restricting transmission availability, Consumers Power Co. has been

**/ Such excess capacity results from their isolation and the onerous reserves required of them to obtain any coordination.

the only market outlet for such power. And, indeed, the "prime reason" for entering into the Holland interchange agreement was "that if Consumers Power Company did not maintain this interconnection undoubtedly the City and Wolverine Electric Cooperative will enter into such an agreement". DJ-150. Holland could not interchange with both, because Consumers Power Company precluded such dual arrangements. DJ-99,100. The MMCPP, which once represented isolated systems, joined together only after they could not reach satisfactory arrangements with Consumers Power Company. However, there is no such coordination provided for the other more isolated systems.

68. The impact of the disproportionate reserves requirements by Consumers Power Company based upon the largest unit concept have meant that the smaller systems could not economically build large units (apart from their market limitations), because they would have to dedicate an excessive amounts of unused capacity. Indeed, as Lansing and Holland now do have large amounts of excess capacity, raising the costs of power on their internal system, although excess energy can be sold to guess who? Consumers Power Company. */

69. Yet, these systems had to enter into these arrangements with Consumers Power Company or be cut off from coordination.

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*/ If smaller systems such as Coldwater wish to generate, but not to maintain excessive reserves, they can purchase power from Consumers Power -- on an annual basis, subject to a demand ratchet.

70. The required reserves -- and willingness of Consumers Power Company to coordinate -- has been related to the ability of Interveners to do without. This explains why the MMCPP, after joining together, could get some interchange advantages. It explains why Holland (who was situated so that it could have joined the MMCPP), could also get interchange from Consumers Power Company. It explains why Lansing with its comparatively greater size and greater amounts of reserves (and less need of an interchange arrangement) could obtain one. It explains why Coldwater or Hillsdale or Marshall cannot. DJ-150, 2635-2652. Indeed, Consumers Power Company's legal theory appears to be that because they do not now have Consumers Power Company's vast markets, large base load generation and high voltage transmission facilities, to start with, they would be disproportionately advantaged from changes in their interchange agreements and therefore they should contribute greater reserves than Consumers Power Company. Prehearing Brief for Applicant, pp. 135-136.

71. As we have stated before, the Midland units are to be major investments as part of a generation and transmission network of integrated generation and transmission facilities. They can be expected, to have a "tremendous impact" on Consumers Power's system. 5525-5529,5525. Interveners cannot themselves build such facilities. Nor could Consumers Power Co. do so economically without the advantages of internal and external power coordination. Indeed, absent

such access to transmission and coordination, it would be uneconomic for interveners to even consider access to Midland. 2827-2845; 5524-5525. The integrated operations of power systems demands that, if the Midland Units are licensed, the interveners not be deprived of the ability to utilize power as part of integrated operations in the same manner as Consumers Power Co. To hold otherwise would give Consumers Power Co. disproportionate advantage from the licensing of these facilities to the substantial detriment of interveners. 5538-5546.

D. Consumers Power Company has Used its Domination Over the Bulk Power Facilities to its Advantage Compared with Smaller Systems.

72. Under the bottleneck monopoly doctrine, there is no need for Interveners to show "unreasonableness" on the Company's part.*/ However, the record does indicate a purposeful intent on the part of Consumers Power Company to achieve domination over the lower Michigan peninsula in violation of antitrust laws and policy.

73. As we stated initially, the Alcoa and United Shoe Machinery cases are declarative of the fact that a corporation cannot grow into a giant enterprise without an intent to do so. United States v. Aluminum Co. of America, 148 F. 2d 416, 430-432 (CA 2, 1945); United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 346 (D. Mass., 1945), affirmed per curiam 347 U.S. 521 (1954). Consumers Power Company's control of bulk power generation and transmission facilities certainly is no accident.

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*/ We discuss this issue separately at pp. 65-69 and also specifically replied to the Board's request of Counsel at pp. 109-110.

74. Consumers Power Company has territorial agreements or "understandings" with dominant surrounding systems who might have had an ability to build duplicate transmission facilities or otherwise to complete directly with Consumers Power Co., for wholesale -- or for that matter retail -- markets. DJ-110, 112, 2160-2163. DJ-157. See DJ-112-113; Gutmann, pp. 35-36:4664. Beyond that, there is ample use of the control over bulk power supply both to limit competition for wholesale power (i.e., that is power sold to other utilities for integration into their operations and resale to ultimate consumers). The most obvious examples are illustrated the existing interchange arrangements. For example, Lansing wanted a more favorable reserves contract among other things. 2098-2116, 2121. However, as has been stated, even a system of Lansing's size, could not obtain coordination on the same basis the Consumers Power Company freely grants to a non-competing system, Detroit Edison Company, DJ-91-92A.

75. The Holland-Consumers Power Company agreement is a prime example of discrimination. DJ-99-101. Under this formula, Holland was required to maintain reserves equal to 1/2 (Largest unit + 1/2 2d largest unit - 0.15 annual peak load) + 0.15 annual peak load. The practical impact was that under the formula Holland's 1973 reserves under the formula computed to 47.2% of its peak load. Moreover, if Holland were to install a larger, more efficient, unit, its reserves requirement, would go up. Chayavadhanangkur pp. 20-21:

5000. Thus, the formula not only penalizes efficiency, but it discourages smaller systems from installing generation competitive with Consumers Power Company. */ Moreover, both the Holland and Lansing Agreements contained express provisions, required as a condition of interconnection, that they could not buy power from or sell power to other systems. **/ See pp. 57-68, supra.

76. The pattern of consistent refusals to deal constitutes an intent and use of Consumers Power Company's domination over bulk power facilities to avoid competition. The most obvious way to avoid competition is to purchase such system. United States v. Crescent Amusement Co., 323 U.S. 173 (1944). Consumers Power Company has attained its large size partially through a process of consolidation and purchase. ***/

77. Consumers Power Company has continually attempted to take over smaller competing utilities adjacent to it or within its service area and has been at least partially successful. There is additional evidence of concerted activities by the Company to limit generation of competing smaller systems. Such activities have included attempts to block REA financing and to break-up the generation and distribution cooperatives, DJ-42-44, 46 2086. Ex.

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*/ Gainesville Utilities Dept. v. Florida Power Corp., 40 FPC 1226, 1238 (1968), set aside, 425 F.2d 1196 (CA 5, 1970), reversed, 402 U.S. 515 (1971, affirming FPC opinion).

**/ Consumers Power Company apparently seeks to defend such arrangements as attempts to avoid federal jurisdiction and not to limit those municipal systems. See Ex. 100, 10936. Assuming that the motivation to avoid federal jurisdiction had a legitimate business purpose, this does not justify actions which would be unlawful on other grounds.

***/ 1974 Moody's Public Utility Manual, p. 1957.

1017-1053, 1073-74, 1076, 1095-1097, 1099-2000, 2003-2007, 2016-2020, 2024, 2029-2030, 2032-2040, 2044, 2051, 2062-2063, 2086, 2092, 2103-2123, 2126-2127, 2129-2133, 2154-2157, 2172, 2174. Tr. 1023-1031 Ex. 1004, pp. 25-27. As, Mr. Robert H. Paul, a witness in this proceeding and presently General Supervisor of Commercial Electric and Governmental Services, stated:

> "The first goal of our Marketing activity or program concerning other utility systems in our service area is, of course, to acquire the systems. Since 1950, Consumers Power has purchased 6 municipal electric systems. An offer to purchase the Charlevoix System was turned down, but we are now supplying most of Charlevoix's requirements. In 1965, when it became apparent that Traverse City was about to expand its generating plant, we attempted to head this off with a lease proposal . . . also in 1965, we offered to purchase the St. Louis Electric System for $825,000 . . . We are are in the process of submitting purchase proposals to the Cities of Allegan for its system and to Grand Rapids and the City of Wyoming for their street lighting systems . . . Ex. 2025 (1966).*/

78. Even assuming for the moment that such acquisitions and attempted acquisitions were not illegal, the

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*/ This statement was apparently part of a speech to Division Engineers of Consumers Power Company, which therefore could be expected to influence policy of the Company and have considerable impact. While the present Chief Executive of the Company disclaims that this is a matter of Company policy, he does not "recall" acquainting Mr. Paul with this policy. (Tr. 6420) Perhaps Consumers Power will argue that this, too, is covered by Noerr-Pennington.

persistent attempts of Consumers Power Company to limit competition through attempted take-overs or limiting self-generation negates any claim that Consumers Power Company's growth and resulting control over bulk power facilities was without knowledge or motivation. It so chose to expand and achieve dominant control. The fact that it did creates obligations to deal.*/

79. Significant evidence of Consumers Power Company's knowledge and use of its domination and control to limit competition is found in the testimony of its chief executive. On deposition, witness A. H. Aymond, the Chief Executive, President and Chairman of the Board of Directors of Consumers Power Company, testified as follows (Ex. 1004, pp. 182-185, 202-203, emphasis supplied):

Q. Just to be clear about it, if, say, a municipal entity in the State of Ohio desired to buy wholesale power from Consumers Power, would you sell it?

A. I don't think so.

Q. You do sell power to Ontario Hydro, do you not?

A. Well, we exchange power with Ontario Hydro.

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*/ The alternative to purchase or acquisition under single ownership is coordination and there is nothing to prevent coordinated development by Consumers Power Company rather than individual company control. Even if one assumed arguendo that the extent of Consumers Power Company's monopoly control is economically necessary and/or desirable, in a situation of monopoly control there is every reason to encourage the competition for wholesale power supply that may be able to continue to exist.

Q. Assume that Ohio Power or Buckeye Power or Ontario Hydro or some other entity were willing to sell power to a municipality within your service territory, would you sell transmission services to get the power there?

A. The matter has never come up and I think I would want to know more of the details of the transaction.

Q. What kind of things would you want to know?

A. I would want to know, for one thing, whether or not our lawyers felt we were obligated to do so. For another, I would want to know for what purpose the power was being sold and at what rate --

Q. Sold by whom?

A. By a selling firm. At what rate, what the receiving utility intended to do with it, what impact it would have in the long run on the ability of Consumers Power Company to maintain its present markets.

Q. Is it fair to say that your judgment would be based at least in part on your judgment of the extent to which the purchase of this power by the municipality or cooperative within your service territory enabled it to reduce its rates in competition with Consumers Power?

A. I think that would be a factor.

Q. A large factor?

A. I think so.

Q. Apart from the question of your legal obligation, are there any other major factors?

A. Well, I think the size of the transaction would be a factor.

Q. Why is that ?

A. Well, it might be a matter that all things considered wasn't too significant. I think whether the receiving utility actually was going to use it to invade our present market area would be a factor.

Q. What do you mean by "invade our present market area"?

A. Well, start taking away our customers which we have invested a great deal of money in order to serve them.

* * * *

Q. I believe this morning one of the reasons you mentioned for, as limiting the willingness of Consumers Power to sell transmission to publicly owned utilities was the impact that such sale might have on competition between the buying entity and Consumers Power. My question is, first, whether that was a fair caracterization and, secondly, assuming it was, were you mainly referring to large commercial and industrial customers or residential customers or both?

A. I was referring principally to large customers but I think the problem also exists with respect to residential

customers even though the amounts involved in a particula area might be relatively small insofar as the transfer of customers from one supplier to another because of, as I mentioned in response to one of Mr. Brand's questions yesterday, we do concern ourselves with the relative rate at which we are able to supply service to our customers as compared with those of other entities. Frankly, we don't like to put ourselves in a position where we are increasing the extent to which our performance looks bad in relationship to that of other entities.

Q. Does that complete your answer?

A. Just one final thought on that and that is to the extent that we do we increase our exposure to losing our markets. See also Ex. 1004, pp. 46-48, 125.

80. The Company's Chief Executive states clearly that a large factor in the Company's determination of whether it will sell transmission service is how the sale of such services may affect competition for customers. More simply put, the Company's Chief Executive says he will not sell transmission services where such use can create retail competition. Gutmann, pp. 30-34:4664 This is clearly illegal and precisely the kind of domination of one market through control of facilities in another market that the anti-trust laws, and the bottleneck monopoly theory, are designed to prevent.

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81. Consumers Power Company and neighboring, large, investor owned utilities have no difficulty in allowing each other free use of their respective transmission facilities so that, for example, Consumers Power Company allows use of its facilities to transfer energy between Detroit Edison Company and Toledo Edison Company, Ex. 1005, pp. 64-66. DJ-72-77. Neither is a competitor to Consumer Power Company. However, the Company has an interest in preventing a sale between such companies and municipals or cooperatives within Michigan and will not sell transmission for that purpose.

82. What the Company claims is a right to restrict use of its facilities because of its ownership status. There is no factual question. If the Company were willing to agree to treat intervenors in the same way it treats Detroit Edison Company, we could all go home.

83. Apparently finding the Company's initial position untenable, during his testimony Mr. Aymond presented a minor bombshell. Yes, he said, it is now the Company's intention to deal with intervenors. Although he never realized they wanted to be treated like other neighboring investor-owned utilities with which the Company has broad coordination arrangements, Mr. Aymond says he is willing to sell participation in Midland, transmission services, and the like, a committment to which the Company should be bound (6046-6071; 8106-8109). While we appreciate this conversion on the road to Bethesda, but see Paul, Ex. 2025, the Company demonstrates a consistent attitude all the more. Will Consumers Power Company sell transmission services? Answer yes, providing that this "will not result in a significant loss to Consumers

Power, directly or indirectly, of existing load or service areas . . . (6049-6051) And how can the sale of transmission services harm Consumers Power Company? Answer. It might lose sales, thus "idling" facilities. Id.

84. This record contains clear, direct, unambiguous evidence by a Company that its intent is to grant or deny use of necessary facilities which it dominates on the basis whether, in its judgment, such use will adversely affect the Company. To control is to control.

85. Consumers Power Company's intent is further demonstrated by its continued legislative support for maintaining the so-called 25% rule, which inhibited retail competition by neighboring municipal entities. Eg., Ex. 2181-2186. Agreement has been reached on a compromise bill, limiting the service areas of the Cities (and also the competitive harm that might result to Consumers Power Company from municipal competition), but allowing additional sales within a prescribed area. However, the Company's attempts to limit competition are further illustrated by its legislative support of the 25% rule over a course of years. See generally, Testimony of Arthur Land, 5872ff. Ex. 1004, pp. 172-173; Ex. 2181-2186. It is noteworthy, however, that at the same time the Company had territorial agreements or "gentleman's understanding" with neighboring investor-owned utilities, Detroit Edison Company and Indiana & Michigan, and was supporting the 25% rule to restrict competition with the municipalities, the Company was attempting to maintain greater

retail competition with the Rural Electric Cooperative Systems. Tr. 995. Ex. 2160-2163. The reason for this is not hard to find. Consumers Power Company has maintained generally uniform retail rates.

86. Finally, there is also clear evidence of the Company's intent to keep smaller systems from the Michigan Power Pool, which provices the mechanism for the major buying and selling transactions of Consumers Power Company with Detroit Edison Company. According to Company documents, the agreements were tailored to keep out "undesirables", although the Company has difficulty in figuring out who such undesirables could be. DJ-170.

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*/ Examining the pool agreement themselves, they provide for a result whereby Detroit Edison and Consumers Power Company effectively have qualized reserves. Each can use the others transmission. However, to be admitted into the pool a system must have transmission facilities at 345 kv or higher (which none of the interveners have) and agree to an excessive reserves formula, as applied to them. Ex. 67, DJ-73, 11, 115. The formula is reminiscent of state statutes providing for general requirements for Cities having populations of more than 1 million but less than 2 million. . . . See Yick Wo. v. Hopkins, 118 U.S. 356 (1886).

87. We state the above to give the Board specific evidence of the obvious: To the extent that motive to control or affect competition is relevant under the "bottleneck" monopoly theory or more generally under the Sherman Act, such evidence exists. However, the results prove the intent. Young Brian Dailey could not successfully defend against pulling a chair from under his Aunt on the ground that he did not "intend" his Aunt to fall; Consumers Power Company cannot defend on the grounds that it only intended to build the necessary facilities and make the necessary contracts to create a bottleneck monopoly: It just happened. Garratt v. Dailey, 46 Wash. 2d 197, 279 P.2d 1091 (1955).

II. CONSUMERS POWER COMPANY'S REFUSALS TO DEAL ON REASONABLE TERMS ARE VIOLATIONS OF ANTITRUST LAWS AND POLICY

88. In light of its domination of large scale generation (including nuclear generation) and bulk power transmission facilities on the lower Michigan Peninsula, absent government interference, Consumers Power Company can control the terms at which smaller entities in its areas of service will compete in the wholesale power markets. It has unlawfully denied smaller systems access to its bulk power generation and transmission of facilities, or permitted access only on discriminatory terms; at the same time, Consumers Power Company freely grants access to larger neighboring utilities such as Detroit Edison. This use of its control over

large scale generation, transmission and the attendant coordination arrangements to bar or limit access of the smaller systems to equivalent alternatives to those possessed by Consumers Power Company constitutes a clear "situation inconsistent". (2805-2811, 2821-2822).

89. The Sherman Antitrust Act, and other antitrust Acts,*/ condemn such attempts of dominant companies in a particular markets to "restrain" competition in that or other markets. E.g., Consumers Power Company has the power to deny access to large generating units, transmission facilities and to the coordinating and interchange arrangements through which wholesale power transactions take place. In refusing access to the smaller systems to these facilities and arrangements, Consumers Power Company -- in the words of the statute -- is "maintaining a situation inconsistent with the antitrust laws".

90. Not only is Consumers Power Company restricting competition in the wholesale power market (i.e., the buying and selling of power for resale to ultimate consumers), but it is also doing so with a purpose and result to affect competition generally, including retail sales. See pp. 47-49, supra.

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*/ 15 U.S.C. 1, 2. See also Federal Trade Commission Act, 38 Stat. 717, as amended, 15 U.S.C. 45 Clayton Antitrust Act, 15 U.S.C. 12-27. The Sherman Act directly prohibits actions "in restraint of trade." However, the Company's discriminatory policies in granting or denying access to bulk power coordination and transmission also clearly constitutes "unfair methods of competition" and discrimination as proscribed by those latter Acts.

91. Additionally, Consumers Power Company is attempting to "tie" together the various wholesale power services thereby limiting interveners' markets for the purchase and sale of wholesale power. The result is unreasonable exclusive dealing requirements and barriers to entry in potentially competitive services.

92. As has been explained earlier, and as the record clearly demonstrates, through interchange agreements companies can buy and sell separately a host of individual services at prices designed both to facilitate such transactions. Thus, utilities can purchase power either on a continual or individual basis at rates per kwh which reflect the type of power purchased. They can buy the right to output from a particular unit, ("unit power") or the right to the combined output from all units ("firm power purchases"), as well as emergency power, maintenance power, economy exchange, short-term power and various other forms of power transactions. To the extent that Consumers Power Company refuses to sell these individualized types of power transactions separately to interveners or in other words to "unbundle" the transactions, the Company is thus engaging in a classic form of "tie-in" sale and, additionally, is restricting entry into the wholesale power markets. Unless power services can be purchased separately to complement other power sources, an intervener will find it more difficult and less economic to purchase or operate a particular type of generating unit or wholesale power service separately. Therefore, it will be forced to accept Consumers Power Company as its sole power supplier.

93. Further, its arrangements to restrict its sales of power to limit self-generation and its wholesale territorial agreements are themselves anticompetitive. They aid exclusive dealing arrangements and inhibit interveners' development of or access to alternative supply sources.

94. Finally, the Atomic Energy Act itself prevents limiting the availability of nuclear power, as Consumers Power Company is attempting to do.

95. If anything is clear from this case, it is that the Consumers Power Company is trying to restrict interveners' abilities to participate in wholesale power markets through limiting or refusing access to its bulk power facilities and power arrangements. The only question is whether its "defenses" that it should be allowed to do so will be successful.

A. The Bottleneck Monopoly Cases, Including Otter Tail, Plainly Establish The Obligations of Consumers Power Company to Grant Interveners Direct Access to Its Bulk Power Generation and Transmission Facilities.

96. Consumers Power Company's refusal to provide access (1) to nuclear generation, (2) to transmission service and, (3) to coordination constitutes the type of refusal to deal long condemned by the antitrust laws. A bottleneck monopoly cannot lawfully refuse to deal in bottleneck or attended services. United States v. Terminal Railroad Association, 224 U.S. 383 (1912); Associated Press v. United States, 326 U.S. 1 (1945); Silver v. New York Stock Exchange, 373 U.S. 341 (1963). Nor may a monopolist use the defense

of refusing to deal in order to avoid competition. Eastman Kodak Company v. Southern Photo Co., 273 U.S. 359, 375 (1927); Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

97. The recent claim of companies like Consumers Power Company was that because of the necessity for at least partial monopolization of some of the involved facilities, antitrust principles should not be applicable -- or at least should be limited in their application -- to the electric power industry. However, in both Otter Tail and Gulf States, the Supreme Court recently reaffirmed the contrary principles.

98. Otter Tail is a bottleneck monopoly case. Otter Tail Power Company v. United States, 410 U.S. 366 (1973). In various pleadings, Consumers Power Company has attempted to narrow or avoid the thrust of Otter Tail, relying on strained or narrowly technical distinctions, as if logic chopping could avoid the clear thrust of the case. The immediate question in Otter Tail was whether that power company could refuse to sell transmission services or otherwise restrict the sale of wholesale power. 410 U.S. at p. 368. The Supreme Court brushed off its economic arguments of claimed demise or competitive disadvantage and held that the Otter Tail could not refuse to deal. 410 U.S. at p. 378, 381-382. Thus, the Supreme Court affirmed the District Court's decree enjoining the Company "from refusing to 'wheel' electric power over the lines from the electric power supplies to

existing or proposed municipal systems in the area and from entering into or enforcing any kind of contract which probibits use of Otter Tail's lines to 'wheel' electric power to municipal electric power systems or from entering into or enforcing any contract which limits to whom in areas in which Otter Tail or any other Electric power company may sell electric power". 410 U.S. at 368-369 (quoting the Supreme Court).

99. It should be stressed that in Otter Tail the claimed bottleneck facilities were relatively low voltage subtransmission lines. It should also be stressed that both the District Court and the Supreme Court showed a concern as to the contractual arrangements, which would have restricted available alternate power sources. 410 U.S. at 370, N. 2; 331 F. Supp. 54, 59-61 (D. Minn, 6th Div., 1971); 331 F. Supp. at 59, 63-65, 410 U.S. 378-379.

100. Finally, from a legal standpoint, both the District Court and the Supreme Court were applying the "bottleneck" monopoly theory that a company that obtains a monopoly in a vital process must use that monopoly in such a way that it does not advantage itself in obtaining markets (or restricting markets) by dint of control of the bottleneck. Thus, in Otter Tail, the Supreme Court cited United States v. Griffith, 334 U.S. 100, 107 (1948); Lorain Journal v. United States, 342 U.S. 143, 154 (1951); Eastman Kodak Company v. Southern Photo Materials Co., 273 U.S. 359, 375 (1927); Schine Chain Stores v.

United States, 334 U.S. 110, 119 (1948); Associated Press v. United States, 321 U.S. 1 (1945). Accord, United States v. Terminal Railroad Association, 224 U.S. 383 (1912), cited at 331 F. Supp. at 61. 101. The bottleneck monopoly theory is not new. It is based upon ordinary principles of fairness. If one operates the only bridge at a river crossing or an inn on a highway necessary to human comfort, or a stock market exchange through which the bulk of stock trading is done or motion picture theater chain with the only theater in a town, the law demands that one not take advantage of the situation. A company may be entitled to profit from that facility (although there are always requirements of fair dealing -- for example rate regulation statutes and common law doctrines restricting utilities to "just and reasonable" rates). */ But that dominant position cannot be used to bar access to vital facilities and certainly not to enhance one's own monopoly power. **/

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*/ See Munn. v. Illinois, 94 U.S. 183 (1877).

**/ The district court opinion stated:

> "Pertinent to an examination of the law is a reference to cases expressive of the 'bottleneck theory' of antitrust law. This theory reflects in essence that it is an illegal restraint of trade for a party to foreclose others from the use of a scarce facility. Here the theory finds application in Otter Tail's use of its subtransmission lines. One authority believes:
>
> > 'The Sherman Act requires that where facilities cannot practically be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms.'

**/(continued)

102. In Consumers Power Company's case, we may assume that Midland should be licensed. We may also assume that there are economic or legal reasons why it presently owns the only bulk power generation facilities over 160 mw and the only transmission lines above 138 kv. We may also assume that the Company is allowed to charge a rate for the use of those transmission lines, so long as that rate is both "just and reasonable" and nondiscriminatory. */ However, it may not use -- or refuse to use -- those facilities to give itself an advantage in the buying or selling of wholesale power transactions. Thus, as Otter Tail clearly confirms, it may not restrict the ability of municipal (or cooperative) systems to obtain alternate sources of purchased power, for either all or part of their needs, by refusals to sell transmission services as separate transactions or by otherwise restricting access to its dominant facilities. It may not restrict its coordination arrangements to create disadvantage to those seeking control over their

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**/ (Continued)

> This statement epitomizes the holdings in federal cases which have established the principle: United States v. Terminal Railroad Assoc., 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912); Gamco, Inc. v. Providence Fruit & Produce Building Inc., 194 F.2d 484 (1st Cir. 1952); Packaged Programs, Inc. v. Westinghouse Broadcasting Co., 255 F.2d 708 (3rd Cir. 1958); Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc., 365 F.2d 478 (5th Cir. 1966). 331 F. Supp. at 61.

*/ Federal Power Act, §§205, 206, 16 U.S.C. 824d, e.

own power supply for distribution either to themselves or to those who would themselves enter into wholesale power markets. While we can understand Consumers Power Company's desire to maintain the municipalities as customers, these entities have a right to seek alternate power sources, including the development of their own power supply. Certainly, Consumers Power Company's now stated willingness to sell transmission services on the condition that it does not adversely affect use of its economic position is a classic example of an attempt to use its dominant bottleneck facility to "create or maintain" self advantage.*/ Precisely what the Atomic Energy Act Amendments and Otter Tail decides is that antitrust principles are indeed applicable to wholesale power supply. These principles include the rules set forth in the "bottleneck" monopoly cases. See Baltimore & Ohio Railroad Co. v. United States, 264 U.S. 258 (1924), ("Chicago Junction Case"); United States v. Griffith, 334 U.S. 100 (1948); United States v. Aluminum Company of America, 148 F.2d 416 (CA 2, 1945). **/

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*/ In classic understatement, the District Court stated, ". . . even the threat of losing business does not justify or excuse violating the law". United States v. Otter Tail Power Co., supra, 331 F. Supp. at 65.

**/ To the extent that the Company is arguing it will transmit, but only if it determines harm to Company economic interests will not result, it argues for a form of price discrimination to offset competitive or other advantages. This is nothing more than a form of basing point pricing, condemned by the antitrust law. United States v. Reading Co. 353 U.S. 26 (1920); Corn Products Ref. Co. v. FTC, 324 U.S. 726 (1945); FTC v. Cement Institute 333 U.S. 683 (1948). Indeed, if its object is to offset intervenors advantages to protect its retail markets, this is a classic "price squeeze" United States v. Aluminum Co. of America, 148 F. 2d 416, 437-438 (CA 2, 1945).

103. The Supreme Court in Gulf States, citing Otter Tail among other cases, reaffirmed its concern that regulatory agencies not be remiss in their consideration and application of antitrust principles to the power industry.

104. The concern for access by the smaller systems to nuclear power development and attendant coordination is not limited to Otter Tail and Gulf States, although these cases, along with Gainesville, constitute recent Supreme Court holdings declaring a necessary broad application of antitrust principles to the wholesale power industry. Counsel for Consumers was indeed correct when he stated that Otter Tail, and presumably Gulf States, could have a definite bearing on the state of the law which would control, at least in part, the issues being raised by the Interveners and the Department of Justice". (Tr. 103-104, See 131-132)

105. In Municipal Electric Association of Mass. v. SEC, 413 F. 2d 1052, 1055 (CADC, 1969), the basic issue was phrased whether approval [of an aquisition under the Public Utility Holding Company Act, Section 10, 15 U.S.C. Section 79 j,] should be given "in a manner which would give municipals an opportunity on reasonable terms to obtain access to this new lower - cost [nuclear] power." The Court presented the issue in terms of blocking access to nuclear base load power and "for low cost bulk power supplies and transmission services". 413 F. 2d at p. 1058. It was held that the SEC could not grant the requested exemption without consideration of the anticompetitive claims raised the Cities.

106. Furthermore, the Atomic Energy Act requires the granting of such access unless it would not be inconsistent with the Antitrust law. The 1970 Amendments were a result of Congressional dissatisfaction with Statesville, which had determined that a "noncommercial" license could be granted without antitrust conditions. But, as the various decisions in Statesville make clear, the results would be contrary for a commercial license, which is being applied for here. Cities of Statesville v. AEC, 441 F. 2d 962 (CADC, 1969, en banc). Atomic Energy Act, Sec. 1056, 42 U.S.C. 2135 (68 Stat. 938, as amended by P.L. 91-560 (December 19, 1970). The reasons for policing the control of facilities and terms of access to coordination were well expressed by Chairman Joseph C. Swilder.*/ Chairman Swilder stated:

> "To the large privately owned electric utility a retail customer even a large industry, is simply a customer. However a wholesale customer is frequently also a competitor, actual or potential. The customer at wholesale may not only be a competitor in the fringe area where the two systems are contiguous but may also be a direct or potential competitor for the commercial and industrial businesses that are able to take costs and conditions of electric service into account in deciding where to locate and which power supplier to patronize.

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*/ The former Chairman of the Federal Power Commission and more recently of the New York State Public Service Commission.

"The electric power wholesaler may in fact be seeking to put the retailer out of business. This is not merely theoretical. Every year many municipals systems surcome to purchase orders by invester-owned wholesaler suppliers . . . */

107. He additionally pointed out that the wholesale power industry involved "multi-state pools" and a variety of wholesale and specialized services, including, emergency service, supplementary and efficiency energy, spinning reserve, reserve capacity, stand-by reserve, wheeling reserve, seasonal interchange and economy energy, all of which are "foreign to retail sales". Senate Bill No. 218, Exemption of Certain Public Utilities from Federal Power Jurisdiction" Hearings before the Committee of Commerce, United States Senate on S. 218, 89th Congress, 1st Sess. [Serial No. 89-38], pgs. 92-93 (1965).

108. At great length Consumers Power Company argues that its conduct has been "reasonable," sanctioned by law, economically justified or otherwise beyond the reach of this Board. Without stating so explicitly, it seeks to apply a standard of reasonableness. However, the harms of limiting competition flow directly from its refusals to deal in the context of its control of the major bottleneck facilities.

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*/ See p. 45-46 for the many references to Consumers Power Company attempting to take-over competing systems or limit their generation.

109. The Board has ask us to comment concerning an analogy to the "per se" standards relevant to application of the anti-trust laws as opposed to the "rule of reason" tests. See pp. 109-110, infra. However, it should be stressed that the "per se" standard is merely a shorthand expression of determining that certain types of activity have a built-in tendency to restrain competition. The are "unreasonable in and of themselves". Fortner Enterprises v. U.S. Steel Corp., 394 U.S. 495, 499 (1969).

110. The Atomic Energy Act Amendments are not an isolated action by Congress and indeed make reference to other statutory law, including broad reference to the antitrust laws. And as we state in the next recent case the law confirms the application of antitrust principles to the wholesale electric utility. In the words of the District of Columbia Circuit, Gainesville Utilities v. Florida Power Corp., 402 U.S. 515, 517-520 (1971), expresses clearly the proposition that municipals should not be interconnected "on terms more onerous than those required of other invester-owned utilities". Lafayette, La. v. AEC, 454 F. 2d 941, 952 (CADC, 1971), affirmed sub. nom. Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973). Moreover, Otter Tail itself cites Gainesville, 402 U.S. 515, 517-520, stating, "We recently described the difficulties and problems of those isolated electric power systems. . . Interconnection with other utilities is frequently the only solution". 410 U.S. at 338.

111. And it cannot be argued that Consumers Power Company does not "intend" to continue to control the bottleneck facilities or to break down its sales of power to allow for equal access to the interveners (i.e. separately sell them the different forms of interchange power). Therefore, under a "per se" standard or not, the evidence is clear. Indeed, the pursuit of this litigation is a specific attempt to avoid an order requiring a direct granting of access by Consumers Power Company to its nuclear generation and transmission facilities or an equal access to its coordination agreements.*/

112. The bottleneck monopoly theory itself recognizes the inherent control which goes hand in hand with the domination of facilities necessary for use in a particular industry. Thus, for example, where railroads also owned coal mines, it took no great imagination to realize that if the railroads could price transportation to equalize the market prices for coal, they would be adversely affecting competition at the retail level. So much more so, if the railroads could have blocked others from independent owhership of coal altogether. United States v. Reading Co.; 253 U.S. 26 (1920). Similarly, an Otter Tail or Consumers Power Company cannot refuse access to a direct form of ownership of nuclear power or to its bulk power transmission lines, especially to affect com-

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*/ Despite attempted qualifications, at least insofar as transmission across is concerned, Dr. Stelzer appears to agree. Pp. 19-20:6723.

petition on the retail level or to preserve its existing wholesale markets.

113. The control of vital facilities and agreements by Consumers Power Company (especially in conjunction with having obtained government privileges, such as franchises and AEC licenses) carries with it an obligation to allow access at reasonable and on non-discriminatory terms. This the law requires.

B. By Refusing to Sell Wholesale Power Services Separately, Including Transmission, Consumers Power Company has "Tied" its Sales of Power, Created Barriers to Entry and Forced Exclusive Dealings Arrangements.

114. Apart from the obligation for fair dealing which results from its control of bottleneck facilities and the more general obligation not to attempt to restrain competition in the wholesale power markets, Consumers Power Company has created "barriers to entry", among other things, through its use of "tie in" sales. This is illustrated in one of its defenses.

115. Consumers Power Company apparently contends that its only obligation is to sell wholesale power, which as we have discussed above, is a sale of power to meet generalized requirements of the purchaser or what is referred to in the industry as "full requirements" or "partial requirements" service. Consumers Power Company

contends that an intervener should not be able to acquire a portion of the Midland Plant through direct ownership, buy transmission services separately, or buy specialized forms of power necessary to accomodate his own generation or power purchased from other sources. If interveners obtain generation to meet part of their needs, the Company would further deny the ability to purchase "back-up" power services at reasonable terms from Consumers Power Company (or others). */

116. The result is to create "barriers to competition", again violative of antitrust law and policy. It becomes more expensive for a municipal or cooperative to self-generate than it would be for Consumers Power Company because of the availability of comparably price back-up and attendant power services. United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 344-345 (D. Mass., 1953), affirmed per curiam, 347 U.S. 521 (1954). See W. Montague Co. v. Lowry, 193 U.S. 38 (1904); Associated Press v. United States, 342 U.S. 143 (1951).

117. Moreover, in forcing partial requirements purchasers to either meet Applicant's imposed tests for adequate coordination (i.e., "self sufficiency", including reserves reservations as determined

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*/ That the sale of such specialized power services is common in the industry is illustrated by Consumers Power Company's own practice of buying and selling such services as part of its interchange transactions. E.g, Ex. DJ-67-76, 11-106-11,122.

justified by it) or to purchase wholesale power from it under its partial requirements' rates, Consumers Power Company adopts a clear divide and conquer strategy. If a utility system is self-sufficient enough so that it can do without is coordination, albeit disadvantageously, Consumers Power Company will then coordinate, but at less favorable terms than its dealings with other utilities. However, the necessity to obtain full self-sufficiency in order to get any back-up at all makes it difficult for a system without generation to acquire generation in the first place and makes such back-up exceedingly expensive. This is especially so since denial of transmission services will discourage joint ventures in constructing generation or obtaining back-up elsewhere. Thus, for many necessary services, systems are constrained to purchase from Consumers Power Company.

118. Consumers Power Company is attempting to maintain a system of "tie-in" sales. The Company maintains that many interveners who do not meet its tests for coordination must buy a whole "bundle" of power services. Even as to systems that do, the Company will not sell transmission so that an intervenor has to buy power and transmission together. */ Consumers Power Company

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*/ As a result of its "Statement of Policy," Consumers Power Company may now be willing to do so providing it does not result in a "significant loss" to the Company, whatever that means. (8106-8107) However, in any event, such restrictions are unwarranted. We further point out that nothing is preventing service agreements or contracts, if not unreasonable, to protect the Company against abrupt changes in suppliers by interveners. However, considering that the Company claims to have difficulty financing necessary facilities, even on its own anticompetitive terms, the "economic detriment" test does not justify the Company's re-refusals to deal. See, e.g., Ex. 1604, pp. 22-24.

could clearly separate the package so that interveners could buy transmission from Consumers Power Company and power from a separate source. It could clearly sell an ownership interest in Midland or unit power from it, based upon the Midland unit costs. It could clearly break down its partial requirements rate to provide for a separate price for "base load" or "peaking" power. It can sell emergency or maintenance power separately. Indeed, its rates for wholesale power include the carrying charges and expenses for all of these services. Thus, the "rate base" used to cost wholesale power includes the costs of its transmission lines, base load units and peaking units. Its prices combine generation costs for all services. (5092-5121).

119. Consumers Power chooses not to sell such services separately except through its interchange transactions, which are either not available to interveners or not available on reasonable terms. Such tie-in sales are per-se violations of the antitrust laws. Fortner Enterprises v. U.S. Steel Corp., 394 U.S. 495 (1969). Northern P.R. Co. v. United States, 356 U.S.1, 5 (1958).*/ **/

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*/ Under Fortner, to establish a per se violation a plaintiff would have to show that the defendant has "economic power over the tying product", 394 U.S. at 502-503, and that the volume of commerce in the tied product "is substantial enough not merely to be de minimis," 394 U.S. 501, although a violation could be proved even if these tests are not met. 394 U.S. 500-501. Here, where Consumers Power dominates the existing market for wholesale power, and controls high voltage transmission and where the availability of wholesale and back-up power is essential to interveners, the tests would be clearly met. Accord, United States v. Loew's, Inc., 371 U.S. 38, 45 (1962).

**/ By using its power over various segments of the wholesale market (e.g., transmission, bulk generation, coordination), the Company further engages in unfair practices to control price at different stages of commerce. United States v. Reading Co., 253 U.S. 26 (1920); American Tobacco Co. v. United States, 328 U.S. 781 (1946).

120. As the Supreme Court said in Fortner, (394 U.S. at 503), commenting on cases such as International Salt Co. v. United States, 332 U.S. 392 (1947); Northern Pacific Railroad Co. v. United States, 365 U.S. 1 (1958) and United States v. Loew's, Inc., 371 U.S. 38 (1962):

> "These decisions rejecting the need for proof of truly dominant power over the tying product have all been based on a recognition that because tying arrangements generally serve no legitimate business purpose that cannot be achieved in some less restrictive way, the presence of any appreciable restraint on competition provides a sufficient reason for invalidating the "tie". "

121. Mr. Justice White stated in dissent, supra, 394 U.S. 510, 512-514 (footnotes omitted):

> "There is general agreement in the cases and among commentators that the fundamental restraint against which the tying proscription is meant to guard is the use of power over one product to attain power over another, or otherwise to distort freedom of trade and competition in the second product. This distortion injures the buyers of the second product, who because of their preference for the seller's brand of the first are artifically forced to make a less than optimal choice in the second. And even if the customer is indifferent among brands of the second product and therefore loses nothing by agreeing to use the seller's brand of the second in order to get his brand of the first, such tying agreements may work significant restraints on competition in the tied product. The typing seller may be working toward a monopoly position in the tied product and, even if he is not, the practice of tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter that market. They must be prepared not only to match existing sellers of the tied product in price and quality, but to offset the attraction of the tying product itself. Even if this is possible through

> simultaneous entry into production of the tying product, entry into both markets is significantly more expensive than simple entry into the tied market, and shifting buying habits in the tied product is considerably more cumbersome and less responsive to variations in competitive offers. In addition to these anticompetitive effects in the tied product, tying arrangements may be used to evade price control in the tying product through clandestine transfer of the profit to the tied product; they may be used as a counting device to effect price discrimination; and they may be used to force a full line of products on the customer so as to extract more easily from him a monopoly return on one unique product in the line.

122. More succinctly, as the Court stated in United States v. Loew's, Inc., 371 U.S. 38, 44 (1962), quoting Standard Oil Co. v. United States, 337 U.S. 293, 305, 306 (1949). "Tying arrangements serve hardly any purpose besides the suppression of competition". In that case the Court condemned block booking, i.e., the requirement that television stations has to buy a package of motion pictures to obtain rights to individual films. As here, there were involved statutory created monopoly rights (copyrights), but the Supreme Court held that this could not justifying extending monopoly power further than necessary.

123. In United States v. Griffith, 334 U.S. 100 (1948), the Supreme Court condemned an arrangement whereby in order to show motion pictures in towns where a theater operator owned the sole outlet, a distributor was required to lease the film to the same operator's theater elsewhere.

124. In International Business Machines v. United States, 298 U.S. 131 (1936), Supreme Court held illegal a requirement that in order to obtain IBM's computers, a customer also had to buy the "soft-ware" (i.e., programming and computer cards). The IBM case, where a customer had to buy a "bundle" of services together but could not purchase individual computer services, directly duplicates the situation here.

125. Finally, while not decided expressly on this ground, Otter Tail requires a separate sale of transmission services distinct from the sale of retail energy.

III. THE LAW REQUIRES THE GRANTING OF BROAD RELIEF

A. The Atomic Energy Act Gives the Atomic Energy Commission Broad Authority to Regulate all Operations Flowing from the Activities of the Licensee that would Maintain or Create competitive Situation.

126. At various times, Consumers Power Company has argued that the Commission's authority under the Atomic Energy Act is to be read narrowly, if it is exists at all. Indeed, from reading the Company's past expressions on the matter, one would get the impression that the purpose of the 1970 amendments was to narrow the Commission's jurisdiction. The plain words of the statute give the Commission a jurisdiction over a "situation", clearly not a narrow expression, "inconsistent" with the antitrust laws. We note that the statute uses the word "inconsistent" and not "in violation of". Upon that finding, there is no limitation stated in the Act on the conditioning power of the Commission. Clearly, the jurisdiction is granted to resolve the problems created by the situation.

127. Moreover, it must again be stressed that the 1970 amendments were a reaction to Statesville, in which Congress was concerned that the Commission was not paying sufficient heed to its function of antitrust review. Considering that the Company admits that large scale nuclear plants will and must be electrically integrated into its entire operation and that what is involved is a licensing of major facilities, which will inevitably shape the production of electric power, we do not see how the jurisdiction could

be read narrowly. */ E.g., pp. 35-36, supra.

128. There is no question that Congress has intended that the Atomic Energy Commission ("AEC") be given broad authority in executing the Atomic Energy Act, to assure that licensees granted the benefit of billions of dollars of public research and development do not utilize that grant in ways that are in violation of the letter or spirit of the antitrust laws. Section 1(b), which states the Congressional declaration of policy in the Act, is notably expansive:

> "§1. Congressional declaration of policy.
>
> Atomic energy is capable of application for peaceful as well as military purposes. It is therefore declared to be the policy of the United States that ---
>
> (b) the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard [illegible]ng, and strengthen free competition in [illegible]vate enterprise." (emphasis added) **/

129. Although the commercial development of nuclear power for the generation of electricity was still a concept to be developed in 1954, when the Atomic Energy Act of 1946 was revised, the 1954 Act made clear that when commercial development arrived, there would be ample regulations governing its use

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*/ It is of note, that it is projected that within a 10-year period over half Consumers Power Company's total generation will be from nuclear energy. Ex. 1001

**/ §1 of the Atomic Energy Act of 1954, 42 U.S.C. §2011.

in accordance with the above-stated Congressional policies. Thus, the 1954 Act specifically provided, among other matters, (1) that any facilities for the production and utilization of atomic energy would be subject to AEC licensing,* (2) that licenses for commercial development (i.e., found to be of practical value) would be "subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes and provisions of this chapter",** (3) that the license would be subject to revocation or "such other action as it (i.e., the AEC) may deem necessary" if the licensee violated any of the antitrust laws "in the conduct of the licensed activity,"*** and (4) that prior to the issuance of any commercial license, the AEC should notify the Attorney General of the proposed license and the proposed terms and conditions thereof for his advice on whether the "proposed license would tend to create or maintain a situation inconsistent with the antitrust laws, and such advice shall be published in the Federal Register."**** In addition, the Act provided for notice "to such regulatory agency as may have jurisdiction over the rates and services of the proposed activity, to municipalities, private utilities, public bodies, and cooperatives within transmission distance authorized to engage in the distribution of electric energy"***** and preferred

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*/ Id., §101, 42 U.S.C. §2131 (1954).

**/ Id., §103, 42 U.S.C. §2133(a) (1954).

***/ Id., §105(a), 42 U.S.C. §2135(a) (1954).

****/ Id., §105(b), 42 U.S.C. §2135(b) (1954).

*****/ Id., §182(c), 42 U.S.C. §2232(c) (1954).

to nip in the bud any incipient antitrust situation but also to further such competitive postures, outside of the ambit of the provisions and established policies of the antitrust laws, as the Commission might consider beneficial to the free enterprise system. The Joint Committee does not favor, and the bill does not satisfy, either extreme view.

The Committee is recommending the enactment of prelicensing review provisions which . . . do not stop at the point of the Attorney General's advice, but go on to describe the role of the Commission with respect to potential antitrust situations. (emphasis added)

* * *

It is intended that the finding be based on reasonable probability of contravention of the antitrust laws or the policies clearly underlying these laws. It is intended that, in effect, the Commission will conclude whether, in its judgment, it is reasonably probable that the activities under the license would, when the license is issued or thereafter, be inconsistent with any of the antitrust laws or the policies clearly underlying these laws. (empnasis added).

It is important to note that the antitrust laws within the ambit of subsection 105c of the bill are all the laws specified in subsection 105a.

* * *

The committee is well aware of the phrases 'may be' and 'tend to' in the Clayton Act, and of the meaning they have been given by virtue of decisions of the Supreme Court and the will of Congress--namely, reasonable probability. The committee has--very deliberately--also chosen the touchstone of reasonable probability for the standard to be considered by the Commission under the revised subsection 105c of the bill."

The above passage makes clear what Congress intended the AEC to do in conducting its licensing procedures, namely, to conclude for itself whether the activities under the license would, applying all the antitrust laws and the policies they represent, be inconsistent with such laws and policies. Moreover, the test

in its deliberations was "the focus of reasonable probability--not certainty or possibility." */ After such consideration, and aided in its deliberation by not only the Attorney General but such intervenors and such other regulatory agencies and personnel as may wish to or be requested to participate, the Commission may issue, deny, amend or condition a license with "such conditions as it deems appropriate." **/

132. The same concern for maintaining competition expressed by the Joint Committee was repeated in the floor discussions of the bill. For example, Senator Hart, Chairman of the Senate Antitrust and Monopoly Subcommittee, stated the purpose of the 1970 Amendment as follows:

> "It seems to me that the clear intent of this language in subsection 105(c)(6) is to enable the Atomic Energy Commission to expedite the licensing of nuclear power facilities while, at the same time, taking those steps necessary to cure adverse antitrust findings under the provisions of the act." ***/

133. The legislative history is replete with the concerns of Congress that the proposed bill be adequate to deal with anti-competitive situations, and the remarks of Senator Aiken, the ranking member of the Joint Committee on Atomic Energy, on this issue are enlightening:

> Sen. Aiken. ". . . I was concerned that the language of the bill clearly would result in the application of the antitrust laws in this country to the producers of electrical energy

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*/ Id., at 31.

**/ §105(c)(6) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2135 (1970).

***/ 116 Cong. Rec., 39622 (1970).

from nuclear plants. Therefore, I consulted with the Department of Justice quite freely and received their assurance that this is a good bill. . . ."*/

Sen. Aiken then inserted in the record a letter dated November 9, 1970 from Richard W. McLaren, Assistant Attorney General, Antitrust Division, to Sen. Aiken concerning the bill to amend the Act, the last two paragraphs of which read as follows:

> "The Committee's intent seems clear: if AEC finds that a situation 'inconsistent with the antitrust laws 'would result from activities under a license, it may either (1) deny the license or (2) condition grant of the license on action by the applicant(s) to eliminate the inconsistency. . . . For example, applicants for a license for a joint venture nuclear power plant could be granted a license by AEC to construct a vitally needed facility; however, grant of the license would be conditioned upon applicants' affording access to low cost power from the nuclear facility on reasonable terms to a utility theretofore excluded from participation, if exclusion of the latter would subject it to unreasonable competitive disadvantage. (Emphasis added)
>
> "On the basis of our understanding of the purpose and meaning of S.4141, as set forth above, the Department of Justice supports enactment of this legislation."
>
> "MR. AIKEN. Mr. President, with that assurance from the Department of Justice, and the cooperation of the entire Joint Committee on Atomic Energy, the bill was reported unanimously, so that I feel we should enact this legislation."**/

134. It is evident that Congress felt the AEC's conditioning authority was not only sufficient to cure any anticompetitive effects in existence or flowing from the issuance of a license but also required to deal adequately with situations in which

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*/ 116 Cong. Rec. 39620 (1970).

**/ Ibid.

anticompetitive conditions were or likely to be present. Thus, in discussing the bill, Congressman Holifield of the Joint Committee explained in the House: */

> "The Committee believes that, except in an extraordinary situation, Commission imposed conditions should be able to eliminate the concerns entailed in any affirmative finding under paragraph (5) while, at the same time, accomodating the other public interest concerns found pursuant to paragraph (6) . . . In connection with the range of Commission discretion, the Committee notes that pursuant to subsection 105a the Commission may also take such licensing action as it deems necessary in the event a licensee is found actually to have violated any of the antitrust laws." **/

Furthermore, in floor debate in the Senate, Senator Hart of the Antitrust and Monopoly Subcommittee stated:

> "If an adverse antitrust finding is made by the Commission, it may issue or continue a license when there is a 'need for power in an area,' but this issuance or continuance must be accompanied by appropriate conditions in the license which require the applicant to cure the adverse antitrust findings. If the applicant or holder of the license does not cure the antitrust findings, then the AEC may suspend or revoke the license regardless of the 'need for power in the affected area.' (Emphasis added)
>
> "Under no circumstances would the Commission be relieved of its responsibility to require applicants for licenses to conform to the antitrust provisions of the act and the antitrust laws generally." ***/

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*/ 116 Cong. Rec. 34312 (1970).

**/ To same effect, see the following statement by Congressman Price at 116 Cong. Rec. 34318 (1970):

> "The Committee . . . expects the Commission normally to take care of both the need for energy as well as to remedy the situation where there has been an affirmative finding under paragraph (5)."

***/ 116 Cong. Rec. 39622 (1970).

Reinforcing the Congressional intent to grant broad scope to the AEC's conditioning authority was the interpretation of the bill's antitrust provisions by the Justice Department's Antitrust Division. In a letter to Senator Metcalf, in response to his inquiry about the bill's antitrust provisions, the Antitrust Division stated: */

> "We would not think the AEC could 'avoid the conditioning of licenses to cure adverse antitrust findings' simply upon a finding that there was a need for power in the affected area. Rather, we expect, and we believe that the Commission expects, that the Commission's conditioning authority could be used to cure competitive problems while allowing construction and utilization of facilities."

Stated simply, the legislative history of the Act and the relevant provisions plainly indicate a comprehensive authority granted by Congress to the AEC to license nuclear power plants, subject to denial or conditions curing or preventing anticompetitive effects created or maintained by the issuance of such license.

135. As we have noted, Congress, in the passage of the 1970 amendments to the Atomic Energy Act, intended that this Commission have broad authority to insure that the nuclear plants to be licensed by the Commission not be used in a manner which would create or maintain a situation inconsistent with the antitrust laws. In effect, this delegation of authority

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*/ Letter of Acting Assistant Attorney General, Antitrust Division, Walker B. Comegys to Senator Lee Metcalf, dated September 2, 1970, re S.4141 quoted with approval in 116 Cong. Rec. 39621 (1970).

to the Commission, as the Supreme Court stated in Gulf States Utilities Co. v. FPC, 411 U.S. 747, 36 L.Ed. 2d 635, 644 (1973), in an analogous case, "serves the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings." For this jurisdiction to be effective, however, it is necessary that this Commission enter its order in such a fashion as to ensure the parties and itself that the conduct of the parties pursuant to that order will in fact be such as to eliminate the anticompetitive situation found to exist under Section 105 of the Act.

136. The Commission's authority to set conditions to a license under Sections 103 and 105 of the Act is plenary. See, e.g., United Gas Improvement Co. v. Callery Properties, 382 U.S. 223 (1965); FPC v. Sunray DX Oil Co., 391 U.S. 9 (1968); Atlantic Refining Co. v. PSC of New York, 360 U.S. 378 (1959); Russell v. Farley, 15 Otto 433, 26 L.Ed. 1060, 1063 (1882); FPC v. Hunt, 376 U.S. 515 (1964); Texaco v. FPC, 290 F.2d 149 (CA 5, 1961); Admiral-Merchants Motor Freight v. United States, 321 F. Supp. 353 (D. Colo. 1971), affirmed 401 U.S. 802, rehearing denied 404 U.S. 987.

B. Antitrust Law and Administrative Law Refutes the Claims that the Atomic Energy Act must be Given a Narrow Reading.

137. As has been established previously, Consumers Power Company is operating an integrated system. pp. 18-37, supra. To the extent that a monopoly situation has been created or maintained by such practices, the construction and operation of the Midland units, makes that situation more feasible. Thus, in determining the "nexus" that need be shown to grant relief, the jurisdictional reference must be the extent to which the construction and operation of nuclear power plants have an impact on Consumers Power Company's operations. Especially considering the broad language of the Act encompassing a "situation" (from interveners' standpoint a problem) inconsistent with the antitrust laws, not limiting itself to the operations of the plant, the relief granted must be consistent with resolution of the "situation inconsistent."

138. Moreover, since the statutory reference of the Atomic Energy Act is to the general antitrust laws, so must the scope of relief be referenced to those laws. The situation in this case is that, contrary to agreements for settlement that have been reached

by numerous other major utilities, Consumers Power Company refuses to deal in major areas of wholesale power transactions with smaller utility systems within its area of service or will do so only on discriminatory terms.

139. In light of cases condemning refusals to deal, barriers to entry, tie-in sales, exclusive dealing requirements, basing point pricing -- in short the attempt to monopolize -- such as those being practiced by Consumers Power Company, the Trial Board has a mandate to take a broad view as to the appropriate relief. There can be no public interest in narrowing the scope of relief. As the D.C. Circuit stated in reference to the Federal Power Act, it is precisely in remedial situations that an administrative agency's power to grant relief is at its broadest.

> "The statutory authority to issue certificates or permits on conditions implies broad authority to take <u>effective</u> action to achieve regulation in the public interest. We are mindful of the liberal interpretation 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 . . .
>
> 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 of voluntary compliance programs <u>in order to achieve maximum effectuation of Congressional objectives</u>. The source of discretion is available . . . where the agency's order, though having aspects of determination of individual fault, is a denial to a wrong-doer of participation in a government program generally extended to businessman, 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". Niagara Mohawk Power Co. v. FPC 379 F. 2d 153, 159 (CADC, 1967, emphasis supplied)

140. Nuclear power development was largely created through the aegis of Federal development and the fruits of that development are part of the"public domain". In this situation, the public interest obligations which result from the acceptance of a license must be at their broadest. Compare FPC v. Idaho Power Co., 344 U.S. 17 (1952).

141. In determining the extent of its power, the Board should consider that there is no public purpose in permitting a continuation of Consumers Power Company's refusals to deal and to coordinate on an equalized basis. Compare Colorado Antidiscrimination Commission v. Continental Airlines Co., 372 U.S. 714 (1963); Southern Steamship Co. v. NLRB, 316 U.S. 31, 46-49 (1942). Expecially relevant are antitrust cases holding that in the case of violations, courts or agencies should look to the transactions and violations as a whole and not limit themselves to the isolated acts immediately complained of. E.g., Swift & Co. v. United States, 196 U.S. 375 (1905); Continental Oil Co. v. Union Carbide Corp., 370 U.S. 690,698-699 (1962). See United States v. Masonite Corp., 316 U.S. 265, 274-276 (1942)

142. 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 and certificating authority. In licensing and certification, the scope of conditioning power 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, it has been held that consideration must be given to national policies beyond the immediate statutory jurisdiction. E.g., FPC v. Transcontinental Gas Pipeline Corp., 365 U.S. 1 (1961); Denver and Rio Grande Western Railroad Co. v. United States, 387 U.S. 485 (1967); FMC v. Svenska Amerika Linien, 390 U.S. 283 (1968); City of Pittsburgh v. FPC, 237 F. 2d 741 (CADC, 1956); Northern Natural Gas Co. v. FPC, 399 F. 2d 953 (CADC, 1968). See Udall v. FPC, 387 U.S. 428 (1967); Scenic Hudson Preservation Conference v. FPC, 354 F. 2d 608 (CA 2, 1965), cert. denied sub. nom. Consolidated Edison Co. of New York v. Scenic Hudson Preservation Conference, 384 U.S. 941 (1966); United Church of Christ v. FCC, 359 F. 2d 994, 425 F. 2d 543 (CADC, 1966, 1969). Especially, considering the strong national policy underlining the antitrust

laws,*/ and the explicit antitrust authority granted this agency,**/ this Board can do no less.

143. Finally, we call to the Board's attention that the Supreme Court specifically considered and rejected in Otter Tail claims that the scope of relief should be limited, noting that a company in Otter Tail's situation could expect to be somewhat "hemmed in". 410 U.S. at p. 391

144. If one is caught stealing a RCA television set, an injunction or consent decree need not limit itself to say that one may no longer steal RCA television sets. Relief, as the word implies, should provide a remedy to the basic problem. Mr. Justice Jackson stated in International Salt Co. v. United States, 332 U.S. 392, 400 (1947):

> "The District Court is not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than the Court requires him to do so. And advantages already in hand may be held by methods more subtle and informed, and more difficult to prove than those which, in the first place, win a market. On the purpose of restrain trade appears from a clear violation of law, it is not necessary that all of the untravelled roads to that end be left open and that only the warn one be closed. The usual ways to the prohibited goal may be blocked against the proven transgressor and the burden put upon him to bring any proper claims for relief to the Court's attention."

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*/ E.g., Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973).

**/ In view of the breadth of the conditioning power granted administrative agencies, it is difficult to preceive that in the situation here presented, action of the Atomic Energy Commission to limit the scope of its jurisdiction would be considered lawful, especially here where there has been given direct statutory authority to apply antitrust law. This is especially true since the Act does not limit itself to violations of the Antitrust laws, but rather to "situations inconsistent".

And, as was further stated, id. at 401:

> ". . . the end to be served is not punishment of past transgression, nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectivly pry open to competition a market that has been closed by defendants' illegal restraints. If this decree accomplishes less than that, the government has won a law suit and lost a cause."

In short, the Commission's jurisdiction is not to be part of a legal game whereby if Consumers Power Company can find the precise intellectualized argument to narrow relief, interveners here should be forced to go elsewhere, continually searching for the right formula to find the exact number of proceedings, and forums which have the precise jurisdiction to give relief. If anything is clear from the legislative history of the 1970 Amendments, it is that Congress did not intend the AEC to do a half-way job, resulting in interveners going from agency to agency for possible years of hearings at great expense before obtaining effective relief. We do not believe that Congress intended administrative agencies to become the tools whereby interveners are submitted to a "shell game" to find where they can get possible agency or judicial correction. Compare Gulf States Utilities v. FPC, 411 U.S. 747 (1973).

IV. RESPONSES TO BOARD QUESTIONS

145. Throughout this proceeding the Board has raised specific questions with regard to intervenors' entitlement to relief or other issues in the case. To the extent that we have not done so previously, we attempt to answer these here.

Q. Is there a conflict between the Atomic Energy Commission's ordering the license conditions that interveners request and Federal Power Commission jurisdiction?

A. No. We have discussed these issues at great length in Section III.B, supra. However, we would add that in interpreting Federal Power Commission jurisdiction, the Supreme Court has indicated clearly that a practical approach should be taken avoiding a "no man's land" or "regulatory gap" where a regulated utility can avoid jurisdiction by arguing the potential of conflict. Panhandle Eastern Pipeline Co. v. FPC, 332 U.S. 507 (1947). Otter Tail, says much the same thing in affirming a Court determination of violation of the antitrust laws despite claims of "primary jurisdiction". 410 U.S. at 376.

146. The Federal Power Commission's rate jurisdiction over utilities has repeatedly been held to give the Commission Board authority to regulate rates and terms and conditions of service subject to contract limitations and other limitations in the law.

Thus, for example, in determining what rates are acceptable for filing or what are "just and reasonable" rates,*/ the Commission clearly must pay attention to the antitrust laws. Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973); Richmond Power & Light V. FPC, 481 F. 2d 490 (CADC, 1963), cert. denied sub. nom., Indiana and Michigan Electric Co. v. Anderson Power & Light of the City of Anderson, Indiana, 414 U.S. 1068; see Southern Steamship Co. v. NLRB, 316 U.S. 31, 46-49 (1942).

147. Similarly, a private utility may make a contract for a lower rate than might otherwise be found just and reasonable and the Commission has an obligation to enforce that contract. United Gas Pipeline Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956); FPC v. Sierra Pacific Power Company, 350 U.S. 348 (1956); Richmond Power & Light v. FPC, supra; Public Service Commission of New York v. FPC, ____ F. 2d ____ (CADC, No. 24176 et al, March 25, 1974, pp. 62-76 of slip opinion, 1974 "Rayne Field"). Both Sierra and Mobile, as well as subsequent cases, hold that the Federal Power Commission gives utilities authorizations to file for rate increases and sets procedures whereby those rates can be reviewed and changed.

*/ We do not request that as a result of these hearings, the AEC reach the question of rates, but we do not waive our rights to argue in an enforcement hearing or a hearing, if held, on the scope of appropriate remedy, that the AEC should do so. However, on the record, as it now stands, the Board need not here reach the issue of appropriate rates. We do point out that unreasonable or discriminatory rates can create a barrier as effective as an absolute refusal to deal and therefore "create or maintain a situation inconsistent with the antitrust laws". Therefore, under such circumstances the Commission would have to consider and order such relief. This would be especially true in a case where direct access to nuclear facilities were not being ordered so that the Commission would have to consider the equivalent benefits to nuclear access.

The Act, however, does not give power companies or others regulated by the Commission unlimited permission to file for rate changes, nor does it prohibit contractual or other limitations on rights which regulated companies would otherwise have. Thus, in a practical way, there is no reason to anticipate that a lawful order of this Commission would conflict with the jurisdiction of the Federal Power Commission, even assuming that the Commission might reach a particular substantive result different from the FPC. Compare Colorado Antidiscrimination Commission v. Continental Airlines, 372 U.S. 714 (1963). In any event, this Commission has jurisdiction over the subject matter of these proceedings and can remedy demonstrated harms. Compare California v. FPC, 369 U.S. 482 (1969).

148. However, for the purposes of this case interveners do not request that this Commission set rates, but are willing to accept an order that defers to the Federal Power Commission. What interveners request is that they be afforded access to nuclear plant, transmission and coordination on a basis similar to that enjoyed by Consumers Power Company. That is they desire access and nondiscrimination. Within the context of relationships that have been established by Consumers Power Company, the FPC would set the specific rates.*/

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*/ The standard of nondiscrimination is common to regulatory statutes. E.g., Federal Power Act, §205, 206, 16 U.S.C. 824d, e.

149. The problem discussed is similar to that involved with the interconnection of specialized common carriers to the AT&T network. Just last month the third circuit affirmed Federal Communications Commission decision holding that -

> ". . . where a carrier has monopoly control over essential facilities we will not condone any policy or practice whereby such carrier would discriminate in favor of an affiliated carrier or show favoritism among competitors." Bell Telephone Co. v. FCC, _____F. 2d_____ (Ca 3, No. 74-1386, September 11,1974).

150. As in the AT&T situation, Consumers Power Company cannot here interconnect and sell services (or charge rates) to its coordination partner, Detroit Edison, and others, and then complain if such terms are made generally available.

151. The Board should clearly establish the entitlement to access and coordination on terms equivalent to those enjoyed by Consumers Power Company. Plainly a rate for a service may be established on an incremental basis (or no rate may be established at all) to facilitate coordination. If by doing so, the larger systems receive advantages denied the smaller systems, the results would be anticompetitive. Thus, for example, if -- as is the case --

Detroit Edison and Consumers Power Co. for their advantage choose to establish their interrelationships so that there is no transmission charge (which they are not forced to do) and the result is to give them greater access to coordinated power transactions, it would be illegal to charge the smaller systems for transmission, thereby imposing a barrier to the smaller systems conducting the transactions participated in by the larger ones. Of course, the two companies could impose a transmission rate for each other and, of course, the smaller systems would have to maintain (or pay for) reserves equal to those maintained by Consumers Power Company, assuming such requirements were justified by engineering criteria. */

*/ The problem may be seen in terms of a "price-squeeze". United States v. Aluminium Co. of America, 148 F. 2d 415, 436-438 (CA 2, 1945). See United States v. Philadelphia National Bank, 374 U.S. 321, 350-352, 368-370 (1963). A monopolist may be willing to deal, but may charge prices to competitors high enough to give himself advantage or to offset an advantage held by others. Indeed, if the price charged is high enough, it will be tantamount to a refusal to deal. Thus, if Consumers Power Co. can exact a transmission surcharge on transactions involving interveners higher than that it charges itself or its larger coordinating partners, it creates a bar to such coordination. Especially, since the FPC has said it has no jurisdiction to consider "price squeeze" claims, incorrectly we believe, there can be no primary jurisdiction issue and it is incumbant for this Commission to establish the principle of non-discrimination, although as stated in the

152. A company violating the law -- or even public interest rights--ought not to be able to defeat relief by raising possible other jurisdictions to deal with the subject matter. In a practical sense, governmental bodies should resolve problems and not permit litigants to avoid relief merely because it might successfully convince another forum of the correctness of its position.

153. Arguments addressed to Federal and State jurisdictional conflicts were decisibly rejected in Otter Tail, supra. Petitioner there as well as the Federal Power Commission**/ explicitly raised -- and repeatedly stressed -- the issues of alternative jurisdiction. They further argued that lack of Federal Power Commission jurisdiction was a clear Congressional intent to permit refusals to deal (i.e., if the FPC has jurisdiction, it should grant relief; if it doesn't no relief should be granted). (Brief for Appellant Otter Tail Power Co., O-T, 1970, NO. 71-991, pp. 22-23, 24, 70-71, and generally throughout its brief). We quote at length Otter Tail's argument. After the Supreme Court rejection of it, this Commission cannot accept a similar position of Consumers Power Company.

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*/ Continued -
text we would leave to the FPC or enforcement or judicial proceedings the establishment of rates which accord with the foregoing principals. E.g., Order of September 21, 1973, in Southern California Edison Co., Docket No. E-8176. Petitioners for review of that order are now pending as Cities of Anaheim et al. v. FPC, CADC, No. 73-2173 et al. Orders of October 29, 1973, in Arkansas Power & Light Co., Docket No. E-8250, appeal pending Conway Corp. v. FPC, CADC No. 73-2207. Order of January 3, 1974 in Union Electric Co., Docket No. E-8215. Opinion of January 7, 1974 in Commonwealth Edison Co., Docket No. E-7578. Order of February 28, 1974, in Public Service Co. of Oklahoma, Docket No. E-8242. Order of March 14, 1974, in Pacific Gas & Electric Co., Docket No. E-7777. Order April 19, 1974 in Wisconsin Electric Co., Docket No. E-8619.

**/ Brief of Federal Power Commission as Amicus Curie Support of Applicant, O.T. 1971 No. 71-991.

"The fundamental error of the decision below lies in its repeated and consistent disregard of Congress' intent concerning both the wholesale sale and transmission of electric energy and the proper application of anti-trust.

"With respect to the interstate transmission and wholesale sale of electricity, Congress enacted Part II of the Federal Power Act, a regulatory statute dedicated to the objective "of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources . . ." The duty of achieving this aim is expressly entrusted to the Federal Power Commission. As to involuntary wholesale sales in particular, Section 202(b) of the Act provides that such transactions may be ordered by the FPC, upon notice and hearing, if the Commission finds that such action would be in the public interest and that certain specified criteria (e.g., that the sale would not impose an "undue burden" on the utility) are met. Totally ignoring these statutory procedures and standards, the lower court held that the antitrust laws impose an absolute duty upon a utility to sell at wholesale in all cases, regardless of the circumstances. In so ruling, the district court has deprived the FPC of a crucial element of its jurisdiction and has effectively nullified the regulatory scheme which Congress provided to govern the specific subject matter of compulsory wholesale sales.

"The lower court's holding that the Sherman Act requires a private utility to transmit ("or wheel") goverment power to municipalities is, if anything, even more repugnant to Congress' intent, since here Congress specifically determined that no such duty should be imposed at all. Indeed, when it enacted Part II of the Federal Power Act in1935, Congress deliberately eliminated two proposed sections that would have imposed the same legal duty which the lower court has created of its own accord in the case at bar.

"Finally, the district court misconceived fundamental antitrust principles and compounded its error by applying mistaken notions of per se illegality without regard to the special circumstances and regulatory framework of the electric utility industry. The court thus held that Otter Tail is a monopolist on the basis of circumstances which are integral in the electric power business, and without regard to the state and federal regulatory schemes which deprive a utility of the very indicia of monopoly proscribed by the Sherman Act, i.e., the power to fix prices or exclude competition.

"In fact, Otter Tail does not possess the power to "fix prices". In Hankinson, Finley and Velva - the only towns considered below which Otter Tail is still serving at retail -- its rates are thoroughly regulated by the North Dakota Public Service Commission.*/ In South Dakota**/ and Minnesota***/ its retail rates are regulated at the municipal level. Throughout its service area, Otter Tail may sell at wholesale only at rates and upon terms and conditions approved by the Federal Power Commission. 16 U.S.C. §§ 824, 824d-824g. It is thus a contradiction in terms to speak of the power to fix prices in a regulated industry context where the regulatory bodies are the ones that determine how much a company may charge. In this setting, regulation provides a surrogare control over price in lieu of the competition which antitrust is designed to foster."

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*/ N.D. Century Code, §§49-02-01 to 03, 15 to 20 (1960), as amended (1971 Supp,).

**/ S.D. Compiled Laws §9-35-1 (1967)

***/ Minn. Statutes §§300.03-04, 454.041-043 (1967).

154. We append the entire brief of Otter Tail Power Co., and the Federal Power Commission to the Supreme Court in Otter Tail. While we assume that Consumers Power Co., will manage much artistry in attempting to distinguish Otter Tail (such as the fact that Otter Tail operates in Minnesota and North and South Dakota), the case is determinative. We invite a comparison of the issues raised by Otter Tail and those raised by Consumers Power Co. in all relevant respects they are nearly identical.

Q. May Consumers Power Company refuse to deal with intervenors because of its ownership interest in either the Midland or other large scale plants or transmission facilities? Answer. This question has been answered previously, but because it is so central to the case, we focus upon the question. Consumers Power Company's arguments ultimately center on rights it sees inherent in its ownership of facilities. However, especially considering that its "bottleneck" control could come about only because of its taking various actions to obtain franchises and other governmental rights, the rights claimed to be inherent in ownership are limited where they can have an adverse impact opon competition or upon other public interests. As stated, Consumers Power Company has a right to charge for the sale of services from its "owned" facilities, but only where such charges are not unreasonable or discriminatory compared with charges allowed others and, further, where the charges do not themselves establish competitive barriers.

155. Consumers Power Company obtains obvious advantage from its franchises and ability to maintain and operate large scale

generation and transmission facilities (i.e., the "bottleneck"). Public policy may militate against direct elimination of the monopoly situation. However, the possession of the bottleneck carries with it an obligation to forego the economic advantage which might otherwise accrue where access or pricing might result in an advantage compared with potential or actual competitiors. United States v. Terminal Railroad Association of St. Louis, 244 U.S. 380 (1912); United States v. New York Great Atlantic Tea Co., 173 F. 2d 79 (CA 7, 1949).*/

156. We note that, in arguing for recognition of its proprietary rights, Otter Tail argued that the "bottleneck monopoly" theory had not "ever been recognized by the Courts" and "[f]urthermore, none of the 'refusal to deal' cases which is in the business of selling at retail must sell at wholesale to its competitors or former retail customers". Brief for Appellant, supra, at pp. 75,78. See, 410 U.S. 366 (1973).

Q. Do the Interveners want the same things that are provided for in the Consumers Power Company interchange transactions with Detroit Edison Company and other major invester-owned utilities?

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*/ Note that the Atomic Energy Commission jurisdiction includes Section 5 of the Federal Trade Commission Act, 15 U.S.C. 13(e), which would prohibit: "unfair methods of competition in commerce, and unfair and deceptive acts in commerce . . ." In interpreting this statute, the Supreme Court has held that it was intended to "combat in their incipience trade practices that exhibit a strong potential for stifling competition". FTC v. Texaco, 393 U.S. 233, 225-226 (1968). Thus, if the Board finds that an exercise of ownership by Consumers Power Company, while lawful under the Sherman Act, would tend to "stifle" competition, that exercise is within the direct reach of the conditioning power of the Atomic Energy Commission through reference of Section 5 of the Trade Commission Act. Atomic Energy Act, 105c, 105a. Senate Report No. 91-1246, 91st Cong., 2nd Sess.

Yes. We would point out that the Michigan Power Pool agreements cannot be applied to directly to them because some of its terms (such as the requirements of ownership of 345 kv transmission for admission) or the reserve formula which as applied to interveners would create an undue discrimination between their reserves as a percentage of load and those maintiined by Consumers Power Company and Detroit Edison Co. DJ-71, Art. I, 6(a),(b); Definitions; Art. III (b) (2). See Yick Wo v. Hopkins, 118 U.S. 356 (1886). These requirements cannot be deemed accidental. See, e.g., DJ-170.

Q. Can the policies of the antitrust laws be reconciled with the desires for "coordination", which implies agreement and cooperation among entities.

A. As we stated earlier coordination is the market mechanism whereby competition with regard to individual buying and selling services takes place. (E.G., 5564-5566,5555). If Consumers Power Company needs emergency power and there is more than one available source, it will obtain emergency power from the cheapest incremental source. Thus, within coordination agreements there is competition for individualized power transactions and the sale will be made by the cheapest source of available power supply for any transaction. On a broader basis, the utilitythat can generate or otherwise obtain

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*/ Continued -
(1970) p. 14. Note that the Supreme Court has specifically held that the unfair methods of competition condemned by Section 5a of the Trade Commission Act "are not confined to those that were illegal at common law or that were condemned by the Sherman Act". FTC v. Motion Picture Advertising Service Co., 344 U.S. 393 (1953).

power supply most cheaply, will be most successful in attracting industry to its service area and in competing for markets subject to competition. It will also enable it to best serve its particular market by enhancing its earnings and making it a more attractive investment opportunity. (E.g., Gutmann, pp. 10-11:4664).

157. It should be noted that in the context of coordination the firm with power to sell (e.g., emergency, maintenance, economy exchange) is selling to a purchaser. While the sale may reduce the purchaser's cost compared with his alternative, it provides added revenues to the seller to its advantage. For example, in an economy exchange situation a seller with an incremental generation cost of 10 mills will sell energy to a buyer with an incremental cost of 20 mills for 15 mills. Over a course of time, the seller gains a decided advantage.

158. Moreover, as is discussed at Sec. I, supra, within the context of coordination, providing competitive access to wholesale power markets, can work towards achieving greater economies. Especially given the public and regulatory concern over power rates, the impact of reduced rates by one utility tends to create pressure towards reduced rates elsewhere. Consumers Power Company has testified that it takes such price comparisons very seriously. E.g., Ex. 1004, pp. 202-203. E.g, 2043, 2082, 2087. Coordination aids the tendency toward reduced rates from competing entities by allowing transactions which share the benefits of efficiencies in operation among utilities thus creating added consumer benefits. See, generally Rogers, supra, especially at the pages cited above. In this way competition and coordination can have complementary consumer benefits.

Q. Considering that there is restrictive retail competition are there consumer gains which are likely to flow from an AEC order granting interveners the relief they seek?

A. Yes. The opening of alternaiive sources and outlets for wholesale power to interveners will clearly benefit interveners in allowing them to obtain lower costs of power supply, which will benefit their taxpayers and ratepayers. Assuming that this were the only impact of an Atomic Energy Commission order, and assuming further that such impact were detrimental to Consumers Power Company or its ratepayers, relief would still be justified because the retail customers of interveners have the right to expect their supplier will be able to obtain the lowest available power supply -- or at least not be restricted for anticompetitive reasons in attempting to do so. However, the benefits from ordering the relief requested by Intervenors are likely to reach beyond the borders of Intervenors' service areas.*/ Studies have repeatedly shown the validity of the "yardstick" concept. See p. 49-51, supra.**/ Where competitive power sources exist, there are incentives to efficiency of all utilities. Thus, for example, one can draw concentric circles around major public power systems, such as TVA, and demonstrate reduced power costs for power sold by all systems not explicable solely by reference to power

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*/ To the extent that it is argued that the type of nondiscriminatory access and coordination sought by interveners will raise costs to Consumers Power Co., this merely argues that the existing situation of interveners is woefully discriminatory.

**/ Hellman, Government Competition in the Electric Industry (Praeger, 1972).

savings that result from less expensive public power production costs due to Government financing. The importance of comparitive rates is demonstrated by the fact that Consumers Power Compaly closely monitors interveners' retail rates and maintains detailed rate comparisons. See previous references. Indeed, given the limitation of regulatory agencies efficiently policing excessive cost incurrences, competition may be the only effective way of ultimately protecting the public against excessive rates. Courts have commented on theis phenomenon many times and for this reason have admonished regulatory agencies to provide for competition to the greatest extent practicable, even within the context of regulated entities. E.G., Northern Natural Gas Company v. FPC, 399 F. 2d 953 (CADC, 1968), Municipal Electric Association of Massashusetts v. FPC, 414 F. 2d. 1206 (CADC, 1969).

159. We would also point out that increased coordination between Consumers Power Company and interveners should provide benefits in the same way that any coordination does and for the same reasons. Obviously, Consumers Power Company may face a detriment to the extent that it must eliminate unreasonable activities as a result of greater competition. However, on a longer range basis, municipal and cooperative systems do provide a potential source of capital for financing of new generation and transmission facilities, which can be coordinated to the benefit of all systems.*/

*/ Consumers Power Company argues a static pie theory that to the extent granting interveners any relief that they may seek reduces their costs, it must increase Consumers Power's customers' costs. Apart from the fact that it depends upon the level and design of the regulated retail rate and upon demand and production cost curves, the argument mixes the "wholesale" and "retail" power supply markets. Interveners are entitled to obtain low-cost wholesale power supply regardless of whether this aids or limits Consumers Power Company in competition for retail customers. E.g., United States v. Aluminum Co. of America, 148 F. 2d 416 (CA 2, 1945). Of course, to the extent that there is actual competition for customers (and the record shows that there are areas of competition), the opportunity for alternate suppliers does exist and there is a direct benefit to retail customers.

160. In terms of the public, the benefits are not all monetary. The coordination rights requetted would allow generation from the most efficient units. Nuclear access would allow interveners' access to nuclear energy. Granting access to transmission on the part of interveners can substitute for reliances on duplicative or low voltage transmission lines. The result would tend to aid conservation and environmental values.

161. Avoiding duplicative transmission lines has obvious aesthetic and land preservation gains. Encouraging efficient generation also has land use gains. It aids goals of fuel conservation and avoidance of unnecessary air pollution. To the extent nuclear power is believed to have environmental values over fossil fuels, interveners should not be deprived of such access. E.g., Chayavadhanangkur, pp. 17-18, 26:5090.

162. The Board requests our views concerning the legality and desirability of conditioning relief to increased competition at the retail level. While the matter is subject to possible doubt, inter-

veners believe that the Board does have such authority. */ As we have stated previously its mandate is to resolve problems resulting from situations inconsistent with the antitrust laws which would be "created or maintained" by the licensing of nuclear generating facilities. If the Board determined that such situation involved competitive barriers on the retail level, the jurisdiction of the Commission would probably reach this far. However, insofar as interveners are aware, all parties to this proceeding have assumed such relief to be unnecessary and none have claimed that a factual situation exists on the retail level warranting correction. Since it is unnecessary to reach retail patterns of competition to correct the "situation inconsistent" to exist by the parties and, since no record adequate to such correction has been developed, we believe that the Board would not be justified in taking such steps on its own motion, however, the matter might be considered as a subject for review in subsequant licensing cases.

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*/ For purposes of interpreting the Federal Power Act, a "bright line" has been developed between Federal and State jurisdictional authority. While matters of the Federal side of this line are clearly within thejurisdiction of the Board, Parker v. Brown, could be interpreted to allow for State jurisdiction the regulation of retail service territorities and competition at least in some circumstances. Parker v. Brown, 317 U.S. 341 (1943). Compare Whitten Jr., Inc. v. Paddock Pool Builders, Inc. 424 F2d 25, 31-34 (CA 1, 1970); cert. denied 400 U.S. 850 (1970); Woods Exploration and producing Co. v. Aluminum Co. of America, 438 F2d 1286 (CA 5, 1971), cert. denied, 404 U.S. 1047 (1972); Hecht v. Pro-Football Inc., 444 F 2d. 931 (CADC, 1970); cert. denied, 404 U.S. 1047 (1972). These cases are discussed infra, Sec. VC, VII.

163. We call to the Board's attention that policies with regard to retail competition are being developed on the State level, including recent legislation, and therefore we believe that, while the Commission might have the legal authority to enter into this area, in the context of this case it would be preferable to give deference to state actions.

164. Absent a record, interveners cannot comment on the desirability of various possible ordered requirements or restrictions concerning retail competition. We do note, however, that as a geneaal matter, rural electric cooperatives were originally encouraged by Federal legislation as a result of a concern that rural electrification would otherwise be delayed or would be uneconomic. There is apparent general agreement that Michigan Rural Electric Cooperatives have higher costs (and rates) than both Consumers Power Company and must municipally-owned utilities (However, allocations of Consumers Power Company costs of operations solely for <u>such areas</u> may not be higher than the Rural Electric Cooperatives' costs). Any ultimate resolution of limitations or encouragements to competition at the retail level would presumably have to consider these factors as well as the factors of the existing investment -- often at higher embedded costs -- of the Rural Electric Cooperatives.*/

*/ Granting the relief in requested in Appendix A should help reduce high rural electric cooperative costs.

Q. Do the activities complained of constitute "per se" violations under the antitrust laws? Yes. We have discussed the of the antitrust laws, as they apply to Applicant, in the body of our brief. However, since the Board asked us to specifically address this question, we shall repeat the answer.

165. The two principal allegations that we raise with regard to Consumers Power Company's "activities inconsistent" are its use of the dominant control of major base load generation and transmission (as well as its intended control of coordination agreements) to bar Intervenors from access equal to that enjoyed by major investor owned utilities and the "bundling together" of wholesale power transactions, so as to refuse to deal on equal terms or refusing to deal at all in individualized power transactions. The former activity is covered by the "bottleneck" monopoly theory under the Sherman Anti-trust Act; the latter is a "tie-in" sale. Moreover, there is substantial evidence that Consumers Power Company has engaged in wholesale (as well as retail) territorial agreements. All three activities are commonly classified as "per se" violations. See pp. 66-68, 70-74, supra.

166. We do not wish to add to our legal discussion at this point in the brief. However, we stress that a main defense of Otter Tail before the Supreme Court was its objection to the Distric Court's adoption of a "per se" standard. In this way, Otter Tail complained that the Court failed to consider (or allow the Federal Power Commission to consider) the various legal and economic limitations

which it claimed should affect its obligations to deal. Continually and consistently throughout its Brief, Otter Tail argues that decisions with regard to "forced" transmission and coordination demand scrutiny and application of judgment as to their consequences by the Federal Power Commission Amicus Federal Power Commission argued the same thing. Thus, Otter Tail concluded its summary as follows: (Brief, p. 24).

> "Finally, the District Court misconceived fundamental anti-trust principles and compounded its error by applying mistaken notions of per se illegality without regard to the special circumstances and regulatory framework of the electric utility industry. The Court thus held that Otter Tail as a monopolist on the basis of circumstances which are integral to the electric power business, and without regard to the state and federal regulatory schemes which deprive a utility of the very indicia of monopoly proscribed by the Sherman Act... The Court further held . . . it is illegal per se for a company to insist, when its property is used by another, that that property not be utilized to destroy its own business. ... [T]he application of such per se concepts to an industry regulated in accordance with specific public interest objectives of its own is especially inappropriate....." Accord, pp. 78-83. See especially Otter Tail's arguments of the necessity for the "favored...scalpel of regulatory discretion rather than the bludgeon of an absolute duty." p. 59-64, 59.

167. It took Otter Tail 84 pages to attempt to explain why it should not be obligated to deal. The Supreme Court readily determined that "otter Tail's theory collides with the Sherman Act as it sought to substitute for competition anticompetitive uses of its dominant economic power."

V. CONSUMERS POWER COMPANY'S DEFENSES DO NOT JUSTIFY DENYING OR LIMITING RELIEF

168. Consumers Power Company has a number of defenses. They are erroneous. We note that they tend to follow in more muted tones the various defenses raised by Otter Tail and rejected by the Supreme Court. Ultimately, these defenses generally ignore the distinction between the wholesale and the retail power markets and the entitlement under the law of interveners to a competitive power supply.

169. While we cannot cover all such defenses, we comment briefly on some of them:

A. The profitability ("Tax-financing") defense: Consumers Power Company argues that the municipal and cooperative systems can compete with it under present circumstances and that it is therefore unnecessary to grant them direct access to nuclear generation or other relief. Specifically, it argues that, because the municipals and cooperatives have certain financing and/or tax advantages, the Company should be relieved of obligations that it might otherwise have under the Atomic Energy Act. However, denial of a disproportionate advantage is no defense to a refusal to deal on a reasonable basis. The coordination is an essential facility for a utility desiring to maintain the most efficient operations. Although the benefit to Consumers might be less proportionate to the benefit to the Interveners, Consumers would achieve added re-

liability for its own system, and reduced costs should it be necessary for Consumers to call on the Interveners to provide some power. To the extent that Consumers decides to give up these advantages becasue the Interveners have more to gain, it is operating a classic price squeeze. It is deliberately following a policy of increasing the costs of competitors without any significant advantage for itself other than the anticompetitive impact of this course of conduct. See e.g., Wein 23-24, 25-27, 60-66:3979.

170. Ignoring its own position as a holder of monopoly rights, Consumers Power Company argues that it has no obligations to grant access, if the interveners can survive without. However, contrary to its position, the leading cases in the utility field including Otter Tail affirm the rights of access by smaller systems to participation, transmission and coordination. Furthermore, the general antitrust law refutes the contention that a party can argue the profitabilty of the complainant as a defense to monopolization, denial of access, or other anticompetitive conduct. E.g., Utah Pie Co. v. Continental Baking Co., 386 U.S. 695, esp. p. 702 (1967). A rich man, as well as a poor man, is entitled not to have his competitor violate the antitrust laws to his detriment. Indeed, the purpose of the antitrust laws is to encourage competition, not necessarily successful competition.

171. The antitrust review provisions in the Atomic Energy Act

were passed by Congress precisely for the purpose of protecting the smaller utility system against use of monopoly power by the larger investor-owned utilities, such as Consumers Power Company. Certainly, Congress was well aware that most of the smaller utilities (although not all) were governmentally or cooperatively owned. Had it chosen to do so, Congress could have viewed the advantages of the smaller systems as offsetting the advantages of the larger ones. It did not.

172. Moreover, even on its own terms, Consumers Power Company's arguments do not stand scrutiny. The defense against granting access to nuclear power on the part of the smaller systems is ultimately based upon an attempt to show that systems can otherwise compete on a retail basis. However, under the law, Consumers Power Company is not entitled to limit access to its nuclear generation and high voltage transmission to protect its retail position.*/ Otter Tail, supra; United States v. Aluminum Co., of America, 148 F. 2d 416 (CA 2, 1945). See, United States v. Philadelphia National Bank, 374 U.S. 321 368-370 (1963); Richmond Power & Light v. FPC, supra, 481 F. 2d 490, 493, 496-497 (1973).

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*/ We do not here challenge the right to Consumers Power Company's exclusive ownership of the "bottleneck" facilities. However, certainly this control does not protect it against having to deal. See, e.g., Gulf States, supra, establishing that insofar as practicable antitrust principles should be applied to the wholesale power industry.

173. The so-called "tax" and financing issues are artificial in any event. Consumers Power Company dominates the Western portion of the lower Michigan penisula. Furthermore, the number of municipally and cooperatively owned electric plants has been declining steadily. E.g., Testimony of Joseph C. Swidler on S. Bill No. 218, Hearings Before the Committee on Commerce, United States Senate, 89th Cong., 1st Sess., pgs. 69-70. The alleged threat of the municipals and cooperatives taking over Consumers Power Company, a 3 billion dollar enterprise controlling the major generation and transmission facilities in its area is -- to say the least -- strained.

174. There are various forms of ownership of electric utilities (or other businesses). Each have different advantages. Thus, for example, as its mentioned in its testimony, Consumers Power Company enjoys the benefits of perpetual franchises in portions of its service area and other long-term franchises elsewhere. It further enjoys limitations on retail competition and, indeed, recently legislation has been passed limiting the geographic area of municipal retail competition. Compare Cities of Lexington v. FPC, 295 F. 2d 109, 116 (CA 4, 1961).

175. It has further advantages stemming from its sheer size and the numbers of customers that it serves, its large service area, and its cumulative assets and revenues. These have allowed it to construct and operate the bottleneck facilities (e.g., large generating units, high voltage transmission lines) in the first place, to negotiate extensive pooling and interchange agreements

and presumptively, to hire and train experienced personnel in diverse fields, such as management, marketing, engineering, financing and space technology. If such advantages are not present, perhaps there would be no excuse for maintaining its monopoly control altogether as opposed to conditioning that control upon its not refusing to deal.

176. Consumers Power Company has the additional advantages of being a combination Company with large natural gas markets. It has been able to contract for long-term oil supplies.

177. The above illustrates the advantages in business management to the corporate form and the additional built-in advantages which flow naturally from large size. Experience shows, once a company has obtained large size, it is difficult to dislodge.*/ We raise these points not to argue the benefits of large investor-owned companies but to point out that advantages are not all a one-way street. Ultimately the balance of advantages between various forms of ownership in the utility business is irrelevant, although encouragement of competition among the various entities can create Consumers advantage.

178. The tax and financing defense is ultimately the complicated defense. While we note that because of various tax advantages (including liberalized appreciation and the investment tax credit), Consumers Power Company and other major utilities pay vastly reduced

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*/ For one thing, large corporations can finance extensive litigation to resist governmental limitations upon their activities.

taxes*/ the question of financing and tax benefits as it relates to profitability depends upon long-term projections and economic prediction. Such predictions of continued profitability can provide no basis to bar interveners from participation in the wholesale power markets except on terms acceptable to Consumers Power Company.

179. Moreover, the Company's arguments of intervener advantage are overstated in the extreme. According to its 1973 Annual Report, p. 24, last year the Company paid only $2,717,766 Federal Income Taxes charged to utility operations and a similar amount in state income taxes ($2,785,570). Thus, its total Federal/State Income Tax expenses charged to utility operations were 3.9% of its Net Operating Income (plus deferred taxes and tax credits excluding income taxes).**/ Federal Income Taxes alone were 1.7% of that amount.***/ Its economies of scale probably more than offset any additional advantages municipally or cooperatively - owned utilities enjoy. It is ironic for the notoreously low tax paying electric utility industry to base a defense a fair dealing on the fact that it pays taxes.

180. Apart from any other factor, use of such studies requires a prediction of competitiveness far into the future. A change in the availability of using a particular fuel or type of generator,

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*/ The building of major facilities, such as Midland, create the type of construction which would reduce or eliminate federal income taxation for the Company.

**/ The figures are $2,717,766 divided by $124,715,102 (p.18) plus $39,129,398, representing deferred taxes and investment tax credits, less $5,503,336 federal income taxes paid (p. 18). The high booked tax expense of $44,632,734 does not constitute a payment, but is a "normalized" a deferred figure. The company takes advantage of liberalized depreciation, investment tax credits, etc., to reduce tax payments. Ex. 1004, pp. 172-174.

***/ $2,717,766 divided by $158,341,102.

labor pay scales, electricity demands, governmental constraints, or combinations of such factors, can change the outcome of such studies. We hesitate to think that courts -- or even expert agencies -- should find a defense to antitrust violations based upon them.

181. In any event, if either advantages possessed by Consumers Power Company or the municipalities or cooperatives are unwise, as matters of public policy, they should be attempted to be changed politically.*/ Indeed, financing costs for rural electric cooperatives have been marketedly increased by the virtual elimination of "2%" money for generation purposes, thus making it more difficult for rural electric cooperatives to compete with Consumers Power Company.

182. It is no justification to bar access to forms of electric utility operations, such as direct ownership of Midland, that based upon studies made for the purpose of trial, the Board might conclude that such utilities might be able to survive without such advantages. Nor is Consumers Power Company justified in using a "self-help" to effect advantages it thinks unfair.

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*/ We do not mean to imply that strong arguments may not be made on their merits for retention of such benefits. Principal among them is that municipal or cooperative utilities are actually owned by the public and that returns on public moneys should not be subject to taxation.

183. We have discussed the profitability arguments because they have been raised in this case. However, as a matter of law, and apart from any other argument, Otter Tail foreclosed the issue. Consumers Power Company is merely attempting to raise in a respectable form the issue of public v. private power. As the Board must be well aware, for years investor-owned utilities have inveighed against what they have considered to be unfair tax benefits enjoyed by public power entities. This issue was sought to be raised by Otter Tail, but in the case of that name the trial judge refused even to enter into such matters.*/ E.g., Appendix to Otter Tail Power Co. v. United States, supra, O-T, 171, No. 71-991, p. 337.

184. Otter Tail complained to the Supreme Court (Brief, supra, p. 46):

> "The lower court held that the Sherman Act requires an electric utility to use its own transmission system to transmit (or 'wheel') subsidized government power for municipalities seeking to take over its retail business . . . The decision clearly contravenes . . . manifest congressional policy . . ."

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*/ One of his reasons was to prevent the trial from becoming a "life-time mission", a justification that appears to have considerable merit. id.

185. The Supreme Court responded to the arguments made as follows (410 U.S. at p. 380):

> "Otter Tail argues that, without the weapons which it used, more and more municipalities will turn to public powerand Otter Tail will go downhill. The argument is a familiar one. It was made in United States v. Arnold Schwinn & Co., 388 U.S. 365 . . . The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct. " id at 375.

186. Should Consumers Power fears come true, it can apply for rate or other justified relief at that time, but claims of potential competition or of competitor advantage do not allow the continued self-help remedy of refusing to deal on non-discriminatory terms. Otter Tail Power Co. v. United States, 410 U.S. 366, 381-382. (19730; New England Power Co. v. United States, 410 U.S. 366, 381-382.(1973); United States v. Aluminum Co. of America, 148 F. 2d 416 (CA 2, 1945). See Alabama - Tennessee Power Co. v. FPC, 359 F. 2d 318, 338-339 (CA 5, 1966), cert. denied, 385 U.S. 847 (1967).

B. Harm to Consumers Power Company

187. Consumers Power Company apparently attempts to make some sort of "failing company" argument in further justifying its refusals to deal. This argument has been subsumed above. While permission to raise such arguments at this juncture might aid the profitability of law firms and consulting firms, the studies perform no other valid function.

188. The potential profitability of a competitor provides no license to violate the antitrust laws. Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967) and, reports of Consumers Power Company's potential demise, we suspect are exaggerated. Again, this argument justifying denial of access was made by Otter Tail, which merely possessed a monopoly on subtransmission lines and not on all transmission lines in its area of service above 138 kv. Compare Otter Tail, supra, 331 F. Supp. at P. 59. As the Supreme Court held in Otter Tail, supra, 410 U.S. at 380-382, the complete answer to any "defense" of Consumers Power Company that coordination with public power systems would put it out of business is that, if such conjuctures should occur, regulatory agencies (including those with the power to raise rates) retain jurisdiction over the industry and can take corrective measures as necessary. New England Power Co. v. FPC, supra, 349 F. 2d. at 264. Alabama-Tennessee v. FPC, 359 F. 2d. 318, 339 (CA 5, 1959), cert. denied, 385 U.S. 847 (1966). See United States v. Philadelphia National Bank, 374 U.S. 321, 371-372 (1963). See also Sierra Pacific Power Co. v. FPC, 350 U.S. 348 (1958), establishing the basis under which the Federal Power Commission can raise rates otherwise subject to contract to protect other ratepayers.

189. We again are constrained to note that Consumers Power Company's arguments of its own demise ignore the reality of municipal

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189. We again are constrained to note that Consumers Power Company's arguments of its own demise ignore the reality of municipal

and cooperative forms of business. Should the State of Michigan choose to condemn Consumers Power Compay and operate a publically owned power system we assume that it could lawfully do so,*/ but the experience of the United States indicates that public officials and citizens will not support the type of financial commitments necessary for small municipalities to run state-wide businesses.

C. State Law Defense.

190. Consumers Power Company argues for absolution on grounds that it obtained its franchise and operating authorities pursuant to state law. Parker v. Brown, 317 U.S. 341 (1973).**/ We find the argument stange. It might as well argue against FPC wholesale rate jurisdiction on the grounds that its contracts to sell power to municipalities are legal and enforceable under state law. Although the proposition might be argued, nobody is here suggesting that Consumers Power Company's franchises should be voided.

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*/ Although Consumers Power Company perpetual franchise rights may create doubts.

**/ Parker v. Brown itself involved a case of complimentary state and Federal action. The state action was deemed to be insulated from the antitrust laws, as, for example, a private action or all-considered state action would not be. E.g., George R. Whitter, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F. 2d 25 (Ca 1, 1971). Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F. 2d 1286 (CA 5, 1971), cert denied 404 U.S. 1047 (1972). Hecht v. Pro-Football, Inc., 444 F. 2d 931 (CADC, 1971), cert. denied, 404 U.S. 1047 (1972). There can be no Parker v. Brown question of insulation by state action here where, as is here

191. Consumers Power Company is applying for a nuclear license. It does so under the Atomic Energy Act, an Act passed by Congress. That Act provides for explicit antitrust review, obviously intending that antitrust principles be made applicable to the granting of the license. The supremancy clause of the United States Constitution and Martin v. Hunters Lessee., 1 Wheat 304 (1816), we would have thought had finally resolved any issue involved in a "state law" defense. We further point out that, at least for purposes of Federal Power Commission, the Courts have established a bright line.

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*/ Continued -

the case, Congress determined a specific antitrust review. Nor can such question exist after Otter Tail and Gulf States, which makes clear that antitrust principle apply to the wholesale power industry. Moreover, the courts have hold repeatedly that legally acquired monopoly rights or privileges (e.g., through state franchise) are not to be extended through implied exemption of the antitrust laws. International Salt Co. v. United States, 332 U.S. 392 395-396 (1947); United States v. Griffith, 334 U.S. 1001 107(1948); Northern P.R. Co. v. United States, 356 U.S. 1 (1958); United States v. Loew's, Inc. 371 U.S. 38, 45-47 (1962); United States v. Aluminum Co. of America, 148 F. 2d 416 (CA2, 1945); Peelers Co. v. Wendt, 260 F. Supp. 193, 197 (W.D. Wah. S.D., 1966). Indeed, such special rights carry correlative obligations to the public to avoid expansion of monopoly privilege. While we do not believe there is any valid Parker v. Brown question, in denying inquiry into Consumers Power Company's political activities -- and the extent it may have been responsible for state action -- the Board has precluded this issue.

By analogy the Atomic Energy Act jurisdiction must also go at least this far. E.g., Federal Power Commission v. Florida Power & Light Co., 404 U.S. 453 (1972).

192. Finally, vis-a-vis Federal jurisdiction we are again constrained to point out that Consumers Power Co. is in no different situation than Otter Tail Power Co., who also argued, unsuccessfully, that its monopoly situation arose from state authorizations and that its rates were subject to local approvals so that it could not be charged with having created a monopoly. E.g., Brief for Appellant Otter Tail Power Co., supra, pp. 13, 19, 24-25, 81-83.

D. They Can Buy From Us Defense

193. Consumers Power Company makes one defense, which we consider truly arrogant. This is that, since the interveners always have the option of purchasing wholesale power (which includes power generated from the Midland Units), that they need not obtain direct access to nuclear or transmission facilities or coordination. This defense illustrates Consumers Power Company's true position. It is that they ought to be able to use their bottleneck control to bar interveners from competiting in the wholesale markets or from obtaining individualized power transactions separately, because they can buy from the Company.

194. As did Otter Tail,*/ the Company does make a technical argument that it is unfair for municipals or cooperatives to buy

*/ Brief for Appellant, supra, pp. 24-25, 81-83.

at a lower rate than they would be entitled to receive through purchasing coordination services, since other customers would have to pay more. The premise of the argument of course is that interveners are and should be considered like retail customers (i.e., that they should be disabled from competiting in wholesale power markets). The answer is that the antitrust laws gives them the specific right to compete at wholesale on fair terms.

195. Even if the suggestion that interveners should prefer to buy from Consumers Power Co. were somehow legally and economically justifiable, a manager ought to have the choice of whether to be dependent upon a major supplier or whether to enter wholesale power markets directly. Certainly the decision should not be made by Consumers Power Company. Given the uncertainties, changing decisions, and delays of regulation, a utility manager at least ought to have the choice to attempt to control his own power supply. Moreover, we note that at the same time Consumers Power Company resists selling direct access to nuclear facilities and specialized power services, noting that the smaller utilities can buy from it, the Company also resists allowing a sale of transmission services (except perhaps on its terms --

i.e., where it will not hurt Consumers Power Company). Thus, it would also cut off the availability of competitive alternatives of purchasing from other utilities at the same time that it is insisting that a direct purchase of wholesale power is an alternative to ability to obtain direct access to Midland generation.*/ E.g., Stelzer, pp. 17-19, 25-26:6723.

196. Consumers Power Company makes the additional argument that it is uneconomic to grant "subsidized" entities coordination. To the extent that the argument is that corporate forms are a preferable form of organization, it can demonstrate this at the market place. On the other hand, to the extent that the Company is arguing that the public would be better off without granting coordination to the smaller systems because they have financing or tax advantages, the argument is logically fallacious. Given any base level of costs of operations for any generating entity, coordination will tend to allow use of larger plants and lesser amounts of re-

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*/ The assumption of applicant seems to be that there is a rate for wholesale power. However, the level of the wholesale rate that a Company will file before the F.P.C. agree to is often dependant upon the purchaser's alternatives. For example, Mr. Aymond stated that, in setting retail rates, he considers competitive factors, and presumptively the same would be true for wholesale rates. Ex. 1004, 232-234. Thus, the price for wholesale power would itself be affected by competitive alternatives, (Tr. 2819-2820), and the denial to intervenors of alternatives will reduce their bargaining power over the level of the wholesale rate.

serves, thereby reducing those costs (i.e., once it is conceded that interveners -- or Consumers Power Company have certain advantages, which will not be eliminated, it reduces costs of operations to coordinate, at whatever level those costs may be).

197. Indeed, if interveners have reduced costs because of financing or tax advantages or for any other reason, economically this would provide reasons to prevent Consumers Power Company from using its bottleneck monopoly to negate them, thus preventing the savings from being passed to public. The Company cannot seriously contend that a monopolist can limit competition because his competitor can operate more cheaply.

E. They Are too Small Defense

198. The "they are too small defense" ties into the "they can buy from us" defense. It is merely an excuse to avoid coordination or dealing with smaller entities. There is no technological or economic reason why coordination is impossible for any particular unit owned by a small system rather than a large one.

F. The "You Never Asked for It" Defense

199. Consumers Power Company expresses shock and disbelief that the smaller entities which it surrounds ever wanted the same type of operating arrangements as its neighboring invester-owned utilities. The Company claims that it never dreamed that these systems might want to be treated equally.

200. There is direct evidence in this proceeding that Consumers Company arranged its relationships precisely to keep out "undesirables". There is further evidence that whenever an approach was made by a smaller system to Consumers Power Company, it was rebuffed. What Consumers Power Company is criticizing is the systems knew the conditions of the market in which they were operating a.d did not have the foresight to make a "paper" record detailing the refusals to deal. Moreover, regardless one should not need a Rosa Parks on a Birmingham bus to ask for rights, which all know are being denied. */

VI. RESERVE SHARING SHOULD BE BASED UPON EQUALIZED RESERVES.

201. Interveners' proposed licensed conditions are Appendix A. They are self-explanatory and provide for condi:ions similar to the interchange arrangement that Applicant presently has. They are supported by the record.

202. There is one particular item provided for that has been specifically objected to by Applicant, that of the requirement that reserve sharing be on an "equalized reserve"basis.

203. Interveners proposed license conditions provide that the amount of reserves shall be mutually established as part of "reserve

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*/ Knowing the economic climate, if one system manager tested the water and was turned down, even at a lower level, this would not be lost on other system managers.

sharing" arrangement. They shall be those required to "maintain adequate reliability of power supply . . ." That is, we do not request the Board to here establish any specified reserve level. The amount of reserves shall be based upon engineering criteria.*/ However, common sense protection for the interveners requires that the reserves levels interveners are required to maintain must be limited by some objective criterion. **/ Even if some reserves formula other than equalized reserves were acceptable (and none is in the record), fairness requires absent agreement that interveners not be required to maintain greater reserves than the pool members themselves.

204. Interchange transactions allow for a reduction in the total reserves requirements of combined systems compared to the reserves those systems would have to carry, if they were isolated. The principle can be readily understood from an example of a system having one unit. To maintain a continuous electrical supply, the system would have to have reserves equal to its load in the event that that unit should fail or be out of service for repair. However by combining with another similar system, each system could share in purchasing a spare unit, thereby reducing their reserves in half.

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*/ They may of course be varied for units or types of units of demonstrated lesser or greater reliability, but are "not to be directly related to the size of generating units". Appendix A.

**/ Compare Otter Tail Power Co. v. United States, 410 U.S. at 381. Cases cited at pp. 82-91, supra.

205. Consumers Power Company, of course, achieves the advantages of "reserves sharing" on its own system. Having many units of varying sizes, it has an ability to plan for the optimal size units, taking advantages of economy of scale, in conjunction with the minimum reserves responsibility to support such units. A system large enough to support 10 or 20 units (especially of large size) needs less reserves than a smaller isolated system. However, even a system the size of Consumers Power Company has reserves sharing agreements with neighboring entities.

206. Absent its internal coordination achieved through its large size and its coordination with other systems, it could not economically build Midland Units without significantly increasing its reserves and, therefore, its costs. E.g., Ex. 1005, pp. 36-42.

207. Consumers Power Company argues that the smaller systems should have greater than "equal"reserves. Consumers Power Company is arguing for an admission fee to get into the club. Consumers Power and Detroit Edison, as well as other major utilities, can dine for merely paying the costs of the food, but the other systems must pay an admission fee, this fee consisting of the maintenance of larger reserves. It is the clearest form of barrier to entry that can be imagined. Furthermore, it makes less valuable the benefits of coordination, increasing intervener costs to the advantage of Consumers Power Company.

208. Mere change of ownership a hypothetical 100 mw unit should not create the requirement of greater reserves for that unit. However, this is the direct result of an unequalized reserves formula. What an unequalized reserve formula does is reward the size of a total system by relating reserves requirement to the relative size of the interconnecting systems. However, the "situation inconsistent" is the use by Consumers Power Company of its control of large unit generation and high voltage transmission block interveners access to power transactions equivalent to those enjoyed by the Michigan Power Pool. Providing interchange service on an unequalized reserves basis is nothing more than charging a special price.

209. The Federal Power Commission has approved an equalized standard, which was confirmed by the Supreme Court. Gainesville Utilities v. Florida Power Corp., 402 U.S. 515 (1971), a case that Judge Levanthal later characterized in Gulf States as standing for the proposition that municipals should not be interconnected "on terms more onerous than those required of other invester-owned utilities". id. Lafayette Louisiana v. AEC, 454 F. 2d 941, 952 (CADC, 1971), affirmed sub. nom. Gulf States Utilities Co. v. FPC supra.

210. Moreover, what Gainesville was all about was the claim by Florida Power that the costs of interconnectioned services should be shared on the basis of benefits received, as Consumers Power Company argues here, rather than upon "burdens" (i.e., costs) imposed. Gainesville Utilities Department and City of Gainesville, Florida v. Florida Power Corp., 40 FPC 1227, 1237 (1968); set aside sub. nom. Florida Power Corp. v. FPC, 425 F.2d 1196 (CA 5, 1970), reversed sub. nom. Gainesville Utilities v. Florida Power Corp., 402 US 515, (1971).*/ As the Supreme Court put in:

> "An airplane seat may bring more profit to a passenger flying to California to close a million-dollar business deal than one flying west for a vacation; as a consequence, the former may be willing to pay more for his seat than the latter. But focus on the willingness or ability of the purchases to pay for a service is the concern of the monopolist, not of a governmental agency . . . "

211. Proposing the splitting of benefits test merely is an attempt by Consumers Powers Company to get this Board to recognize its monopoly power in setting interchange terms.

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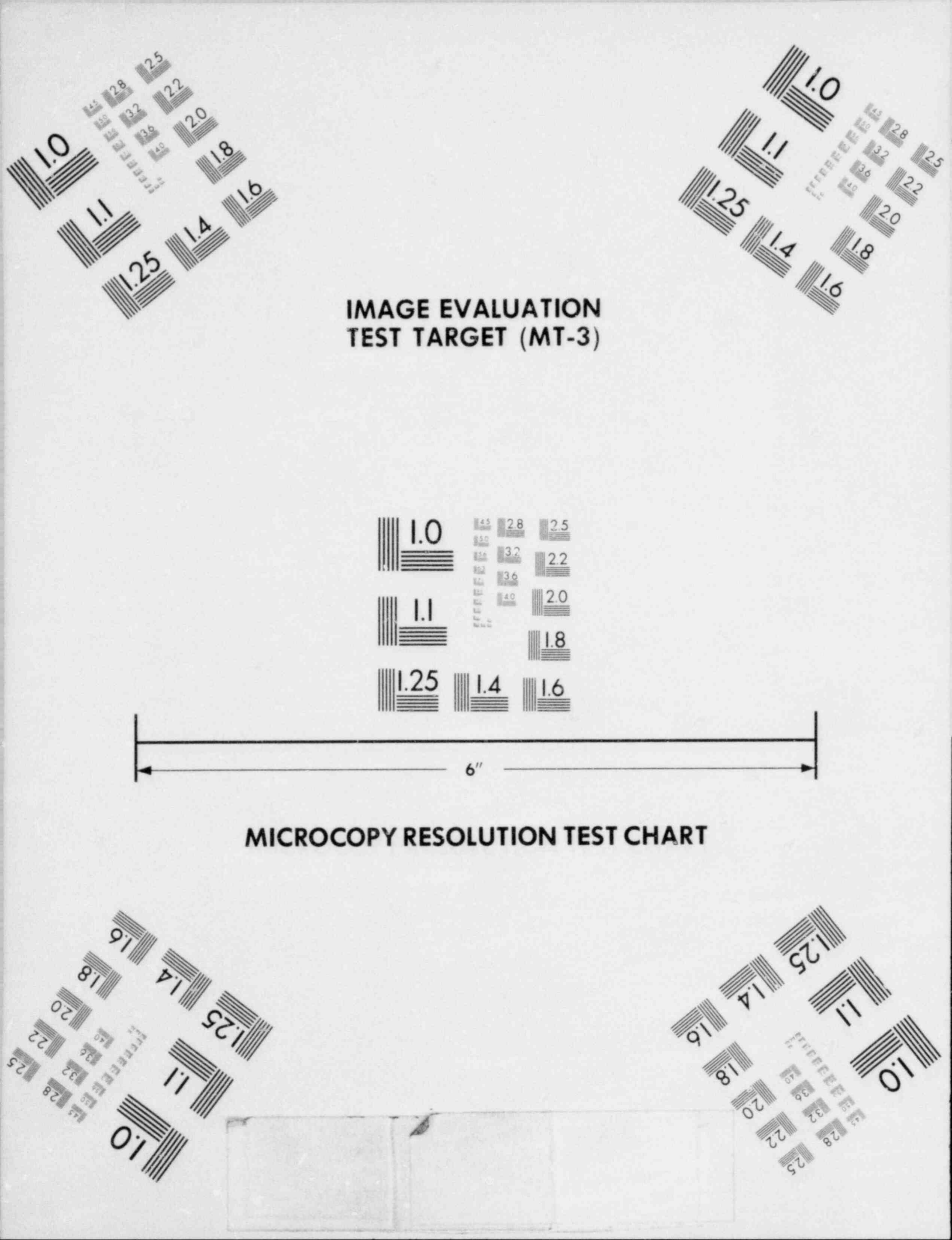
*/ The Federal Power Commission noted at 40 F.P.C. at 1238, that a special charge based on Gainesville's largest unit would reduce "the economic incentive for Gainesville to install larger and more efficient generating units", precisely the anticompetitive effect that results from Consumers Power Company's various refusals to deal on non-discriminatory terms and conditions.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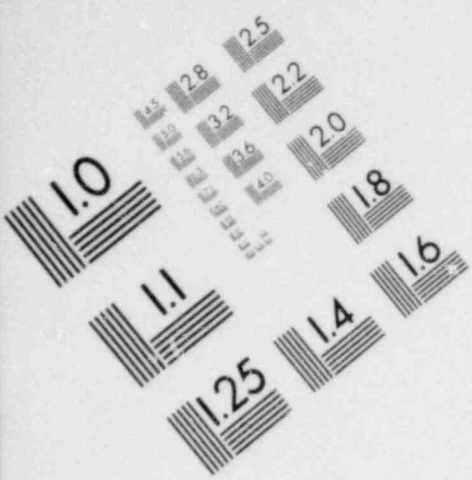

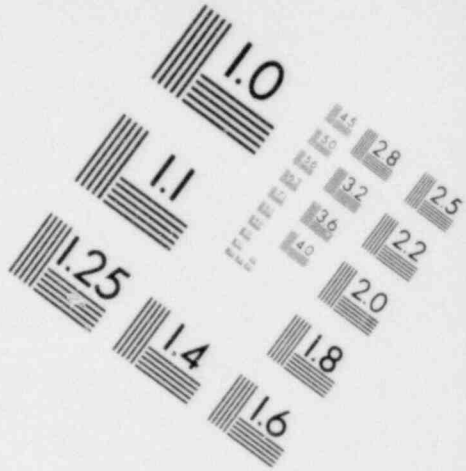

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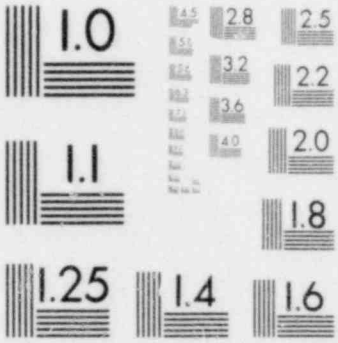

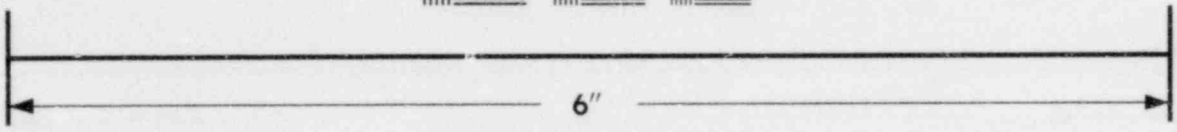

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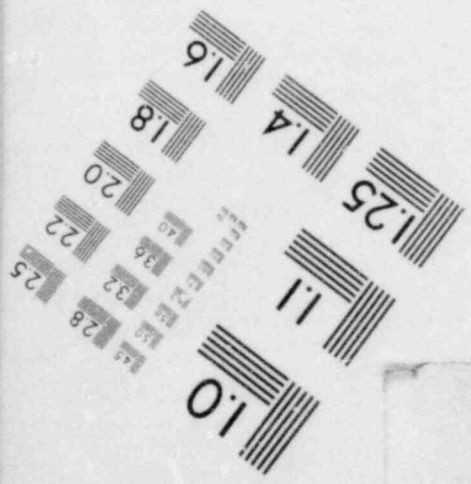

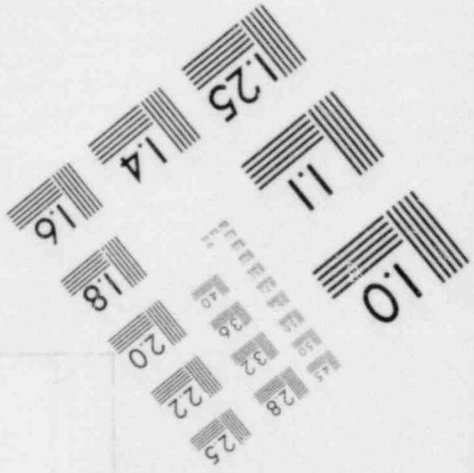

212. Consumers Power Company apparently makes the argument that interchange arrangements result from a balancing of interests and that, therefore, it should be excused from an equalized reserves standard because bargained for agreements may have resulted in some different tests. In other words negotiations might result in discriminatory agreements. Even assuming this to be the case, nothing will prevent utilities from voluntarily agreeing to different standards on the basis of mutual agreements. However, the AEC cannot justify license conditions based upon standards which permits discriminatory access, not agreed to.

213. Consumers Power Company also appears to argue that, since Gainesville paid for the interconnection facilities in the lead case, this is a substitute for not having "equalized reserves" (i.e., reserves based on proportionate loads). However, Consumers Power Company makes no showing that Gainesville did not want to build the interconnection facilities. In Gainesville, Florida power argued that it should have the right to purchase the transmission facilities so that it could serve markets off the interconnection facilities. In any event, it is beside the point. 40 FPC, at 1227. All Gainesville */ held was that, since Gainesville agreed to build the facilities, Florida Power could not claim a detriment from the interconnection. Consumers Power Company would turn this around to argue in effect that, if a smaller system does

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*/ Gainesville v. Florida Power Corp., 402 U.S. 515 (1972).

not build the interconnection facilities, the larger system can discriminate forever after. */

214. Equalized reserves represents a short-hand expression that parties to coordination agreements will contribute proportionate reserves to the total loads supplied or, in other words, pay an equal price for what they receive. Tr. 2633. It is the type of arrangement that would be expected to result from parties having equal bargaining strength. Id. However, a system having great relative size (and therefore greater bargaining strength) could exact more. 2630-2632. This Board should not countenance relief in a form that allows Consumers Power Company to exact extra payment from each transaction by requiring the smaller systems to maintain disproportionate reserves to obtain essential coordination.

215. If Consumers Power Company can impose a special burden on

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*/ The problem does not generally come up in Michigan that existed in the Florida Power-Gainesville situation. Interconnection facilities themselves are largely already in existence. Interveners proposed licensed conditions provide that interconnections will be made at the highest transmission voltage available "if the costs to applicant will not exceed applicant's benefits". The provision states further that, where the requesting entity pays the full costs of the interconnection (i.e. facilities), the benefits to the applicant will always be deemed to exceed the costs.

interchange terms, it will be able to effectively exclude interveners at least partially from participation in markets for interchange. While we anticipate that the Company will advance many objections, it must be remembered that the major utilities -- not the interveners -- have established the standards for interchanging power. It is Consumers Power Company that has established the standards. Gainesville Utilities v. Florida Power Corp., 402 U.S. 515, 528-529 (1971).

VII. THE BOARD SHOULD HAVE PERMITTED INQUIRY INTO CONSUMERS POWER COMPANY'S GAS AND POLITICAL OPERATIONS

216. On June 29, 1973, Intervenors filed a "Motion for Reconsideration of the Trial Board's November 28, 1972, Order and Motion to Compel" in which they again argued for consideration of Consumer's Power Company's use of its gas monopoly to aid it in competition for electric customers and for consideration of Consumer's Power Company's political activities. That motion was denied. Rather than reargue the merits of our position, Intervenors respectfully incorporate that Motion by reference. They recognize that the Board's ruling has been adverse, but do so in order to preserve their rights.

217. Briefly, Intervenors' position is that any demonstration of use of Consumer's Power Company's gas monopoly to aid it in electric competition or vice-versa would aid Applicant competitively.

As the Supreme Court stated in United States v. Griffith, 334 U.S. 100, 108, "If monopoly power can be used to get monopoly, the [Sherman] Act becomes a feeble instrument indeed."

218. Intervenors' position is furt er that, while applicant may have the right to petition the state legislature or other governing body, such activities are not protected from scrutiny. What applicant fails to understand is that it has been granted certain monopoly or franchise rights, including rights of incorporation. As a result, it takes on certain obligations. Indeed, regulation could be totally inhibited, if applicant could hide behind claimed First Amendment rights to refuse to reveal its activities even to Governmental bodies. The question is not the right of communication, but the claimed right of maintaining its activities secret.

219. Intervenors' further position is that, even where Consumers' Power Company's political activities may not be illegal per se, such activities may violate independent laws. What the famed dictum about shouting fire in a crowded theatre was all about is that through speech one can commit independently illegal acts. */ Otherwise Consumers' Power Company could have an absolute defense that its contracts could not be claimed to violate the anti-trust laws since they are printed matter. Moreover, even

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*/ "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic." It does not even protect a man from an injunction against uttering words that may have all the effect of force." Schenck v. United States, 249 U.S. 47 (1919, Holmes, J.)

fully protected speech may evidence a course of conduct giving color to other non-protected actions. NLRB v. Virginia Electric Co.*/, 314 U.S. 469 (1941).

220. While we do not expect the Board to reverse its position on these issues at this time, it would have an obligation to look towards the evidence most favorably to Interveners, since one cannot tell what evidence of further anti-competitive activity may have been uncovered. Indeed, entreaties to local government to prevent installation of generation or limit municipal or cooperative activities may well have fallen under the "political" rubric.

221. The Board has asked us to discuss the Noerr-Pennington Doctrine as it may further affect this case. We anticipate that Applicant well make some sort of combined Parker v. Brown-Pennington-Noerr argument**/ to the effect that since retail monopolization is at least partially sanctioned by state law***/, the Board can-

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*/ It is noteworthy that on remand the District Court held against Otter Tail in its claimed Noerr-Pennington defense to the use of litigation to delay and prevent the establishment of municipal electric systems. Eastern Railroad Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965) but see California Motor Transport Co. v. Trucking Unlimited, 444 U.S. 508 (1972).

**/ Parker v. Brown, 317 U.S. 341 (1943).

***/ E.g., franchise rights.

not consider or take action from any results stemming from that retail monopoly. First, we are constrained to point out that this argument was decisively rejected in Otter Tail, supra. Arguing at pages 69 - 83 of its brief that the retail power industry is by definition monopolized, Otter Tail contended forcefully that its activities should be insulated because of its franchises and local or federal regulation. The Supreme Court determined otherwise.

222. Independent of Otter Tail, on its own merits Noerr-Pennington merely allows a petitioning to the government or the public in certain circumstances and does not protect against violations of the anti-trust laws. While Parker v. Brown, supra, does protect state policy from contravening the anti-trust laws, the Doctrine would be irrelevant as against a specific statute, such as the Atomic Energy Act, which made express a Congressional concern that the policies of the anti-trust laws be applied. Parker v. Brown merely expresses that the anti-trust laws may not have intended to reach certain state activities, but certainly Congress could manifest a different intent.

223. As we have stated earlier, Intervenors are asking for conditions which would reach wholesale power sales. Since, as is evidenced by the Federal Power Act, such transactions are federal

in nature, the rationale of local policy acting as a protection has no impact in any event. Federal Power Commission v. Florida Power and Light, 404 U.S. 453 (1972). And given recent cases by the Supreme Court stating that the anti-trust laws should be applied to wholesale power transactions, there is no warrant for an implied exemption on the grounds of local actions. E.g., Otter Tail, supra; Gulf States, supra; California v. FPC, 369 U.S. 482 (1962).

223. Moreover, even on its own terms, Parker v. Brown is limited. The lead case involved the validity of a California statute, which it created no apparent conflict with federal policy */ and was apparently either modeled after federal legislation or written with the aid of federal officials. It should not be a surprise that a local statute not in conflict with federal policy would be upheld. However, as recent cases make clear, neither Noerr-Pennington or Parker v. Brown can protect corporate as opposed to state activity. Nor can these cases protect activities which "flow" from state policies. Sacramento Coca Cola Bottling Co. v. Chauffeurs Local 150, 440 F.2d 1996, 1998-1999 (CA 9, 1971), certiorari denied, 404 U.S. 826 (1971); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc. 424

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*/ Compare Panhandle Eastern Pipeline Company v. FPC, 324 U.S. 635 (1945).

F2d 25, 31-34 (CA 1, 1970), certiorari denied, 400 U.S. 850; Woods Exploration and Producing Co. v. Aluminum Co. of America, 438 F2d 1286 (CA 5, 1971), certiorari denied, 404 U.S. 1047 (1972); Hecht v. Pro-Football Inc., 444 F2d 931 (CADC, 1971), certiorari denied, 404 U.S. 1047 (1972). Whether or not Consumers Power Company's local franchises are legal, the fact of them does not protect Consumers Power Company against refusing to sell participation in the Midland units, refusing to sell transmission services, refusing to coordinate at equal terms with Intervenors or its other anti-competitive activites. */

CONCLUSION

224. For the reasons stated herein interveners urge the Board to adopt its proposed license conditions. Their citizens and ratepayers will greatly benefit from such order in that they will be allowed access to alternate wholesale power supply. Moreover, we know of no better aid to stimulating cost reductions for all consumers, including customers of Consumers Power Company, than encouraging additional competition for wholesale power supply, Additionally, there should be substantial environmental and conservation benefits from the increased coordination required.

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*/ There is no showing that the state of Michigan has attempted to regulate wholesale "interchange" transactions. Nor did anybody force Consumers Power Company to exclude Intervenors from equal access to such transactions.

225. While this case may have seemed overly complex, from the beginning interveners have been requesting an entitlement to participation in bulk power generation, the access to the purchase of transmission services and to coordination on an equalized reserves basis. These concepts are all common in the utility industry and supported by law. Unless there is to be continued, drawn out, litigation the clear standards established by the courts should be reaffirmed. Indeed, the reward for Consumers Power Company's holding out should not be license conditions less onerous than others have agreed to voluntarily. (5515-5517). Once such principles are reaffirmed, it will then be in all parties interests to settle on the particulars of implementing agreements.

226. We must again note that IBM establishes that a seller of severable commodities with control over one element of the package (e.g., here transmission) cannot "bundle" them together. Otter Tail establishes the validity of the bottleneck monopoly concepts as applied to the utility industry. And Gulf States reaffirms the duty of administrative agencies to apply the concepts of anti-trust law to the wholesale power industy. There is little argued by Consumers Power that was not argued by Otter Tail; nor is it reasonable to assume that the Court that decided Otter Tail would distinguish that the situation here. While Consumers Power Company will argue for narrow relief, accepting its arguments will not

resolve the "situation inconsistent". Nor will it serve any public purpose.

227. For the foregoing reasons, interveners request that their proposed license conditions be ordered.

Respectfully submitted,

Robert A. Jablon

Robert A. Jablon

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

October 8, 1974

Law offices of:

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

UNITED STATES OF AMERICA
BEFORE THE
ATOMIC ENERGY COMMISSION

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

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 October, 1974:

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Atomic Energy Commission
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Kennedyville, Maryland 21645

Honorable J. Venn Leeds, Jr.
Atomic Energy Commission
Post Office Box 941
Houston, Texas 77001

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

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

Mr. Abraham Braitman, Chief
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October 8, 1974

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INTERVENORS' PROPOSED LICENSE CONDITIONS
MIDLAND UNITS 1 AND 2

1. As used herein; (a) "Applicant" means Consumers Power Company; (b) "utility" means a public utility under federal or Michigan law; an REA Cooperative; a governmental (federal, state or municipal) unit or agency having an electric generation or distribution system; (c) "entity" means (1) a "utility"; or (2) any person or organization which is legally authorized to represent one or more utilities.

2. Consumers Power will interconnect with and coordinate reserves by means of the sale and exchange of emergency and maintenance power with any entity or entities in its service area*/ engaging in or proposing to engage in electric bulk power supply on terms that will provide for Applicant's costs (including a reasonable return) in connection therewith and allow the other participant(s) full access to the benefits of reserve coordination and reserve sharing.

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*/ The use of the term "service area" in no way indicates an assignment or allocation of wholesale market areas. It is intended only as a general indication of an area within the State of Michigan where Applicant provides some class of electric service.

The participant(s) to the reserve sharing arrangement shall, jointly with Applicant, establish from time to time the minimum reserves to be installed and/or purchased, as necessary, to maintain adequate reliability of power supply on the interconnected system of Applicant and participant(s). The reserve responsibility thus determined shall be calculated as a percentage of peak loads and is not to be directly related to the size of generating units. Under no circumstances will minimum spinning or operating reserve requirements exceed the installed reserve requirement.

At the request of a participant or the Applicant, each shall, to the extent it has surplus available, sell and furnish spinning and/or operating reserve services to the other at terms which are compensatory, subject, however, that these terms be no higher than those charged to any other utility with which Applicant or the participant(s) is interconnected.

3. Interconnections will be made at the transmission voltage requested by the entity if such voltage is available on Applicant's installed or planned facilities in the area where interconnection is desired, if the costs to Applicant will not exceed Applicant's benefits. Where the entity pays

the full costs of the interconnection, the benefits to the Applicant will always be deemed to exceed the costs.

4. Mutual emergency and maintenance service provided under such agreements will be furnished by each party to the other to the fullest extent available as desired where such supply does not impair service to the supplier's customers. Reimbursement for these services shall be on a non-discriminatory basis and rates shall be no higher than those established with any other utility with which the supplier is interconnected.

The Applicant and each participant shall provide to the other emergency and maintenance power if and when available from its own generation, or through its transmission from the generation of others to the extent it can do so without disrupting service to its own customers.

5. Applicant will purchase from or sell "bulk power" to any other entity or entities in the aforesaid area engaging in, or proposing to engage in, the generation or ownership of electric power in bulk, at its cost, including a reasonable return, when such transactions would serve to reduce the overall cost of new bulk power supply for Applicant or the other participant(s) to the transaction. This

refer specifically to the opportunity to coordinate in the planning of new generation, transmission, and associated facilities, including the joint ownership of new generation and transmission facilities or a portion of the capacity in such facilities.

In circumstances where coordinated planning results in any new generating unit(s) which Applicant owns, constructs, organizes, or is a joint participant with others, Applicant will, upon timely request, sell to any other entities who seek to participate in such planning, either an appropriate undivided interest in the plant in fee, or a portion of the plant capacity (i.e., unit power) upon the basis of a rate that will recover to the Applicant the average fixed costs (including a reasonable return) of the plant. In either event the utility receiving power will pay the associated energy and operating costs incurred for the power it receives, at rates and terms no greater than those charged to any other utility to whom such power is sold. The above shall include the right to participate on an equitable basis in the ownership of the Midland Units Nos. 1 and 2, or a portion of the capacity and associated energy thereof.

6. Applicant will provide transmission service over its system between or among two or more entities with which it is interconnected on the same terms as exist between Applicant and any other utility with which it is interconnected to the extent that subject arrangements reasonably can be accommodated from a functional and technical standpoint. This condition applies to entities with which Applicant may be interconnected in the future as well as those with which it is now interconnected.

Applicant is obligated under this condition to transmit bulk power for other entities on the terms stated above, and to include in its planning and construction programs sufficient transmission capacity as required therefor, provided that such other entities give Applicant sufficient advance notice as may be required to accommodate the arrangement from a functional and technical standpoint and that the other entities will be obligated to compensate applicant for the use of its system at rates and terms no higher than any other utility with which Applicant is interconnected.

7. Applicant will not directly or indirectly, enter into, adhere to, continue, maintain, renew, enforce or claim any rights under any contract, agreement, understanding, joint plan or joint program with entities to limit, allocate, restrict,

divide or assign, or to impose, or attempt to impose, any limitations or restrictions respecting the markets or territories in which either the Applicant or any other entity may hereafter sell or transmit electric bulk power supply.

8. Upon request the Applicant will sponsor the membership of any entity in its aforesaid area and will take all necessary and available steps to facilitate membership for said entity in utility planning organizations or power pools including the Michigan Power Pool and the Michigan Illinois Indiana Ohio ("MIIO") group with which the Applicant is or may become affiliated. Membership shall be sponsored on the basis of terms and conditions established herein.

9. To the extent that compliance with the foregoing conditions requires filings to be made under the provisions of the Federal Power Act or by the statutes of the State of Michigan or by any regulatory agency, the Company shall submit all necessary filings to the Federal Power Commission or to the MPSC or any other appropriate regulatory agency in accordance with the provisions of the respective laws, the regulations thereunder, and the provisions set forth therein.

10. Unless otherwise specified, should a dispute arise between the Applicant and an entity over obligations under

these license conditions, this Commission shall have continuing jurisdiction to resolve such dispute.

11. Should a dispute arise between the Applicant and an entity over the compensation to be received by the Applicant for services it is obligated to provide hereunder, the Applicant will nonetheless provide the services and refund to the entity, or receive from the entity such amounts retroactively to the date of initiation of the service as determined by a final order of the Federal Power Commission to be either less then, or in excess of, a just and reasonable rate therefor.

63.	Ft. Worth Area, Texas 772	Jaime Padilla, Pres. P.O. Box 842 Ft. Worth, Tex. 76101
64.	Broward County Area, Fla. 761	William E. Sullivan, Pres. P.O. Box 8307 Ft. Lauderdale, Fla. 33310

LOCALS - 500 to 750 members

65.	Tampa, Florida Area Local 754	Ranson (Ranny) Erskine, Gen. Pres. P.O. Box 22173 Tampa, Fla.
66.	Southwest Coastal Area, Calif. 745	John S. Gaffney, Gen. Pres. 811 N. Broadway, Suite 304-306 Santa Ana, Calif. 92701
67.	San Juan, Puerto Rico 770	Aurelio Rivera, Gen. Pres. Box 6047 - G San Juan, P.R. 00936
68.	New Haven, Conn. 813	Reno Gabianelli, Pres. P.O. Box 21 New Haven, Conn. 06501
69.	Keystone Area, Pa. 717	Eugene Deaven, Pres. P.O. Box 3421 Harrisburg, Pa. 17105
70.	Jacksonville, Fla. 695	James E. Phelan, Pres. P.O. Box 2881 Jacksonville, Fla. 32203
71.	Central Area, Fla. 685	Laurel R. Rice, Pres. P.O. Box 20133 Orlando, Fla.
72.	Nashville, Tenn. 678	Edward Bryan, Gen. Pres. P.O. Box 103 Nashville, Tenn. 37202
73.	Salt Lake City, Utah 666	B. Clyde Buckley, Pres. P.O. Box 2458 Salt Lake City, Utah
74.	Toledo, Ohio 615	Harold Ingle, Pres. P.O. Box 695 Toledo, Ohio 43694
75.	Tulsa, Oklahoma Area Local 599	Tom Wright, Pres. P.O. Box 651 Tulsa, Okla. 74101

APPENDIX B

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-991

OTTER TAIL POWER COMPANY,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF FOR APPELLANT OTTER TAIL POWER COMPANY

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In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-991

Otter Tail Power Company,
Appellant,

v.

United States of America,
Appellee.

On Appeal From The United States District Court for The District of Minnesota

BRIEF FOR APPELLANT OTTER TAIL POWER COMPANY

Opinion Below

The opinion of the district court is reported officially at 331 F. Supp. 54 and unofficially at 1971 Trade Cas. ¶ 73,692.

Jurisdiction

The jurisdiction of this Court is conferred by the Expediting Act § 2, 15 U.S.C. § 29, 32 Stat. 823 (1903). The district court entered its original Judgment on October

22, 1971. Appellant moved, *inter alia*, to amend such Judgment (A. 134-204),[1] and an amended, final Judgment was accordingly entered on November 10, 1971. (A. 207-210). A timely Notice of Appeal was filed in the District of Minnesota, Sixth Division, on December 7, 1971. (A. 211-212). The district court's Amended Judgment has been suspended during the pendency of this appeal. (*See* Dec. 7, 1971 order in the record). Otter Tail filed its Jurisdictional Statement with this Court on February 4, 1972. On May 1, 1972, the government served a memorandum conceding that the issues involved in this case are "novel" and "obviously important in the administration of the Sherman Act and its relation to the Federal Power Act." Probable jurisdiction was noted on May 22, 1972. 32 L. Ed. 2d 330, 40 U.S.L.W. 3556.

Statutes Involved

Subsections (a) and (b) of Section 202 of the Federal Power Act, 16 U.S.C. § 824a, provide:

> "(a) For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the [Federal Power] Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.
>
> (b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, that the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them."

Section 2 of the Sherman Act, 15 U.S.C. § 2, 26 Stat. 209 (1890), provides:

[1] References to the Appendix are cited throughout as "(A.)."

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Questions Presented

1. Did the district court err in imposing on Otter Tail an absolute duty to sell at wholesale to all municipalities, without regard to the specific procedures and criteria which Congress provided in Section 202(b) of the Federal Power Act to govern determinations as to whether involuntary wholesaling should be ordered?

2. Did the district court err in requiring private utilities to wheel government power even though Congress has specifically and repeatedly determined that no such duty to wheel should be imposed?

3. Did the district court err in applying the Sherman Act to Otter Tail's efforts to influence the electoral decisions of municipal voters with respect to the public power issue?

4. Did the district court err in enjoining Otter Tail from the exercise of its constitutional right to petition the courts even though no suit commenced or supported by Otter Tail was found to be baseless or brought in bad faith and even though no such litigation has ever prevented the establishment of a single municipal power system?

5. Did the district court err in holding that Otter Tail is a "monopolist" solely on the basis of circumstances which are integral to the electric power business and without regard to the state and federal regulatory schemes which deprive Otter Tail of the very incidents of monopoly power that the Sherman Act prescribes?

6. Did the district court err in blindly applying mistaken *per se* concepts without regard to the special circumstances of the electric utility industry, the nature, purpose and policy of the pertinent regulatory scheme, and the adverse effects of its holdings upon producers and consumers of electric energy?

7. Did the district court err in holding as a matter of antitrust law (i) that a company must make its individually owned capital assets available for use by its competitors; (ii) that a company which is in the business of selling at retail must also sell at wholesale to competitors; and (iii) that it is illegal *per se* for a company to insist, when its property is used by others, that the property not be utilized to destroy its business?

Statement of the Case

1. *Otter Tail's Business and Service Area*

The Otter Tail Power Company ("Otter Tail") is in the business of supplying electricity at retail to consumers located in the small towns[2] and countryside of western Minnesota, eastern North Dakota, and northeastern South

[2] 440 of Otter Tail's 465 towns have populations under 1,500. Only 25 have a population of 1,500 or greater, and only three have a population in excess of 10,000, with the largest (Jamestown, North Dakota) having a population of about 15,000. (A. 661; DX-95, Sch. 4, A. 933-938).

akota. (A. 658-664; DX-93, Schedules 1, 4, 5 and Chart A. 933-938; DX-39, A. 610, 611). While the district court und that Otter Tail serves 465 of the 615 towns in this gion considered by the court, and thus "possesses monoly power" (A. 33, 34; Finding 187, A. 87, 88), the opulations of these towns vary from a high of 29,687[3] to low of 20 persons.[4]

Based on actual retail sales—rather than counting ariously sized towns as though they were fungible units—tter Tail's market share is only 28.9% of the total in the eographic market area as a whole.[5] The remaining 71.1% accounted for by the retail sales of rural electric coperatives, municipal systems, federal agencies, and other vestor-owned utilities. (DX-94, A. 1201-1208; A. 873-876, 12-916).

Despite the modest size of its business,[6] by painstaking ffort over a period of more than 60 years, Otter Tail has eated for the consumers whom it does serve, an integrated electric power system capable of furnishing economic and reliable service to this thinly populated part of ural America. (A. 658, 659).

Otter Tail is a regulated utility under Part II of the ederal Power Act. It is also regulated by the State

[3] Moorhead, Minnesota (not served by Otter Tail). DX-94, 4, A. 873, 1204. (Population from 1970 Census).

[4] Sibley, North Dakota (served by Otter Tail). GX-2, p. 4, A. 1, 285-286; Dep. GX-287, p. 127, A. 280, 286, 661; DX-95, h. 4, A. 933-938. (Population from 1970 Census).

[5] The relevant geographic market is Federal Power Commission pply Area 26, which corresponds generally with the outer limits the area served by Otter Tail's system. (DX-94, p. 4, A. 872-874, 04; Finding 186, A. 87).

[6] For example, Otter Tail's installed generating capacity is only 1,163 KW. In comparison, the installed generating capacity of otomac Electric Power Company, the utility which serves Washgton, D.C., is 3,708,050 KW—more than 15 times as much. FPC, TATISTICS OF PRIVATELY OWNED ELECTRIC UTILITIES IN THE U.S. R YEAR ENDED DECEMBER 31, 1970 at 703, 718.

Public Service Commission of North Dakota[7] and by municipal bodies in Minnesota[8] and South Dakota.[9]

Under applicable state law, Otter Tail generally operates pursuant to municipal franchises which expire every 10 or 20 years. (A. 697, 698; A. 936; Dep. GX-287, pp. 19, 23, A. 280-286; A. 30). Since the 1940's there have been municipal power factions in various towns which have advocated that Otter Tail's franchise be terminated and that the town in question serve itself by establishing its own, independent power system. (A. 28; A. 706, 707, 712-715; 807-812). The issue of municipal versus private power has been decided at the polls in each instance. A total of 22 elections have been held in 12 towns with various municipal electorates often reversing their previous vote either for or against public power. (GX-2, Answer to Interr. No. 2, A. 241, 285-286; Finding 180, A. 85). Nine of these 12 municipalities have thus far elected to remain with Otter Tail. (A. 806). Of the three which ultimately voted for municipal power, all are presently operating their own electric systems. (GX-84, Stips. 10, 11, 43-45, 58-60, A. 1104, 1113, 1116, 254-257, 285-286; Findings 46, 136, 137, 164, A. 58, 77, 83).

Although the government carefully investigated Otter Tail's activities with respect to all of the hundreds of towns which it has serviced over the past several decades,[10] the trial court dealt with only six municipalities in any detail—Elbow Lake, Minnesota; Colman and Aurora, South Dakota; and Hankinson, Finley, and Velva, North Dakota. (A. 50-85).

[7] N.D. Century Code, Chs. 49-01 to -07,-09,-20 (1960), *as amended* (1971 Supp.).

[8] Minn. Statutes §§ 300.03-04, 454-041-043 (1969).

[9] S.D. Compiled Laws § 9-35-1 (1967).

[10] A good deal of the evidence which the government thus proffered was rejected by the district court as immaterial. (A. 484-487).

2. *Refusal to Sell at Wholesale and to Wheel*

The district court stated that the "basic issue" in this ase is whether Otter Tail's refusal "to sell electric power wholesale, and . . . to wheel [or transmit] electric power municipalities it formerly served at retail, constitute a onopolization of commerce in violation of the [Sherman] ct." (A. 27). In fact, this issue relates to only two wns—Elbow Lake, Minnesota and Hankinson, North akota. None of the other municipalities considered lbow had any need for such services since alternative urces of wholesale power and transmission facilities were adily available in each instance.[11]

Elbow Lake, Minnesota (pop. 1,550) elected not to new Otter Tail's franchise when it expired in 1960. (GX-, Stip. 2, A. 1100, 254-257, 285-286; Finding 19, A. 52). tter Tail nevertheless continued to serve Elbow Lake ntil that municipality's own generating and distribution ystem began operations in June, 1966. (GX-84, Stip. 10, , A. 1104, 254-257, 285-286). While the municipal power roject was in its preparatory stages, Elbow Lake requested that Otter Tail support its efforts by furnishing ectricity at wholesale or, in the alternative, that Otter ail allow its transmission lines to be used to wheel subdized, governmentally produced power to its former reil customers. (A. 37, 53, 57; GX-92, GX-99, A. 285-86). Otter Tail refused both requests on the ground, mong others, that such support for municipal power venres would lead to the erosion and eventual destruction its own integrated system. (A. 703-717, 32).

[11] Colman and Aurora, South Dakota, each secured a source of wer from the Bureau of Reclamation. In each case, the electricity wheeled to the municipality over the lines of the Sioux Valley mpire Electric Cooperative. (GX-84, Stips. 36-38, 44, 52, 53, 59; A. 11, 1113, 1114, 1116, 254-257, 285-286; Findings 137, 165, A. 77, , 83; A. 365-369, 606, 607, 849, 850, 868, 869; DX-17, DX-18, X-19, A. 1181-1183, 367, 368; Chart submitted by the United ates, A. 1219, 670, 671, added to record by order dated July 5, 72).

(footnote continued on following page)

In March, 1966 (some three months before its system became operational), Elbow Lake filed an application with the Federal Power Commission to compel Otter Tail to furnish the services which it had previously requested. (GX-84, Stip. 13, A. 1104, 1105, 254-258, 285-286; Finding 45, A. 58; A. 320, 321). On November 6, 1968, the FPC entered an order pursuant to Section 202(b) of the Federal Power Act, requiring Otter Tail to provide a short term interconnection and to sell electricity at wholesale as an emergency measure, in order to prevent overloading of Elbow Lake's generators.[12]

(footnote continued from preceding page)

While similar sources of power and transmission were available to Finley and Velva, North Dakota, both of these towns nevertheless elected to remain with Otter Tail. (GX-84, Stips. 68, 69, A. 1117, 1118, 254-257, 285-286; Findings 170, 171, 175, 178, A. 84, 85; A. 809-811, 865-868, 905-907; DX-93, A. 864; Chart submitted by the United States, A. 1219, 670, 671, added to record by order dated July 5, 1972). The witness called by the government to establish Otter Tail's purported "dominance" over transmission admitted that he had not made a study of any other towns (A. 607, 608, 613, 614), and the record contains no evidence that Otter Tail possessed such "dominance" with respect to any municipalities other than Elbow Lake and Hankinson. In fact, as shown below in the text, Otter Tail did not even have "dominance" as to these two towns since (i) both had recourse to the FPC to require Otter Tail to sell at wholesale, and (ii) both had other feasible alternatives available to them. (A. 559, 560, 562, 565, 566, 583, 584, 597-600, 614, 887-890).

In addition, the record affirmatively shows that Otter Tail owns only 8% of the total mileage of the electric lines in the geographic market area. (DX-91, A. 1196-1198; A. 855-858, 877). Electric lines of other suppliers proliferate the geographic market area and furnish competitive sources of power. (A. 862-872, 905; DX-92, A. 1199-1200, 864; DX-93, A. 864; *see also* A. 606-608, 614, 615, 696, 697, 699, 712-716).

[12] Village of Elbow Lake v. Otter Tail Power Co., 40 FPC 1262 (1968), 79 PUR 3d 259 (printed in Jurisdictional Statement at A-120-135), *aff'd*, 429 F. 2d 232 (8th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971).

In a second opinion dated September 13, 1971 (A. 187-203), the FPC ruled that a long-term interconnection also would be in the public interest in Elbow Lake's case. (A. 190-194, 198).[13] The Commission made it clear, however, that it did not wish to encourage "improvident ventures" by other municipalities. (A. 191). It pointed out that Elbow Lake, while perpetuating Otter Tail's rates, had nevertheless incurred a financial loss, and that the new municipal system was of "doubtful reliability." (A. 191). The FPC also found "that Otter Tail is legitimately concerned about the possible erosion of its system." It thus stated:

> "If other communities were to follow Elbow Lake's route, and if, having miscalculated the results, they could expect to be rescued by overly generous interconnection terms, then Otter Tail's fears that it will lose its customers, seriatim, seem to us to be supported." (A. 191).

The FPC therefore formulated an order designed to provide assistance in the immediate case, but upon terms which would be "fair to Otter Tail and its customers" (A. 193), and would not encourage other municipalities to follow suit.

The fact of the matter is that Elbow Lake did not actually need wholesale power from Otter Tail or anyone else in order to establish its municipal power system. As initially approved by the electorate and ultimately implemented, that system is designed to itself generate all of the power needed by Elbow Lake consumers.[14] What

[13] The FPC also ruled that it had no power to compel wheeling. (A. 193-194). *See* p. 5, *infra*. While Otter Tail has not challenged the Commission's determination that it furnish wholesale service, an appeal is presently pending in the Eighth Circuit with respect to one of the terms of the interconnection.

[14] GX-84, Stips. 6, 11, A. 1101, 1104, 254-257, 285-286; A. 888.

Elbow Lake thus exacted from Otter Tail in its proceeding before the FPC was a back-up source of energy to increase the reliability of a municipal plant which had already replaced Otter Tail as the sole supplier of electricity to the town's residents. While the use of Otter Tail's facilities may have provided the optimum means of achieving this result, the record shows that Elbow Lake could have accomplished the same end by providing its own interconnection (i) by an independent transmission line built either by the Village, or by the Missouri Basin Municipal Agency and operated in conjunction with local generation (A. 559, 560, 562, 565, 566, 583, 584, 614, 888, 889, 326-329), or (ii) via lines of the East River Electric Cooperative. (DX-5, A. 1178, 292; DX-99, A. 1211-1213, marked and received in evidence by order dated November 8, 1971; A. 889, 890, 907, 908, 562).

Hankinson, North Dakota (pop. 1,125) voted to establish a municipal electric system in October, 1963. (GX-84, Stip. 22, A. 1106, 254-257, 285-286; Finding 67, A. 63). Like Elbow Lake, Hankinson asked Otter Tail to supply electricity at wholesale and to wheel government power. (A. 37, 38, 63, 64, GX-117, A. 1130, 1131, 285-286). Otter Tail did not comply with these demands, and Hankinson accordingly applied first to the North Dakota Public Service Commission[15] and then, in 1966, to the FPC for an order compelling Otter Tail to render such services. (GX-132, A. 285-286).

In 1968 the composition of the Hankinson City Council changed with the election of a new mayor and councilmen

[15] The North Dakota Commission found that it had no power to grant the relief requested. (Finding 95, A. 69; GX-131, GX-140, A. 285-286). It is the FPC that has exclusive jurisdiction over interstate transmission and wholesale sales of electricity under Part II of the Federal Power Act. *See, e.g.*, Federal Power Comm'n v. Florida Power & Light Co., 404 U.S. 453, 458 (1972). On the other hand, the North Dakota Commission has comprehensive power to regulate the sale of electricity at retail. (A. 699, 700).

opposed to municipal power. (A. 726, 351). As a result, the Council elected to terminate the FPC proceeding and to offer a new franchise to Otter Tail. (GX-84, Stips. 28, 29, A. 1108-1110, 254-257, 285-286; Findings 102-104, A. 70; A. 615; GX-311, pp. 26-42, A. 344). The city thus chose voluntarily not to pursue its Federal Power Act remedies as Elbow Lake had done.

Again, it should be noted that even without Otter Tail's facilities, Hankinson had three alternative sources of power available to it, the nearest being only 18 miles away. (A. 887, 597-600). The total cost of such power to Hankinson (including the expense of a connecting line) would have been 15 mills per kilowatt hour—a sum which the government's own expert admitted would have been "feasible" for Hankinson to pay. (A. 599-600).

In summary, the district court's finding of monopolization rests upon Otter Tail's refusal to sell at wholesale or wheel electricity to two towns. Both municipalities had alternative feasible means of obtaining power from other sources, albeit at a somewhat higher cost. One town (Elbow Lake) established its own municipal power system in 1966 without using Otter Tail's facilities. It then obtained two orders from the FPC requiring Otter Tail to sell to it at wholesale, first on a temporary and then a permanent basis. These orders were entered in 1968 and 1971, respectively, after the town had supplanted Otter Tail as the "monopolist" in the municipal "market" in question.[16] The second town (Hankinson) commenced the same type of FPC proceeding as had been successfully invoked by Elbow Lake, but then switched its preference

[16] This is the terminology used by the district court with respect to Otter Tail in the same circumstances. As indicated below at pp. 72-74, *infra*, it is Otter Tail's position that the use of such terms to describe the fact that a small town is generally served by a single supplier misconceives fundamental principles of antitrust.

from municipal to private power through the electoral process. Otter Tail is thus presently serving Hankinson consumers subject to the full and comprehensive regulation of the North Dakota Public Service Commission. In the cases of both Elbow Lake and Hankinson, the administrative procedures available to the towns under the Federal Power Act provided a perfectly adequate means of obtaining the very same relief which the instant antitrust action was intended to afford.

3. *Political Activities and Litigation*

Since the issue of public versus private power has been invariably decided at the polls, the struggle between the opposing factions in the various municipalities was generally conducted in the same manner as any other political campaign. The trial court admitted in evidence, over Otter Tail's objection, a mass of campaign material on both sides of the municipal power question,[17] and the opinion below reiterates the government charge that Otter Tail monopolized by "participating in local municipal power political campaigns." (A. 31-32).

In addition to such campaigning, the district court considered a number of lawsuits, often directly related to the

[17] GX-112 A thru GX-112 M; GX-113 A thru GX-113 M; GX-142 A thru GX-142 M; GX-143 A thru GX-143 D; GX-178 A thru GX-178 C; GX-179 A thru GX-179 I; GX-201 A thru GX-201 C; GX-202 A thru GX-202 D; GX-292 A thru GX-292 O; GX-293 A thru GX-293 J; GX-420, GX-421; GX-168-170; GX-171, A. 1137, 1138.

The offers, statements of counsel, objections and rulings in this area appear in the record at the following places: A. 224, 225, 256, 260-263, 271, 272, 280-285, 482, 483, 487, 488.

After the court overruled defendant's objections to the campaign material, to make the record complete and without waiving the objections, the balance of the items of campaign material (all relating to Velva, North Dakota) which the government did not offer were identified, offered and received in evidence. DX-25 thru DX-37, A. 488-489, 482, 483.

electoral process, which Otter Tail brought or supported. Since neither Colman nor Aurora had any need for Otter Tail's wholesale power or transmission facilities, the lower court's finding of monopolization with respect to these towns is predicated entirely upon such litigation (as well as related political activities) rather than any refusal to sell at wholesale or wheel. The trial court also considered certain suits involving Elbow Lake and Hankinson. Except for the three actions referred to below where Otter Tail is indicated as a named plaintiff, these cases were brought by local citizens opposed to municipal power. Otter Tail's participation consisted of offering legal advice and/or financial assistance to meet the expenses of litigation. (DX-42 thru DX-87, A. 850; GX-105-106 A, GX-110, GX-131-140, GX-150-167, GX-186-198, A. 285-286, Dept. GX-287, pp. 159-169, 180-185, Dep. GX-289, pp. 34-36, Dep. GX-291, pp. 5-8, 14-16, A. 280-286).

a. *Lawsuits Involving Aurora, South Dakota*

State ex rel. Jensen v. *Rasmussen* was a mandamus action brought by a number of Aurora voters to enforce compliance with an initiative petition calling for a vote on a resolution to abandon the town's plan for establishing a municipal electric system.[18] Although they had originally refused to do so, the commencement of this suit prompted town officials to hold the requested election, thus making further litigation unnecessary. (DX-83-86, A. 850; Findings 159, 161, A. 82, 83; A. 363, 364).

Similarly, in *Otter Tail* v. *Town of Aurora* (DX-80, A. 850), the South Dakota Circuit Court held, *inter alia*, that the town could not purchase its own revenue bonds (which

[18] Aurora had first voted *against* municipal power (GX-2, p. 1, A. 285-286; Finding 141, A. 78; GX-318, pp. 25, 26, A. 350-361), but had reversed this decision in a subsequent election. (GX-2, p. 1, A. 285-286; Finding 144, A. 79; GX-318, pp. 36, 37, A. 350-361). Petitioners thus hoped that a third vote would restore the original determination.

would thus, in effect, be transformed into general obligations) without submitting such action to the electorate. (*See* Finding 153, A. 81; A. 362, 363). As that court stated, the bond issue was invalid since "a necessary election was never held." (DX-80, p. 4).[19]

b. *Lawsuits Involving Colman, South Dakota*

State ex rel. Strenge v. *Westling*, 130 N.W.2d 109 (S.D. 1964), involved another mandamus petition, this time to compel certain officials of the Town of Colman to hold an election as to whether a previously authorized bond issue should be rescinded. The court held for defendants on the ground that the 1961 statute which provided for such an election did not apply retroactively to a bond issue approved in 1960, even though the initiative petition was filed in 1963. A. 409; *see also* DX-64 thru DX-67, A. 850).

In *Otter Tail Power Co.* v. *City of Colman*, 121 N.W. 2d 483 (S.D. 1963), Otter Tail challenged certain irregularities in the manner in which a resolution favoring municipal power had been passed by the City Council and submitted to the electorate. The court held for the defendants, this time on the ground that a subsequent statute *did* apply retroactively so as to cure the defects in question. It may be noted that the legislation relied upon in this case was found insufficient to cure the defects successfully challenged in *Otter Tail* v. *Aurora*, *supra*. (A. 406-408; *see also* DX-60 thru DX-63, A. 850).

In addition to these actions against Colman and its officials, the town itself brought suit against Otter Tail to enjoin the installation of a small number of larger-sized

[19] While it rendered judgment in favor of the other plaintiffs on this ground, the court found that Otter Tail had no standing to sue since, although a taxpayer, it was not a "resident" of Aurora. (DX-80, p. 2, A. 850).

poles which Otter Tail contended were necessary to improve its distribution system. (DX-69, DX-70, A. 850; Dep. GX-288, pp. 23, 24, A. 280-286; GX-156, GX-157, A. 286). At consumer insistence, Colman ultimately stipulated that Otter Tail could install one larger pole especially needed to maintain service. (DX-71, DX-72, A. 850; Dep. GX-288, p. 24, A. 280-286; GX-158, GX-159, A. 285-286). Although the district court brushed aside this case, and a similar dispute involving Hankinson, as "minutiae" which should not be considered (A. 346-348), it subsequently adopted as a "finding" the government's incomplete and one-sided version of the facts. (Finding 124, A. 74).

c. *Lawsuits Involving Hankinson, North Dakota*

In *Anderson* v. *City of Hankinson*, 157 N.W. 2d 833 (N.D. 1968), a group of Hankinson taxpayers sued the city, charging, among other things, that expenditure of funds to compel Otter Tail to make its transmission facilities available for wheeling was unlawful because state law prohibited a municipality from leasing such transmission facilities without first obtaining the permission of the electorate. (GX-133, A. 286). This suit was successful at the trial court level, although the decision was ultimately reversed on appeal. (GX-136 A thru GX-138, A. 285-286).

For its part, in addition to the proceedings the city started before the North Dakota Public Service Commission and the FPC, Hankinson commenced a private antitrust suit against Otter Tail which it later abandoned after subsequent elections had changed the complexion of the town government. (GX-84, Stip. 29, A. 1110, 254-257, 285-286; A. 724-726).

d. *Lawsuits Involving Elbow Lake, Minnesota*

Otter Tail and an Elbow Lake resident brought an unsuccessful action against the town challenging certain misrepresentations and other alleged irregularities in connection

with the municipality's electric bond issue. *Otter Tail Power Co.* v. *MacKichan*, 270 Minn. 262, 133 N.W. 2d 511 (1965) (DX-42 A, B and C; DX-43, DX-44, DX-45, A. 850). The town then sued Otter Tail—equally unsuccessfully—for alleged damages claimed to have resulted from the first litigation. (DX-47, p. 1-5, A. 850). This time Otter Tail prevailed at both the trial court and appellate levels. *Village of Elbow Lake* v. *Otter Tail Power Co.*, 281 Minn. 43, 160 N.W. 2d 571 (1968). (DX-47, pp. 94-105, A. 850; DX-48, DX-49, A. 850).[20]

In addition to its damage action in the state courts and its proceedings before the FPC, Elbow Lake commenced an antitrust suit against Otter Tail in federal district court. This private action was continued pending the outcome of Elbow Lake's FPC proceeding. (DX-59; *see* DX-87, p. 3, par. E., A. 850).

In summary, Otter Tail brought or supported six actions against four towns (Aurora, Colman, Hankinson and Elbow Lake), no actions having been brought against either Finley or Velva. While the district court found that these litigations had been brought to prevent the establishment of municipal power systems, in fact no suit brought or supported by Otter Tail had any such effect.[21] As noted above, all of the towns which ultimately voted for municipal power (Elbow Lake, Colman and Aurora) presently have their

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[20] The Findings also refer to another Elbow Lake case which had been brought in 1956. After the municipality had prevailed in this action, it nevertheless elected to grant Otter Tail a new franchise in 1952. It was upon the expiration of that franchise in 1960 that the more current municipal power dispute in Elbow Lake began. (Findings 14-19, A. 50-52).

[21] While the mandamus action against Aurora succeeded in bringing about the desired election, the electorate chose to adhere to its decision in favor of municipal power. (Findings 159-161, A. 82-83). After Otter Tail's suit against Aurora established that the town could not purchase its own revenue bonds, the town succeeded in marketing its obligations lawfully to an outside buyer. (Findings 150-153, 155, A. 80-81).

own electric systems. (A. 614, 615; Chart submitted by the United States, A. 1219, 670, 671, added to record by order dated July 5, 1972).

Significantly, the trial court did not find that any of the suits were groundless or brought in bad faith. In fact, three of the six actions were at least partially successful[22]; and, of the three which were lost, the two cases involving Colman were clearly decided on technical, legal grounds of narrow compass. In the last case, involving Elbow Lake, the town's subsequent claims to having been damaged by the litigation were flatly rejected by the state trial and appellate courts.

The trial court similarly did not find that Otter Tail had any policy of litigating in every instance regardless of the merits. As previously indicated, no suits at all were brought with respect to Finley or Velva, although these towns also had initially elected to terminate Otter Tail's franchise. Furthermore, the uncontradicted testimony of Otter Tail's president established (i) that he personally made the decision as to whether to litigate in each instance, (ii) that the decision was based upon a careful assessment of the merits of the case in question, and (iii) that Otter Tail had no general policy as to litigation with municipalities. (A. 722-726; Dep. GX-287, pp. 283-284, A. 280-286).

The decision below fails to indicate the clearly political nature of most of this litigation. As the foregoing summary indicates, four of the six cases involved the failure of one or another town to hold an allegedly required election, two of these suits being mandamus actions to compel compliance with initiative petitions. Such actions were plainly ancillary to the more central, electoral battles at which the municipal power issue was in fact decided.

[22] In addition to the two successful suits against Aurora, the taxpayers' action against Hankinson was successful at the trial court level, although reversed on appeal.

Finally, although the opinion below deals only with litigation instigated by private power advocates, as the preceding outline of the suits shows, municipal power advocates were at least equally free in invoking the aid of judicial and administrative tribunals in connection with these local controversies.

4. *Other Towns*

The only other towns which the district court examined in any detail in its Findings were Finley and Velva, North Dakota (pop. 809 and 1,241, respectively). (A. 83-85). In these cases, Otter Tail neither instituted litigation nor refused to interconnect or wheel electricity. The electorates in both towns simply reversed their earlier resolutions in favor of municipal power. All that Otter Tail was found to have done was to take action to improve service in both municipalities. (Findings 172, 177, 179; A. 84, 85).

In summary, of the six towns which the district court considered in any detail, three opted for, and now have municipal power (Elbow Lake, Colman and Aurora). Of the three which elected to remain with Otter Tail (Hankinson, Finley and Velva), two (Finley and Velva) are towns in which Otter Tail is accused of nothing more than having improved its service, and in the third (Hankinson) the electorate voted the municipal power faction out of control. Finally, it may be noted that all of the aforesaid municipalities which Otter Tail is now serving (Hankinson, Finley and Velva) are located in North Dakota where Otter Tail's retail business is thoroughly regulated by the State Public Service Commission.

5. *Voluntary Interconnection and Coordination Arrangements*

In 1955, Otter Tail entered into a contract with the United States Bureau of Reclamation whereby, upon specified terms and conditions, each party agreed to sell and exchange power and to provide wheeling services for the

other. (GX-67, A. 1034-1038, 253, 285-286; A. 676-679, 31). Among other things, Otter Tail agreed to transmit power to Bureau customers other than those located in municipalities which Otter Tail was itself serving at retail. (GX-67, par. 27(e), pp. 27, 28, A. 1078, 1079, 679-683). The Bureau has also entered into such agreements with various other utilities. (A. 693, 694). Otter Tail has likewise concluded substantially similar contracts with various rural electric cooperatives. (A. 688-695; GX-22, A. 979-1005, 286; GX-38, A. 1005-1017, 285-286; GX-39, A. 1018-1040, 286; GX-65, A. 1040-1053, 285-286; A. 42). In each case, the duty of Otter Tail and of the contracting cooperative to transmit power for the other is subject to the same kind of restriction. (A. 694, 695; Finding 224, A. 129).

Although the district court made no finding on the point, evidence adduced at the trial showed that the aforesaid contracts would not have been entered into without the provisions assuring the parties that their facilities could not be used to deprive them of existing customers. (A. 676-683, 688-695). Such voluntary interconnection and coordination arrangements, which plainly serve to assure "an abundant supply of electric energy . . . with the greatest possible economy and with regard to the proper utilization and conservation of natural resources . . .", are expressly encouraged by Section 202(a) of the Federal Power Act.

6. *Proceedings Below*

The government's Complaint, filed July 14, 1969, alleged that Otter Tail had monopolized and attempted to monopolize by (1) refusing and threatening to refuse to sell power at wholesale, (2) refusing and threatening to refuse to wheel and (3) "engaging in other activities designed to obstruct and defeat the attempt by municipalities to establish alternative local electric power system [ic]." (A. 28, 13, 14). In its Answer, Otter Tail admitted its refusal to sell at wholesale and wheel, but denied

that such conduct violated Section 2 of the Sherman Act. (A. 29, 17-21).

The case was tried on June 1 through June 14, 1971. Many of the operative facts were established by stipulation. (A. 29). The district court rendered its opinion on September 9, 1971, and entered its original judgment on October 22, 1971. Without considering the application of the Federal Power Act, it held that Otter Tail's refusal to sell at wholesale and wheel constituted monopolization (A. 27-40; 131-133); Otter Tail was accordingly enjoined from refusing such services to existing or proposed municipal power systems in the future. (A. 132). The court also found that litigation initiated or sponsored by Otter Tail had violated Section 2 (A. 40-42), and it enjoined Otter Tail from thereafter engaging in any litigation "for the purpose of delaying, preventing or interfering with establishment [sic] of a municipal electric power system." (A. 132). Finally, the district court found that Otter Tail's contracts with the Bureau of Reclamation and various rural electric cooperatives were illegal *per se* because the parties did not undertake to wheel power to their own retail customers. (A. 43-45). The Judgment accordingly prohibited Otter Tail from entering into or enforcing any such agreements. (A. 132).

On October 27, 1971, Otter Tail moved for a new trial or, in the alternative, for amended and/or additional findings of fact and conclusions of law, and to amend the Judgment. (A. 134-204). Among other things, Otter Tail brought to the court's attention the Federal Power Commission's decision of September 13, 1971 which had granted Elbow Lake a long term interconnection. (A. 137-142, 187-203). The district court amended its Judgment on November 10, 1971 by adding the proviso that Otter Tail would not be compelled "to furnish wholesale electric service except at rates which are compensatory and under terms and conditions which are filed with and subject to approval by the Federal Power Commission."

(A. 205-206, 209). The Amended Judgment did not, however, allow the FPC any discretion as to the threshold question of whether the public interest required that wholesale or wheeling service be compelled at all in a given case.

SUMMARY OF ARGUMENT

The fundamental error of the decision below lies in its repeated and consistent disregard of Congress' intent concerning both the wholesale sale and transmission of electric energy and the proper application of antitrust.

With respect to the interstate transmission and wholesale sale of electricity, Congress enacted Part II of the Federal Power Act, a regulatory statute dedicated to the objective "of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources. . . ." The duty of achieving this aim is expressly entrusted to the Federal Power Commission. As to involuntary wholesale sales in particular, Section 202(b) of the Act provides that such transactions may be ordered by the FPC, upon notice and hearing, if the Commission finds that such action would be in the public interest and that certain specified criteria (*e.g.*, that the sale would not impose an "undue burden" on the utility) are met. Totally ignoring these statutory procedures and standards, the lower court held that the antitrust laws impose an absolute duty upon a utility to sell at wholesale in all cases, regardless of the circumstances. In so ruling, the district court has deprived the FPC of a crucial element of its jurisdiction and has effectively nullified the regulatory scheme which Congress provided to govern the specific subject matter of compulsory wholesale sales.

The lower court's holding that the Sherman Act requires a private utility to transmit ("or wheel") government power to municipalities is, if anything, even more repugnant to Congress' intent, since here Congress specifically determined that no such duty should be imposed at all. Indeed, when it enacted Part II of the Federal Power Act in 1935, Congress deliberately eliminated two proposed sections that would have imposed the same legal duty which the lower court has created of its own accord in the case at bar. Since 1935, the issue which the court below purported to resolve has been the subject of intensive legislative debate. However, while numerous proposed wheeling bills have been introduced in the 88th through 92nd Congresses, Congress has consistently elected to stand by its earlier determination that forced wheeling would be inimical to the national interest. The decision below thus represents an improper attempt to reverse Congress judicially and to usurp its role in deciding important matters of national policy.

The district court again contravened Congress' intent, as well as this Court's decisions in *Noerr* and *Pennington*, by applying the Sherman Act so as to interfere with local political controversies and to deprive Otter Tail of its constitutional right to petition. The decisions which Otter Tail is accused of having sought to influence in this case are all basically political in nature, with the citizens of each town indicating their choice as between public and private power by voting on this issue in municipal elections. The lower court thus considered a mass of political campaign material and reiterated in its opinion the government charge that Otter Tail had "monopolized" by participating in such political activities. Furthermore, proceeding upon the erroneous assumption that the right of judicial redress is not constitutionally protected, the lower court found that Otter Tail had "monopolized" by bringing or supporting some six lawsuits involving four towns. None of these actions was found to be base-

less or brought in bad faith (indeed three were at least partially successful), and none in fact prevented the establishment of a single municipal system. Nevertheless, on this basis, the court restrained Otter Tail from henceforth bringing or supporting any litigation, however meritorious it might be, to delay, prevent, or interfere with a municipal take-over of its retail business. This absolute injunction on the exercise of a constitutional right is plainly contrary to Congress' intent.

Finally, the district court misconceived fundamental antitrust principles and compounded its error by applying mistaken notions of *per se* illegality without regard to the special circumstances and regulatory framework of the electric utility industry. The court thus held that Otter Tail is a monopolist on the basis of circumstances which are integral to the electric power business, and without regard to the state and federal regulatory schemes which deprive a utility of the very indicia of monopoly proscribed by the Sherman Act, *i.e.*, the power to fix prices or exclude competition. The court further held—without any precedential basis whatsoever—that as a matter of antitrust law (i) a company must make its individually-owned capital assets available to municipalities which seek to replace it as a supplier of electricity; (ii) a company in the business of selling power at retail must nevertheless sell at wholesale if requested to do so; and (iii) it is illegal *per se* for a company to insist, when its property is used by another, that that property not be utilized to destroy its own business. While these notions would be erroneous in any circumstances, the application of such *per se* concepts to an industry regulated in accordance with specific public interest objectives of its own is especially inappropriate. The consequences of the lower court's holdings would be to impair service, to raise costs for consumers of electricity and to discourage the very kind of voluntary interconnection and coordination of facilities which Congress expressly stated should be promoted. In sum, the decision below

would produce both injustice and chaos in an industry whose proper functioning is essential to the national welfare.

ARGUMENT

POINT I

The Decision And Judgment Below Would Nullify The Regulatory Scheme Provided By Congress In Part II Of The Federal Power Act Specifically To Govern Involuntary Wholesale Sales Of Electric Energy.

In light of the government's admission that the issues at bar "are obviously important in the administration of the Sherman Act *and its relation to the Federal Power Act*" (Memorandum For The United States, p. 1; emphasis added), the fact that the trial court's opinion does not even mention the latter statute plainly shows the error of its analysis. In enacting Part II of the Federal Power Act, Congress clearly indicated its intent that refusals to sell electricity at wholesale be dealt with by the Federal Power Commission applying the criteria and utilizing the procedures explicitly set forth in the regulatory statute —not (as here) by a court applying the quite different standards of the antitrust laws.

Section 202(b) of the Federal Power Act provides that the FPC may order the interconnection of transmission facilities and/or the sale or exchange of electricity at wholesale "under certain circumstances." *Pennsylvania Water & Power Co.* v. *FPC*, 343 U.S. 414, 422 (1952). The particular criteria which Congress specified for determining whether a wholesale sale may be compelled were paraphrased by this Court in *Gainesville Utilities Department* v. *Florida Power Corp.*, 402 U.S.

515 (1971). As stated therein, the FPC may enter a § 202(b) order:

> "... if the Commission 'finds such action necessary or appropriate in the public interest,' and 'if the Commission finds that no undue burden will be placed upon such public utility thereby.' The proviso to the section makes explicit that the Commission has no authority in ordering an interconnection 'to compel the enlargement of generating facilities . . . [or] to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers.'" 402 U.S. at 521-522 (brackets in original).[23]

As demonstrated below, Congress plainly intended that § 202(b) should govern determinations as to whether a particular utility may be properly required to sell at wholesale in a given case. The decision below nullifies this regulatory scheme in disregard of Congress' intent, and should therefore be reversed.

A. The Federal Power Act Was Clearly Intended To Provide The Exclusive Means By Which A Regulated Utility May Be Required To Sell At Wholesale.

As early as *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), this Court established the principle that where Congress has created a specific regulatory scheme to deal with a given subject matter, the specialized administrative procedures provided thereby cannot be circumvented by judicial intervention based upon purported common law or antitrust principles. The plaintiff in *Abilene*, a shipper, asserted a common law claim for damages predicated upon the exaction of allegedly unreasonable railroad rates. Although the Interstate Commerce Act, by its terms, expressly preserved existing common law and statutory remedies (*see* 204 U.S. at 446), the Court held that:

> "... the recognition of such a [common law] right is wholly inconsistent with the administrative power conferred upon the Commission. . . . Indeed no reason can be perceived for the enactment of the provision endowing the administrative tribunal . . . with power . . . not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future . . . if the power was left in courts to grant relief . . . without reference to previous action by the Commission in the premises." 204 U.S. at 440-441.

In *Keogh* v. *Chicago & Northwestern Ry.*, 260 U.S. 156 (1922), this same principle was held to bar an antitrust suit for treble damages predicated upon the exaction of rates which, although approved by the ICC, were alleged to have been fixed conspiratorially by the defendant-railroads. Writing for the Court, Justice Brandeis pointed out that if the alleged conspiracy resulted in rates which were unreasonably high or discriminatory, the plaintiff could claim damages in an administrative proceeding before the ICC. In such circumstances, the Justice found it incredible "that Congress intended to provide the shipper from whom illegal rates have been exacted with an additional remedy under the Anti-trust Act[.]" 260 U.S. at 162.

Similarly, in *United States Nav. Co.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932), the Court held that a private antitrust plaintiff may not bring an action based on conduct covered by the provisions of the Shipping Act. Specifically, the Court said:

> "A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections

[23] Under the second sentence of Section 202(b), the FPC may prescribe the "terms and conditions" of a wholesale sale once it has made the threshold determination that the transaction should be compelled.

of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions or are so interrelated with such charges as to be in effect a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws." 284 U.S. at 485.

These principles were reiterated and applied by Mr. Justice Cardozo, writing for the Court in *Terminal Warehouse Co.* v. *Pennsylvania R. R.*, 297 U.S. 500 (1936). Holding that a warehouse owner could not bring an antitrust action attacking an exclusive arrangement between the railroad and another warehouse, the Court said:

> "Certain then it is that the Anti-Trust laws are inapplicable in all their apparent breadth to carriers by rail or water. A consignor or consignee aggrieved by such a wrong must resort to the appropriate administrative agency, at least for many purposes. If he is remitted to the Commerce Act or the Shipping Act to cancel the illegal preference, may he pass over those acts and revert to the Clayton or the Sherman Act for the purpose of recovering damages? The Commerce Act like the Shipping Act embodies a remedial system that is complete and self-contained. . . . For the wrongs that it denounces it prescribes a fitting remedy which, we think, was meant to be exclusive." 297 U.S. at 514.

In *Far East Conference* v. *United States*, 342 U.S. 570 (1952), which involved facts substantially similar to those in *Cunard*, the Court characterized as "firmly established" the principle:

> ". . . that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." 342 U.S. at 574.[21]

In *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963), the government attacked, as violations of the Sherman Act, (i) an agreement dividing certain South American air routes between Pan American and Panagra (a corporation jointly owned by Pan American and Grace), and (ii) Pan American's alleged interference with Panagra's efforts to obtain the approval of the Civil Aeronautics Board for certain additional, competing routes from Central America to the United States. The CAB had itself requested that the Attorney General bring suit. Nevertheless, the Court found that the administrative remedies provided in the Civil Aeronautics Act barred an antitrust suit based upon the same subject matter. While noting that air carriers are not *per se* immune from antitrust, the Court said:

> "The acts charged in this civil suit as antitrust violations are precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers." 371 U.S. at 305.

The Court therefore held:

> ". . . that the [Civil Aeronautics] Act leaves to the Board under § 411 all questions of injunctive relief against the division of territories or the allocation of routes or against combinations between common carriers and air carriers." 370 U.S. at 310.

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[21] *Far East Conference* also authoritatively established that the availability of administrative procedures and remedies will bar an antitrust suit brought by the *government* as well as foreclosing private treble damage actions. This issue had previously been left open in *Keogh*, *Cunard* and *Terminal Warehouse*. *See also, e.g.*, Pan American World Airways, Inc. v. United States, *infra*.

Again, in *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411 (1965), this Court rejected the plaintiff-bank's suit to enjoin the opening of a competing bank holding company subsidiary. The Court held:

> "[Congress] intended that challenges to [Federal Reserve] Board approval of the organization and operation of a new bank by a bank holding company be pursued solely as provided in the statute. This view is confirmed by our cases holding that where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive. . . . Congress has set out in the Bank Holding Company Act of 1956 a carefully planned and comprehensive method for challenging Board determinations. That action by Congress was designed to permit an agency, expert in banking matters, to explore and pass on the ramifications of a proposed bank holding company arrangement. To permit a district court to make the initial determination of a plan's propriety would substantially decrease the effectiveness of the statutory design." 379 U.S. at 420.

The principles articulated in the foregoing decisions[25] are controlling in the case at bar. There can be no ques-

[25] *See also, e.g.*, Baltimore & O. R.R. v. United States *ex rel.* Pitcairn Coal Co., 215 U.S. 481 (1910); Robinson v. Baltimore & O. R.R., 222 U.S. 506 (1912); Mitchell Coal & Coke Co. v. Pennsylvania R.R., 230 U.S. 247 (1913); Morrisdale Coal Co. v. Pennsylvania R.R., 230 U.S. 304 (1913); Texas & Pac. Ry. v. American Tie & Timber Co., 234 U.S. 138 (1914); Pennsylvania R.R. v. Clark Bros. Coal Mining Co., 238 U.S. 456 (1915); Loomis v. Lehigh Valley R.R., 240 U.S. 43 (1916); Northern Pac. Ry. v. Solum, 247 U.S. 477 (1918); Director General of Railroads v. The Viscose Co., 254 U.S. 498 (1921); Western & Atlantic R.R. v. Georgia Pub. Serv. Comm'n, 267 U.S. 493 (1925); Midland Valley R.R. v. Barkely, 276 U.S. 482 (1928); Board of R.R. Comm'rs v. Great N. Ry., 281 U.S. 412 (1930); United States v. Western Pac. R.R., 352 U.S. 59 (1956); Arrow Transp. Co. v. Southern Ry., 372 U.S. 658 (1963); Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62 (1970).

tion that the remedies and procedures of the Federal Power Act—like those of the Inter-state Commerce Act, the Shipping Act and the Civil Aeronautics Act—are exclusive as to the matters which they cover. *See Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951). *See also Pennsylvania Water & Power Co.* v. *FPC*, 343 U.S. 414 (1952), where this Court held that a utility may not avoid prescribed Federal Power Act procedures by seeking "to utilize a violation of the Sherman Act so as to nullify a rate-reduction order." *Id.* at 423-424.

As to § 202(b) in particular, the FPC's authority under that section clearly covers the "precise ingredients" of the government's antitrust claim, *i.e.*, Otter Tail's refusal to sell at wholesale. *See Pan American World Airways, Inc.* v. *United States, supra; United States Nav. Co.* v. *Cunard Steamship Co., supra.* That section provides the procedure and criteria by which such involuntary wholesale sales may be ordered—in short, "a remedial system that is complete and self-contained" as to the subject dealt with. *See Terminal Warehouse Co.* v. *Pennsylvania R.R., supra.* It was plainly intended as a "carefully planned and comprehensive method" whereby the expert agency to which Congress has entrusted such matters might "explore and pass on the ramifications of a proposed [transaction]." *See Whitney National Bank* v. *Bank of New Orleans, supra.*

By the enactment of § 202(b), Congress has explicitly directed that compulsory wholesale sales should be ordered only on the basis of certain specific factual determinations and discretionary judgments which lie outside the scope of common judicial experience. In such circum-

stances, the FPC, as the expert agency created by Congress to deal with such matters, "should not be passed over." *Far East Conference* v. *United States, supra.* It is inconceivable that Congress intended any party—including the United States—to assert an additional, antitrust remedy whereby mandatory wholesale sales could be ordered on bases entirely different from those specified in § 202(b). *Cf. Keogh* v. *Chicago & Northwestern Ry., supra.* Indeed, it is difficult to imagine a case in which the assertion of such a right would be more "wholly inconsistent with the administrative power conferred upon the Commission. . . ." *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co., supra.*

In sum, a regulated utility such as Otter Tail may be ordered to sell at wholesale only by the FPC, in a proper § 202(b) proceeding, and not by a court applying the antitrust laws. The district court's decision to the contrary contravenes Congress' manifest intent and is therefore plainly erroneous.

B. The Decision And Judgment Below Are Repugnant To The Regulatory Scheme Which Congress Provided By The Enactment Of Part II Of The Federal Power Act.

1. The lower court found that Otter Tail "monopolized" by refusing to sell at wholesale to two towns, Elbow Lake and Hankinson. Both municipalities availed themselves of their prescribed Federal Power Act remedies. While Hankinson elected to renew Otter Tail's franchise, and thus withdrew its application with the FPC, Elbow Lake proceeded before the Commission and obtained first a temporary and then a permanent § 202(b) order requiring Otter Tail to sell at wholesale. Otter Tail has duly obeyed both of these administrative directives.

The putative antitrust violation involved in this case thus consists of Otter Tail's refusal to comply with the municipalities' demands *before* being ordered to do so in accordance with statutory procedures. In other words, in

the lower court's view, a utility which is presented with a demand for wholesale service must always comply immediately and of its own accord. If it seeks to have the matter resolved by the Federal Power Commission in accordance with § 202(b), it may do so only at the risk of invoking the full panoply of antitrust sanctions. Obviously, any interpretation of the antitrust laws which makes it a misdemeanor to rely upon Federal Power Act procedures is plainly repugnant to the latter statute.

2. The Judgment below requires Otter Tail to furnish wholesale power to any municipality which makes a demand, regardless of whether the FPC finds that the transaction may be properly ordered under § 202(b). In fact, municipalities in Otter Tail's service area may henceforth compel wholesale sales directly under the district court's Judgment, without the need for making any application to the FPC. While Paragraph V of the Amended Judgment purports to restore the Commission's authority under the *second sentence* of Section 202(b) to pass on the terms and conditions of such sales, the injunction still deprives the FPC of all power under the *first sentence* of that section to decide whether a mandatory sale should be ordered at all.

In *Gainesville Utilities Department* v. *Florida Power Corp.*, 402 U.S. 515 (1971), this Court reversed a court of appeals modification of the terms of an FPC § 202(b) order and reinstated the Commission's decision. The Court held that:

> "... the Court of Appeals overstepped the role of the judiciary. Congress ordained that that determination [as to the terms of a § 202(b) order] should be made, in the first instance, by the Commission, and on the record made in this case, the Court of Appeals erred in not deferring to the Commission's expert judgment." 402 U.S. at 527.

If it is improper for a court of appeals to substitute its judgment for that of the FPC with respect to a single term of a § 202(b) order, surely it is indefensible for a district court to usurp entirely the FPC's more important role in determining whether a mandatory wholesale sale should be ordered in the first place.

3. In enacting § 202(b), Congress carefully provided that no utility may be compelled to sell at wholesale if such action would (i) impose an undue burden, (ii) require the enlargement of generating facilities, or (iii) impair service to existing customers. *See Gainesville* v. *Florida Power Corp.*, 402 U.S. at 521-522. Ignoring these provisos, the district court has ordered Otter Tail to furnish wholesale power in all cases, even where compliance *will* impose an undue burden, require enlarged generation facilities or impair service. In lieu of the congressionally ordained scheme, whereby determinations as to mandatory wholesale sales are to be made on a case-by-case basis, in light of the particular facts involved in each instance,[26] the district court has entered a blanket injunction, requiring Otter Tail to furnish wholesale power to *all* existing and prospective municipal electric systems, regardless of the circumstances. It is difficult to conceive of a more direct contravention of Congress' intent.

4. Section 202(b) also provides that a wholesale sale may be compelled only upon a finding that such action is "necessary or appropriate in the public interest." This standard must be read in light of the purpose of Part II of the Federal Power Act, which is stated to be that "of assur-

[26] ...nificantly, the FPC may not initiate a § 202(b) proceeding on its own motion, but rather can only proceed upon an application duly made in a particular case. By structuring § 202(b) in this manner, Congress made it impossible for any utility to be subjected lawfully to a blanket order to sell at wholesale in all situations. Such an incongruous result could be achieved only by an order, such as the Judgment below, which is entirely outside of the procedures created by Congress.

ing an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources. . . ." Federal Power Act § 202(a). The district court's utter disregard of this primary congressional objective is evident both from the Judgment itself and from the numerous disparities between the court's decision and those of the FPC in Elbow Lake's § 202(b) proceedings. For example, in its September 13, 1971 order, the FPC stressed the importance of not encouraging other municipalities to follow Elbow Lake with improvident power ventures of their own. (A. 191). The district court, on the other hand, has given all such ventures the strongest possible encouragement by proscribing utility opposition and, indeed, requiring utility support, by wholesale sales and wheeling, regardless of the circumstances. (A. 129-132). In its earlier interconnection order, the FPC declared Otter Tail's viability as a producer of electricity to be an element of the public interest. Jurisdictional Statement at A-131. For the district court, however, Otter Tail's survival—and the consequences of its failure for consumers—are utterly immaterial to a determination as to whether mandatory interconnection should be required. (A. 45).[27] In short, the district court reached its decision solely on the basis of its novel interpretation of the antitrust laws which it blindly applied to an electric utility without even considering the "public interest" under the Federal Power Act, or the need for a specialized, expert agency to apply this standard.[28]

[27] The court and the Commission also disagreed on such basic evidentiary matters as whether an overly broad duty to sell at wholesale might in fact lead to the erosion and eventual destruction of Otter Tail's integrated system. While the court brushed aside Otter Tail's contentions in this regard (A. 45, 46), the FPC found that the utility was "legitimately concerned." (A. 191).

[28] It may be observed that if the Judgment at bar had been entered five years ago (rather than last year), the FPC would never have had the opportunity to pass on Elbow Lake's applications for

5. Section 202(b) requires that each state commission which will be affected by the FPC's order must be given notice and an opportunity to be heard. Under the district court's Judgment, the North Dakota Public Service Commission has been deprived of all such rights with respect to wholesale sales to North Dakota municipalities—some of which may be encouraged thereby to embark upon what the FPC has called "improvident" municipal power ventures. Thus, instead of the procedures that Congress has provided for promoting the coordination of federal and state regulatory efforts, the district court has substituted a one-sided regime of federal control predicated solely on antitrust considerations.

6. By the addition of Paragraph V of the Amended Judgment, the district court apparently recognized that only the FPC is competent to prescribe the rates and other terms and conditions for a compulsory wholesale sale. But, the power (a) to order a compulsory wholesale sale and (b) to determine the terms of the transaction, are integral parts of a single regulatory function. As this Court stated in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951):

temporary and permanent interconnections under § 202(b). The FPC decision which this Court reinstated and affirmed in Gainesville Utilities Department v. Florida Power Corp., *supra*, would likewise never have been entered, since the utility in that case would presumably also have been under an absolute antitrust duty to interconnect. Thus no agency would have ever considered the "public interest" aspects of these transactions. This result is particularly incongruous with respect to Elbow Lake and Gainesville, which were both seeking back-up power allegedly needed to improve reliability. Thus, in addition to other § 202(b) factors, the FPC had to consider what the municipalities' needs actually were—a judgment requiring a great deal of expertise as to the reliability of electric systems under various circumstances. Presumably, a municipality in the position of Elbow Lake or Gainesville may, under the decision below, obtain such back-up power automatically, without any demonstration of need.

> "Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion."

In the instant case, a determination as to whether a particular wholesale sale is in the "public interest" requires at least as much expertise and informed discretionary judgment as a decision concerning the terms of a transaction which has already been compelled. By excising the major portion of the FPC's jurisdiction, and requiring it henceforth to enforce the Judgment rather than the Federal Power Act, the district court has nullified Congress' intent that Commission expertise and statutory standards be brought to bear at the outset and with respect to the most crucial issues in a Section 202(b) proceeding.

7. The district court's decision invites concurrent proceedings before the courts and the Commission with respect to virtually all of the matters encompassed by the Federal Power Act. As noted above, Elbow Lake and Hankinson both commenced treble damage actions as well as proceedings before the FPC. *See* pages 16, 17, *supra*. Similarly, the matters dealt with by this Court in *Gainesville Utilities Department* v. *Florida Power Corp.*, *supra*, are presently the subject of a private antitrust action. *See Gainesville Utilities Department* v. *Florida Power Corp.*, Civil No. 68-305 Civ. J. (M.D. Fla., filed Aug. 13, 1968). *See also Bartow* v. *Florida Power Corp.*, Civil No. 70-129-T (M.D. Fla., filed Apr. 6, 1970); *Borough of Pitcairn* v. *Duquesne Light Co.*, Civil No. 68-858 (W.D. Pa., filed July 23, 1968). In other words, in a proliferating number of cases the courts and the Commission must now rule concurrently on the same subject matter applying the differing standards of the Sherman Law and the Federal Power Act. In such circumstances, inconsistent determinations—such as those

which characterize the district court and FPC decisions here—are virtually inevitable. Further inconsistencies will undoubtedly also arise among the differing determinations of the various district courts. Plainly, Congress never intended that the orderly scheme of enforcement provided by the Federal Power Act should be replaced by a chaotic regime of duplicative proceedings.

In sum, the decision and judgment below are repugnant to the letter, spirit and purpose of the Federal Power Act. Such blatant disregard of Congress' intent is manifestly erroneous and should be reversed.

C. Congress Has Mandated That Decisions Regarding Compulsory Wholesale Sales Of Electricity Be Based Upon An Appraisal Of The "Public Interest" Within The Meaning Of The Federal Power Act.

The decision and judgment below make the policies and requirements of the antitrust laws of primary importance to a determination as to whether a utility should be compelled to sell at wholesale. This result, in the context of a regulatory scheme dedicated to its own, particular "public interest" objectives, is plainly contrary to this Court's holdings in *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944), *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953) and *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963).

In *McLean Trucking* the Court reviewed an order of the ICC approving the consolidation of certain regulated motor carriers. The Justice Department attacked the ICC's decision for its alleged failure "to consider and give due weight to the anti-trust and other laws of the United States." 321 U.S. at 77. In upholding the Commission, the Court found that "the policies of the antitrust laws determine 'the public interest' in railroad regulation only in a qualified way." *Id.* at 83. Specifically, the ICC must base its decisions upon an assessment of the "public interest,"

which in turn incorporates the goals of the national transportation policy.[29] The Court concluded:

> "In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. . . . 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.' " 321 U.S. at 87-88.

In *RCA Communications*, the FCC had approved certain duplicative radiotelegraph circuits on the ground that competition was "reasonably feasible" in the circumstances. The Court (per Frankfurter, J.) reversed the Commission, holding that the FCC must determine that competition is not merely "feasible" but desirable in light of the purposes of the Federal Communications Act. A decision based simply on antitrust goals would deprive the public of the benefits of the FCC's expertise and would be contrary to Congress' intent that such decisions be based upon all factors relevant to the "public interest." 346 U.S. at 95.

In *Pan American*, this Court similarly pointed out that the words "unfair practices" and "unfair methods of com-

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[29] That is, the fostering of "'a system of coordinated transportation for the Nation which will supply the most efficient means of transport and furnish service as cheaply as is consistent with fair treatment of labor and with earnings which will support adequate credit and the ability to expand as need develops and to take advantage of all improvements in the art.'" *Id.* at 82.

petition," when "transferred to the Civil Aeronautics Act, gather meaning from the context of that particular regulatory measure and the type of competitive regime which it visualizes." 371 U.S. at 308. The Court continued:

> "That regime has its special standard of the 'public interest' as defined by Congress. . . . It would be strange, indeed, if a division of territories or an allocation of routes which meet the requirements of the 'public interest' as defined in § 2 were held to be antitrust violations. . . . Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board. . . . If the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide." *Id.* at 308-310.

In the instant case, Congress has created a scheme of regulation dedicated to "assuring an abundant supply of electric energy throughout the United States with the greatest economy and with regard to the proper utilization and conservation of natural resources. . . ." Federal Power Act § 202(a). It has specifically directed that all determinations as to mandatory wholesale sales be based upon this "public interest" standard. Far from seeking to achieve antitrust goals, one of the draftsmen of the bill which became Part II of the Federal Power Act explicitly stated that "[t]he bill is not drawn upon the theory that competition shall be established in the industry."[30]

The decision below stands this congressionally intended scheme of regulation on its head. Otter Tail has been ordered to sell at wholesale to all municipalities based upon antitrust considerations alone, with no regard to the "public interest" goals of the Federal Power Act. The statutory objectives, and the expertise of the FPC, are permitted to play a role only secondarily in determining the terms of a previously ordered interconnection. This

[30] Remarks of Solicitor DeVane, Addendum, p. 19 (hereinafter cited as "(Add.)"). *See also* Add. 17-18, 20.

result is plainly contrary to the law as articulated in *McLean, RCA Communications* and *Pan American*.

This is not to say that competitive consequences may not be considered in determining whether a particular compulsory sale is in the public interest. But the teaching of *McLean, RCA Communications* and *Pan American* is that competition is but one such factor in the "public interest" equation, and that a determination as to its proper weight and role may properly be made only by the expert regulatory agency, not the courts.[31] The district court is therefore doubly in error: first, because it based its decision solely on antitrust rather than Federal Power Act goals; second, because the court itself ordered Otter Tail to sell at wholesale rather than leaving such determination to the Commission. In both respects, the decision below is contrary to the expressed will of Congress and therefore erroneous.

D. The Question At Bar Is Not Whether There Is Any Express Exemption Or Implied Immunity From Antitrust, But Rather Whether Congress Intended The Provisions Of § 202(b) To Be Nullified By An Antitrust Suit Predicated Upon The Same Subject Matter.

The application of antitrust to particular conduct in a regulated industry depends, in each case, upon the intent of Congress. While it is true that "repeals by implication are not favored," *see, e.g., Texas & Pac. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. at 437, antitrust has repeatedly been held not to apply "in cases of plain repugnancy between the antitrust and regulatory provisions." *United*

[31] Significantly, the FPC did consider the role of competition in the *Gainesville* case, where the defendant utility cited increased competition as a *negative* factor militating against the issuance of a § 202(b) order. The Commission, in a decision reinstated and affirmed by this Court (402 U. S. 515 (1971)), did not disagree that, in the circumstances of the case, increased competition would be contrary to the public interest; rather, it found as a matter of fact that such competition was unlikely to occur. Gainesville Utilities v. Florida Power Corp., 40 FPC 1227, 1239-1242 (1968).

States v. *Philadelphia National Bank*, 374 U.S. 321, 351 (1963). As demonstrated in Section A, such repugnancy has been found wherever Congress has provided statutory procedures and standards to govern specific subjects. In Sections B and C, we have pointed to the particular areas of repugnancy in the instant case between the lower court's construction of the Sherman Act and the regulatory scheme provided by Congress to deal with involuntary wholesale sales of electric power.

The issue at bar is thus totally unlike that in *United States* v. *Borden Company*, 308 U.S. 188 (1939), where this Court held that the express exemption from antitrust contained in the Agricultural Marketing Agreement Act of 1937 for marketing agreements approved by the Secretary of Agriculture did not apply to agreements which were not so approved. In that case, the application of antitrust could not possibly interfere with the Secretary of Agriculture's regulatory functions since in all cases where he acted to approve an agreement, the exemption would automatically take effect. There was thus no disruption of the regulatory scheme and no repugnancy between the Sherman Law and the Agricultural Marketing Agreement Act.

In the instant case, on the other hand, the subject matter involved—involuntary wholesale sales of electricity—is specifically regulated by the FPC under § 202(b). In contrast to *Borden*, and to this Court's similar decision in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966),[32] here the district court's Judgment operates

[32] *Carnation* involved a treble damage claim predicated upon a rate-fixing agreement which had not been approved by the Federal Maritime Commission. The Court held that courts may:

> "... subject activities which are clearly unlawful under the Shipping Act to antitrust sanctions so long as the courts refrain from taking action which might interfere with the Commission's exercise of its lawful powers. . . . The award of treble damages for past and completed conduct which clearly violated the Shipping Act would certainly not interfere with any future action of the Commission." 338 U.S. at 221-222.

so as to directly deprive the FPC prospectively of decision-making authority in essential areas of its jurisdiction. The problem is thus not one of construing an express exemption, but rather of permitting the regulatory scheme to function as Congress intended.

The mere fact that an industry is regulated does not, of course, mean that it is *per se* immune from antitrust. The question in each case is whether Congress intended the regulatory scheme applicable to a particular *subject matter* to be controlling. Congress' intent may thus be construed differently with respect to various subjects in the context of a single industry. *Compare, e.g.*, as to bank regulatory agencies: *United States* v. *Philadelphia National Bank*, *supra* (bank mergers), *with Whitney National Bank* v. *Bank of New Orleans*, *supra* (establishment of bank holding company subsidiary); as to the ICC: *Georgia* v. *Pennsylvania R. R.*, 324 U.S. 439 (1945) (attack on unregulated conspiracy) *with Keogh* v. *Chicago & Northwestern Ry.*, *supra* (direct attack on regulated rates); as to the FPC: *California* v. *Federal Power Commission*, 369 U.S. 482 (1962) (merger of natural gas companies) *with Federal Power Commission* v. *Louisiana Power & Light Co.*, 32 L. Ed. 2d 369, 40 U.S.L.W. 4636 (U.S. June 7, 1972) (interstate "transportation" of natural gas); as to the FCC: *United States* v. *RCA*, 358 U.S. 334 (1959) (exchange of television stations) *with Federal Communications Commission* v. *RCA Communications*, *supra* (licensing of radio telegraph circuits). The only issue in the instant case is thus whether Congress intended antitrust to control the specific subject matter provided for in § 202(b).

Congress' intent may be derived from the language and legislative history of a particular enactment. For example, in *United States* v. *RCA*, 358 U.S. 334 (1959), the Court found that the legislative history of the Federal Communications Act compelled the conclusion that the antitrust laws were intended to apply and to be enforced by the courts with respect to the exchange of television

stations. In contrast, the statute and legislative history in the instant case compel precisely the opposite conclusion. The statute here specifically provides that wholesale sales are to be ordered on the basis of the criteria expressly set forth, including the FPC's judgment as to the "public interest," rather than any antitrust considerations. The legislative history likewise shows that the regulatory scheme was intended as a substitute, rather than a predicate, for competition. *See* page 40, *supra;* Add. 17-20.

In *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), this Court held that the Bank Merger Act does not preclude the application of the Clayton Act to bank mergers. The Court reached this conclusion on the basis of the pertinent legislative history and the absence in the banking field of comprehensive "public utility regulation." *Id.* at 352. It was pointed out, for example, that "[r]ate regulation in the banking industry is limited and largely indirect," that "banks are under no duty not to discriminate in their services" and that "banks may do business . . . where they please." *Id.* In contrast, "public utility regulation" is precisely what Part II of the Federal Power Act does provide. Section 201(a) declares that federal regulation of "transmission of electric energy in interstate commerce and the sale of such energy at wholesale" is necessary in the public interest. As this Court has repeatedly held, Congress specifically intended to fill the "gap" in state regulation created by the decision in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), so that state and federal regulation together would cover all aspects of the field. *See, e.g., Federal Power Commission* v. *Florida Power & Light Co.*, 404 U.S. 453, 458 (1972). *Cf. Federal Power Commission* v. *Louisiana Power & Light Co., supra.* Section 202 thus provides for both voluntary and compulsory interconnections, sales and exchanges. Section 203 allows the FPC to control dispositions of property, consolidations and purchases of securities by regulated

utilities. Section 204 regulates the issuance of securities and assumption of liabilities by such companies and imposes certain reporting requirements. Section 205 prohibits discrimination and affords the FPC comprehensive powers to regulate rates. Section 206 provides the FPC with power to order the furnishing of adequate service. Plainly, the Federal Power Act provides a pervasive scheme of regulation which Congress intended to be enforced by a single, expert agency.

Unlike *Georgia* v. *Pennsylvania R.R., supra*, this is not a case where there is a contract, combination or conspiracy which can be condemned under the antitrust laws separate and apart from the resulting, regulated conduct. Thus, as in *Penn Water*, this Court need not decide "what, if any, power the [FPC] has to rely on or to compel parties to carry out private contracts which would otherwise be illegal. . . ." 343 U.S. at 421. Here, the allegation of illegality is predicated upon Section 2 of the Sherman Act and consists precisely of the conduct which the FPC has been mandated to regulate. *See Pan American World Airways, Inc.* v. *United States, supra; United States Nav. Co.* v. *Cunard Steamship Co., Ltd., supra; cf. Central Transfer Co.* v. *Terminal Railroad Ass'n*, 288 U.S. 469, 476 (1933).

In sum, there is a direct repugnance between the decision and Judgment below and Part II of the Federal Power Act. The antitrust laws should thus not be applied so as to nullify § 202(b) for the determinative reason that any such construction would be obviously contrary to Congress' intent.

POINT II

The Decision And Judgment Below Are Contrary To Congress' Specific Determination That A Duty To Wheel Not Be Imposed On Electric Utilities.

The lower court held that the Sherman Act requires an electric utility to use its own transmission system to transmit (or "wheel") subsidized government power for municipalities seeking to take over its retail business. As demonstrated below, Congress specifically determined in 1935 that private utilities should *not* be required to wheel involuntarily; and it has since repeatedly reaffirmed its determination by rejecting proposed legislation that would impose this duty. The decision below directly contravenes this manifest congressional policy, and is therefore clearly erroneous.

A. In Enacting The Public Utility Act of 1935 Congress Determined That Private Utilities Should Not be Required to Wheel Government Power.

The proposed Public Utility Act of 1935, which ultimately became Part II of the Federal Power Act,[33] was principally drafted by FPC Commissioner Seavey and Commission Solicitor DeVane, later a United States District Judge, both of whom were key witnesses at the congressional hearings on the bill. *Hearings on H. R. 5423 Before the House Comm. on Interstate and Foreign Commerce*, 74th Cong., 1st Sess. (1935) (hereinafter, "House Hearings") at 400, 552; *Hearings on S. 1725 Before the Senate Comm. on Interstate Commerce*, 74th Cong., 1st Sess. (1935) (hereinafter, "Senate Hearings")

[33] Part I of the Federal Power Act had been enacted by Congress in 1920. That statute created the Federal Power Commission and gave it certain licensing powers with respect to hydroelectric projects.

at 223. (Add. 11-12).[34] As originally drafted, this bill contained a section (202(a)) which would have made it "... the duty of every public utility to ... transmit energy for any person upon reasonable request ..." (Add. 1). In addition to this so-called "common carrier" provision, Section 203(b) of the bill would have empowered the FPC to order wheeling, upon due notice and an opportunity for hearing, if it found such action to be "necessary or desirable in the public interest." (Add. 1).

The proposed wheeling sections were vigorously opposed at the House and Senate Committee Hearings. (Add. 2-10, 25-27). It was particularly feared that if private utilities could be forced to transmit subsidized governmental power over their own lines, the result "... would be [the] complete domination of the power supply field by the Government with private operators no longer able to maintain any position in their field." (Add. 7). As one company pointed out:

> "[Private utilities] will be heavily taxed and compelled to maintain fixed schedules of rates and forbidden to discriminate, while the [governmental producer] is tax free and may charge whatever rates it pleases at any moment, and discriminates at will." (Add. 2).

Other witnesses testified that the consequent erosion of investor-owned electric systems "may impair the integrity of [the utilities] underlying obligations" (Add. 10) and would increase costs for those consumers who remained. (Add. 25).

Significantly, neither Judge DeVane nor Commissioner Seavey disputed the fact that great harm would result if private utilities were required to wheel government power.

[34] As indicated below in the text, the pertinent sections of the proposed bill and relevant portions of the House and Senate Hearings are set forth in the Addendum.

On the contrary, both draftsmen took the position that the proposed bill would not impose any such duty;[35] but both agreed that the bill should be amended if there were deemed to be any ambiguity on this point. For example, Judge DeVane and Congressman Wolverton engaged in the following colloquy:

> "Mr. Wolverton. Under the provisions of this bill, would it be possible for the Government in any of its electric operations to utilize the transmission lines of private companies?
>
> Mr. DeVane. No, sir; and I want to make that very definite; and if there is any doubt about it, so far as I am concerned, such admendment might be made as to make it clear." (Add. 12).

Congressman Wolverton then posed a hypothetical question which tracks the precise facts involved in the case at bar:

> "Mr. Wolverton. Let me suggest a possible situation. Your answer will clarify my mind considerably as to the effect of this bill in the particular instance. Assume that a municipality built a plant for the generation and distribution of electric energy; assume that a distant community is serviced by a company that comes under the regulation of this bill in that it procures its electric energy from outside of the State. Could the city which has constructed a plant, but has no transmission lines, utilize the system of transmission lines constructed by the private company?
>
> Mr. DeVane. No, sir.
>
> Mr. Wolverton. Then, you do not think that the power given in this bill to the Federal Power Commission would enable it to direct that those transmission lines be so used?

[35] The draftsmen believed that any such interpretation of the bill would be precluded by the exclusion of municipalities from the definition of "persons" who might require wheeling services. (*See* Add. 12, 24).

> Mr. DeVane. Mr. Wolverton, my answer to that is this: That if there is any doubt about it and this committee can remove that doubt by additional words in this bill, let us put them in." (Add. 13).

In answer to another, similar hypothetical, Judge DeVane made it clear that the "common carrier" provisions were not intended, under any circumstances, to aid competitors in ousting a utility from its retail market:

> "Mr. Pettengill. . . . I would like to ask you this question: Here is a market, let us say (indicating) in my home city; here is a generating plant, and we will say that that entire market is being supplied by this generating plant, and it is capable of furnishing sufficient power.
>
> Here is another generating plant owned by a competitor of this one (indicating and illustrating), and does not have access to this market. It has no transmission lines. Now, do you agree that by order of your Commission you may require this company (indicating) to carry that generating plant's (indicating) energy to that market in competition with the original company?
>
> Mr. DeVane. No, sir; if I understand your question, the answer to that is 'no.'
>
> • • •
>
> Mr. Pettengill. Well, what sort of situation would the language of 202(a) apply? [sic]
>
> • • •
>
> Mr. DeVane. We will take a company that lies between one producing energy and another needing energy, and we will assume that the middle company cannot furnish the needed energy to its neighbor but has facilities that are available for transmitting the energy from the producing company to the one in need. The Commission could require the use of those facilities in order to meet that situation.
>
> Mr. Pettengill. But not to take the company that owns the line; not to take its market aware [sic] from it?
>
> Mr. DeVane. No, not to take the market away from it; no, sir." (Add. 16-18; *see also* Add. 13-15, 21-24).

In order to clarify the intent of the draftsmen, Judge DeVane proposed an amendment which would have stated explicitly that the FPC had no power to compel the transmission of electricity produced by municipal, state or federally-owned plants. (Add. 25). This proposed amendment, however, failed to satisfy opponents of the bill who feared that a utility might still be compelled to wheel competing power *by a court* in an action (such as the one at bar) brought by someone other than the FPC. As one witness testified:

> "[The proposed amendment] does not cover it at all. It merely provides that the Federal Power Commission could not compel any company to transmit such energy. All this does is to say that the power commission's powers shall not be invoked to compel it. But the power of the Interstate Commerce Commission, for instance, is not invoked to compel a railroad to accept a shipment of goods. Any Federal court can do that because that is the law. And this is the law under section 202(a)." (Add. 27).

Consequently, in order to ensure that no utility could possibly be placed in the position in which Otter Tail now finds itself, Congress eliminated from Part II of the Federal Power Act any provision which, in Congress' view, might have allowed the FPC or a court to impose a duty to wheel on a private power company. There can be no question as to Congress' intent in excising these sections. During the floor debate Senator Wheeler, sponsor and manager of the legislation in the Senate, plainly stated:

> "Likewise there was a provision in the bill making transmission lines common carriers. That was stricken out, I may say, at my suggestion, because I did not think that at present transmission lines should be held to be common carriers." (Add. 28).

Similarly, the Senate Report accompanying the Public Utility Act of 1935 explicitly stated that, in eliminating

Sections 202(a) and 203(b) of the original bill, the legislators intended to rely solely upon "*voluntary coordination*" and to relegate wheeling to the realm of "*voluntary action.*" (Add. 27-28).

The foregoing legislative history—and the policy against forced wheeling that it embodies—have been recognized by this Court, *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 313 n. 23 (1953)[36] by the Federal Power Commission itself, *City of Paris, Kentucky* v. *Kentucky Utilities Co.*, 41 FPC 45 (1969); *Village of Elbow Lake* v. *Otter Tail Power Co.* (A. 187-203), and by several circuit courts of appeal, *Florida Power Corp.* v. *FPC*, 425 F.2d 1196 (5th Cir. 1970), *rev'd in part on other grounds sub nom. Gainesville Utilities Department* v. *Florida Power Corp.*, *supra*; *Otter Tail Power Co.* v. *FPC*, 429 F.2d 232, 235 (8th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971). *See also City of Paris, Kentucky* v. *FPC*, 399 F.2d 983 (D.C. Cir. 1968). That legislative history conclusively demonstrates Congress' specific intent that a utility (such as Otter Tail) not be legally required to wheel the power of a government agency (such as the Bureau of Reclamation) to a municipality (such as Elbow Lake or Hankinson).

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[36] *See also* Federal Power Commission v. Idaho Power Co., 344 U.S. 17 (1952), where the FPC sought to condition the issuance of a license for a hydroelectric project under Part I of the Federal Power Act upon the utility's agreement to wheel in certain circumstances. The D. C. Circuit had stricken the condition, basing its decision largely upon the legislative history of Part II of the Federal Power Act. 189 F.2d 665 (1951). This Court reversed, not because it disagreed with the D. C. Circuit's reading of Congress' intent, but because it found that the intended restrictions had no application to the conditioning of a license under Part I of the Act. This Court's decision in *Idaho Power* has thus been construed by the Federal Power Commission as an affirmance of Congress' intent not to require forced wheeling—as distinguished from Congress' acceptance of voluntary wheeling undertaken by agreement. City of Paris, Kentucky v. Kentucky Utilities Co., *infra*.

It was plainly *not* Congress' intent to withhold the power to compel wheeling from the FPC while allowing the very same obligation to be imposed by the courts in enforcing anti-trust or other laws. Indeed, it was precisely in order to preclude the possibility of any such judicial action that the proposed amendment to limit the FPC's powers was rejected as inadequate; and Congress instead eliminated all provisions which might allow the use of transmission facilities to be compelled, either by the Commission, or by the courts.

In taking such action, Congress proceeded upon the understanding that no existing law, such as the Sherman Act, required utilities to wheel in any event, regardless of how the Federal Power Act might be amended. Certainly no witness at the House or Senate Hearings suggested this possibility. On the contrary, Judge DeVane specifically testified that no legal obligation to wheel then existed and that the industry practice in the field was based on voluntary agreement. (Add. 21). Commissioner Seavey similarly testified that private power companies could be required to transmit government power only if Congress enacted an additional, particular provision to that effect. (Add 22-24).

If the district court's holding on the wheeling issue is correct, the proceedings in the 74th Congress were nothing more than an exercise in futility. Under the court's view, the provisions as to compulsory wheeling in the original draft of Part II of the Federal Power Act were unnecessary—an absolute duty to wheel having existed since the enactment of the Sherman Law in 1890—and the elimination of those provisions was thus totally without effect. In other words, the thousands of pages of House and Senate Hearings at which scores of witnesses testified and legislators carefully deliberated on the merits of the proposed bill would amount to nothing more than a great deal of sound and fury, signifying nothing beyond a mammoth waste of time and effort. Surely, any such interpretation of the Sherman Act, which would make a mockery of the legislative process, must be rejected.

The plain fact is that Congress refused to enact compulsory wheeling in 1935 because it determined that the imposition of such a duty would be inimical to the national welfare. As demonstrated above, it was the consensus at the House and Senate Hearings that involuntary wheeling would adversely affect the utility industry and the public generally, the harmful consequences in question being the same regardless of whether the obligation to wheel emanates from the FPC enforcing the Federal Power Act or (as here) from a court applying the antitrust laws. Consequently, as the Senate Report plainly states, Congress determined that wheeling should be a matter of *voluntary* action on the part of the utilities rather than something which could be compelled by the operation of any law. The decision below is directly contrary to this congressional determination and therefore clearly erroneous.

B. Since 1935 Congress Has Repeatedly Reaffirmed Its Intent That Forced Wheeling Should Not Be Imposed On Private Utilities.

Numerous bills were introduced in the 88th through 92nd Congresses which, in one form or another, would have imposed a duty to wheel on private utilities. Thus far, Congress has declined to enact any of this proposed legislation into law.

In 1963, two identical bills were introduced in the 88th Congress (S. 350 and H. R. 2101)[37] which would have conditioned the issuance of certificates of convenience and necessity for extra-high-voltage interstate transmission lines upon an applicant's willingness to make its excess capacity "available on a common carrier basis for the transmission of other electric energy." (Add. 28-29). Though both bills died in committee, they were reintroduced in

[37] The relevant sections of the wheeling bills introduced in the 88th through 92nd Congresses, as well as pertinent excerpts from the hearings with respect thereto, are set forth at Add. 28-51.

the 89th Congress as S. 1472 and H. R. 2072. At this same session, two alternative bills were also introduced (S. 2140 and H. R. 7791) which likewise would have conditioned the issuance of certificates for extra-high-voltage transmission, but which did not provide expressly for wheeling. (Add. 29-30).

Many municipal power advocates testified at the hearings on the Senate bills. *See Hearings on S. 1472, S. 2139 and S. 2140 Before the Senate Comm. on Interstate Commerce*, 89th Cong., 2d Sess. (1966). (Add. 30-40). Among others, the Legislative Director of the American Public Power Association criticized S. 2140 for its failure to impose a specific duty to wheel. (Add. 38-39). To support his argument, this witness described the same events involving the Town of Hankinson which the district court relied upon in arriving at its decision in the case at bar. (Add. 39). Presented with these facts, Congress declined to enact the bill which the public power proponents advocated (S. 1472).

On the other side, those opposed to wheeling presented many of the arguments which had been successfully urged before Congress in 1935,[28] as well as pointing out the planning problems and reduced reliability which would result if the component parts of an integrated system could be used by third parties. (Add. 30-33).[29] In addition, FPC Chairman White testified *against* an invariable duty to wheel, stating:

> ". . . this type of condition is not appropriate in every case. There is no doubt in my mind that the Commission could act more efficiently to protect the public interest if it were free to choose among methods of guaranteeing participation in the projects it would certificate to all whose participation would be in the public interest. In some cases, for example, joint construction and ownership of a line might be a better solution than 'common carrier' status imposed by statute." (Add. 35).

[28] *E.g.*, that wheeling would put private industry at a competitive disadvantage and lead to the erosion of its retail mo (Add. 33-35).

[29] Significantly, Senator Metcalf, sponsor of S. 1472, defended his bill in this regard by pointing out that (unlike the Judgment in the instant case) the proposed legislation would only apply to *"excess"* transmission capacity. (Add. 36).

The Justice Department responded to the FPC in the form of a letter from then Deputy Attorney General Ramsey Clark to Senator Magnuson, Chairman of the Senate Commerce Committee. Mr. Clark wrote:

> ". . . we favor an amendment to the bill to require a certificate holder to transmit power to anyone who requests it and wheel power for anyone who tenders it. However, the Federal Power Commission . . . has indicated that this type of condition is not appropriate in every case. * * * As an alternative we would, therefore, recommend that the bill be amended to provide that if any certificate holder refuses to transmit or wheel power the Commission shall hold hearings to determine if such refusal was justified—taking into consideration the burden upon the certificate holder to transmit the power and his duty to act in the public interest. Also, the Commission should be given the power to require the wheeling or transmission of power, prorated if necessary, where the refusal is found to be unjustified." (Add. 40).

In other words, the Justice Department took a far more moderate position before Congress than it has taken in the case at bar, advocating at that time only a conditional duty to wheel subject to FPC discretion. Nevertheless, the Department failed to convince Congress to enact the legislation which it proposed.

In 1967, S. 1472 and H. R. 2072 (providing for an express wheeling condition) were reintroduced in the 90th Congress as S. 1834 and H. R. 2311; and S. 2140 (providing for a general FPC power to condition certificates) was

reintroduced as S. 1835. In addition, Congressman Moss, among others, introduced the Electric Power Reliability Act of 1967 (H. R. 12322), which would have empowered the FPC to order wheeling, after notice and hearing, if it found that such action was necessary or appropriate to carry out the objectives of the Act, and that no undue burden would be placed on the utility as a result. (Add. 40-41).[40] At the hearings on these various bills, public power advocates again testified in favor of wheeling; and industry representatives and others (including state regulatory officials) testified—successfully—on the other side. *See Hearings on S. 1931 and Related Bills Before the Senate Comm. On Interstate Commerce*, 90th Cong., 1st Sess. 16, 26 (1967) (Add. 41-43). *See also* 113 Cong. Rec. 22513-22519 (1967) (remarks of Congressman Moss).

In 1969, the substance of the "Electric Power Reliability Act" was reintroduced in a number of bills in the 91st Congress (S. 1071, H. R. 7016, H. R. 7032, H. R. 7186 and H. R. 9557). In addition, the Electric Power Coordination Act was introduced as H. R. 12585, proposing an express congressional policy in favor of wheeling and the imposition of common carrier status on transmission lines. (Add. 44-45). Again, hearings were held, *see Hearings on H. R. 7186 and Related Bills Before the Communications and Power Subcomm. of the House Interstate and Foreign Commerce Comm.*, 91st Cong., 1st & 2d Sess. (1971) (Add. 45-49); and again all of the proposed bills died in committee.

At least seven proposed wheeling bills are now pending before the 92nd Congress: four (S. 294, H. R. 605, H. R. 3838 and H. R. 5941) to enact the Electric Power Realiability Act giving the FPC power to order wheeling; one (H. R. 6972) to enact the Electric Power Coordination Act imposing common carrier status on transmission lines

[40] Another version of the Electric Power Reliability Act which did not provide for wheeling was introduced in the Senate as S. 1934.

and two (S. 2324 and H. R. 9970) to enact the National Power Grid Act, which, *inter alia*, would create regional bulk power supply corporations and require those entities to insert wheeling conditions in their contracts with private utilities. (Add. 49-50). Hearings have already been held, *see Hearings on H. R. 5277 and Other Bills Before the Communications and Power Subcomm. of the House Interstate and Foreign Commerce Comm.*, 92nd Cong., 1st Sess. (1971), with the advocates for and against forced wheeling once again laying their arguments and evidence before Congress. (Add. 50-51). Since the 92nd Congress is still in session, the fate of the various wheeling proposals (all still in committee) remains uncertain.

In sum, Congress has repeatedly reaffirmed its determination that forced wheeling should not be imposed. Surely, that decision—and the democratic processes by which it was arrived at—may not be circumvented by a district court in the context of an antitrust suit.

C. The Decision And Judgment Below Are Contrary To The Manifest Intent Of Congress.

1. The district court's Judgment requires Otter Tail to wheel electricity for any municipality which makes a demand. (A. 132). This Judgment is predicated upon the court's holding that Otter Tail violated Section 2 of the Sherman Act by refusing to transmit Bureau of Reclamation power to the towns of Elbow Lake and Hankinson. (A. 36-38). Otter Tail was found to have had "dominance" over transmission with respect to these municipalities on the basis of evidence showing that the use of Otter Tail's lines provided the cheapest of the several feasible alternatives by which the towns could have secured a supply of wholesale power. *See* pages 11, 12, *supra*. On this basis, a private utility would have to wheel governmentally produced power in virtually any case where there would be an incentive for a municipality to request such service. In short, the lower court has imposed common carrier status

by judicial fiat on the transmission lines of Otter Tail in particular, and on those of electric utilities in general.

As noted above, the 74th Congress deliberately rejected the imposition of just such a common carrier obligation. Even standing alone, Congress' refusal to enact a statutory wheeling requirement would constitute decisive evidence of its intent. *See, e.g., New York Times Co.* v. *United States*, 403 U.S. 713, 721 (1971) (Douglas, J.); *id.* at 733-734 (White, J.); *id.* at 745-747 (Marshall, J). As Justice Marshall stated, "[w]hen Congress specifically declines to make conduct unlawful it is not for this Court to redecide those issues—to overrule Congress." *Id.* at 745-746. Here, Congress' intent in rejecting the wheeling sections of the 1935 bill need not be inferred; it is explicitly spelled out in a wealth of legislative history demonstrating Congress' considered judgment that under no circumstances should electric utilities be required to wheel involuntarily.

2. As in *Flood* v. *Kuhn*, 32 L. Ed. 2d 738, 744, 40 U.S.L.W. 4747, 4754 (U.S. June 19, 1972), here "remedial legislation"—to impose wheeling—"has been introduced repeatedly in Congress but none has ever been enacted." In the circumstances at bar, this plainly constitutes "something other than mere congressional silence and passivity." *Id.* The fact of the matter is that this case has been tried time and again—and indeed is still being tried—in Congress. All of the policy arguments with respect to wheeling, and even the facts at bar (*see* pages 48-49, 54, *supra*), have been presented to that body. While the district court rejected evidence that forced wheeling would result in the erosion of Otter Tail's system,[41] impair its credit and harm

[41] Although apparently accepting Congress' assessment that forced wheeling would afford governmental producers an insuperable advantage, the district court found that Otter Tail's fears of erosion were unjustified in view of the limited availability of Bureau of Reclamation power. (A. 46). The evidence at trial, however, showed that, as a matter of history, the Bureau has repeatedly

consumers (A. 666, 667, 695-722, 737-749, 935-964; DX-41, A. 1194, 1195, 738, 739, DX-96, A. 952; Dep. Ex. 287, pp. 285-287, A. 280-286), testimony to precisely the same effect (Add. 2-10, 33-35, 42-43) has thus far persuaded Congress that wheeling should be left in the realm of voluntary action. Plainly, if the law is to be changed and forced wheeling is to be imposed, Congress should be the one to make the decision.

3. Even proponents of forced wheeling have generally favored the scalpel of regulatory discretion rather than the bludgeon of an absolute duty. (Add. 35-37, 40, 50-51). In this connection, the inappropriateness of judicial law-making here is highlighted by the district court's total disregard of the practical consequences of its Judgment in terms of the continued operation of the nation's electric systems.

Numerous witnesses at the 1935 and subsequent hearings testified that forced wheeling is technologically impractical. (Add. 4, 10). A utility's transmission lines constitute a component part of its integrated system, the physical nature of electricity being such that generation, transmission and use all occur simultaneously. (Add. 2-4). Planning in terms of both operation and future investment must thus be done on a system-wide basis. (Add. 31-33, 42).

asserted its lack of capacity, but has nevertheless always increased its generating output to meet demand. (A. 410-412, 647, 648, 793, 795; Dep. GX-204A, p. 31, and Dep. GX-204C, pp. 58, 59, A. 285-286, 275, 276). Furthermore, a number of projects are presently in the planning stage which would vastly increase the supply of government power. (DX-23, A. 1181-1193, 460; Otter Tail Muller Dep. Ex. A, A. 1214-1218, 315; DX-24, A. 460; A. 437, 438, 449-460, 579-581, 617-624, 798-802, 832, 833; Dep. GX-204, pp. 50-65; Dep. GX-204D, pp. 14, 15; Dep. GX-204E, pp. 33-35, 63-68, 285-286; Dep. GX-287, pp. 266-268; A. 285-286). Whatever the future developments may be, however, nothing in the court's holding or its Judgment limits the requirement of forced wheeling to cases where it would be meaningless, *i.e.*, where there is no government power to be wheeled in any event.

If the capacity of a single transmission line is exceeded, the system as a whole—and perhaps interconnected systems as well—may shut down. (Add. 30-31).

Industry spokesmen have repeatedly testified that the necessary system planning cannot be effectuated if some component parts—*i.e.*, transmission lines—are available for use by others. (Add. 31-33). In rebuttal, the proponents of wheeling bills have pointed out that only excess transmission capacity would be affected. (Add. 36). *Compare Federal Power Commission* v. *Idaho Power Co., supra.* Opponents have replied that reliability requires reserve transmission capacity and that, for this reason among others, the term "excess" is intrinsically unrealistic. (Add. 30, 32-33).

In the case at bar, the district court's Judgment requires Otter Tail to wheel for any municipality which makes a demand, regardless of whether Otter Tail has excess capacity or not. (A. 208). The court avoids the problem which troubled Congress by simplistically stating that Otter Tail must have sufficient capacity since it served the municipalities in question at retail. (A. 107, 126). But, as the government [illegible] this point conceded, capacity which is presently sufficient may become inadequate in one, two or three years time. (A. 640, 641). Since the lines serving Otter Tail's former municipal customers are integral parts of a single transmission system, the adequacy of Otter Tail's transmission capacity must be gauged in terms of the increasing needs of all its customers, not merely the consumers residing in a particular municipality. The lower court's assertion of a dogmatic, antitrust duty to wheel on demand for all existing and proposed municipal systems thus provides no safeguard to ensure the adequate functioning of Otter Tail's system. If upheld as a rule of law, it would make it virtually impossible for private utilities to assure the continuance of reliable service, particularly in view of the problems which the industry already faces in terms of meeting the predictable and vastly expanded power needs of the nation during the remainder of this century. *See, e.g.*, FPC, 1970 National Power Survey at 1-3-4 (1972).

4. Nothing would be more contrary to Congress' intent than to construe the deletion of the wheeling provisions from Part II of the Federal Power Act as creating a regulatory "gap" to be filled by the simplistic application of antitrust. Any such interpretation would imply the existence of antitrust-derived obligations to cover precisely those areas in which Congress expressly determined that no duty should be imposed at all. By a parity of reasoning, if congressional limitation of the FPC's powers so as to preclude forced wheeling is deemed to create a "gap," then the provisos of Section 202(b), which similarly limit the FPC's discretion so as to preclude certain compulsory interconnections—i.e., those which would impose an undue burden, require increased generating facilities, impair service, or otherwise not be in the public interest—must also be viewed as creating "gaps" in the regulatory scheme, and therefore defining the proper scope of antitrust. In other words, if compelling a particular wholesale sale would not require a utility to build new generating facilities, it may be ordered by the FPC in a Section 202(b) proceeding; but if increased generating capacity would be required, the very fact that the FPC "has no authority" to order the sale, *Gainesville Utilities Department* v. *FPC*, 402 U.S. 515, 521 (1971), would empower a court to do so. Under this view, an antitrust plaintiff might be able to obtain a court order requiring a utility to sell at wholesale, if—but only if—the plaintiff could prove, as an essential element of its case, that the relief being requested would impose an undue burden on the defendant, harm other consumers or otherwise be contrary to the public interest. Obviously, any such bizarre reading of the law would completely destroy the regulatory scheme which Congress sought to create.

The fact is that Congress enacted Part II of the Federal Power Act with the specific intention of occupying the entire field of interstate transmission and wholesale sale of electric power and thereby filling the "gap" in state regulation created by the decision in *Attleboro*. *See, e.g., FPC* v. *Florida Power & Light Co.*, 404 U.S. 453, 458 (1972). In placing certain limitations on the FPC's discretion, Congress certainly did not intend to create new "gaps." Rather, these limitations represent a congressional effort to predetermine certain issues which would otherwise have been left open for the FPC to decide by applying the "public interest" standard. Such determinations are plainly no less a part of the regulatory scheme because they were made by Congress in 1935 rather than by the Commission acting today. Nor do they fail to constitute regulation because they are negative rather than positive in effect; a determination not to order an interconnection in certain defined circumstances is as much a part of the regulatory function as a determination that such action may be compelled in other situations. By the same token, Congress' determination that forced wheeling would not be in the public interest constitutes "regulation" to precisely the same extent as its contrary determination that, in certain circumstances, compulsory interconnection would be desirable.[42]

[42] Limitations with respect to the FPC's discretion and remedial powers thus in no way confine the scope of its jurisdiction. Where an applicant requests an interconnection that would be unduly burdensome, the FPC's lack of authority to grant such relief does not leave the applicant free to seek the same order from a district court; rather, the FPC retains jurisdiction to implement an arrangement which would be in the public interest. Similarly, in City of Paris, Kentucky v. Kentucky Utilities Co., 41 FPC 45 (1969), after the FPC determined that it had no power to compel wheeling, the Commission added that it nevertheless did have jurisdiction to provide proper relief in the premises, and it proceeded to order a mandatory interconnection under § 202(b). *See also* Village of Elbow Lake v. Otter Tail Power Co. (A. 187-203).

In sum, the FPC's inability to order wheeling does not constitute a regulatory "gap," and to misconstrue it as such would frustrate congressional objectives by encouraging antitrust suits to achieve precisely the kind of compulsion as to wheeling that Congress determined would be inimical to the national welfare.

5. The provision in the Amended Judgment allowing the FPC to pass on the rates, terms and conditions for forced wheeling highlights the fundamental error in the decision below. As this Court stated in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co., supra*:

> "The fact that the Congress withheld from the [Federal Power] Commission power to grant reparations does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly. There is no indication in the Power Act that that was Congress' intent." 341 U.S. at 254.

By its Judgment, the district court effectively conceded its incompetence to enter a mandatory wheeling order on its own. But it cannot lawfully seek to remedy this defect by judicially granting to the FPC all or part of the very power which Congress specifically and repeatedly has chosen to withhold.

In summary, Congress determined in 1935 that electric utilities should not be compelled to wheel power involuntarily. While the issue of whether Congress should reverse that decision has been the subject of intensive legislative debate for over a decade, Congress has thus far elected to stand by its original determination. In these circumstances, the lower court's decision and Judgment represent nothing less than an attempt to reverse Congress judicially and to pre-empt its role in deciding important matters of national policy. Such a result is "utterly inconsistent with the concept of separation of powers," and

should be reversed. *New York Times Co.* v. *United States*, 403 U.S. 713, 742 (1971).

POINT III

The Decision And Judgment Below Are Directly In Conflict With The Rulings Of This Court In *Noerr* And *Pennington*.

In *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), this Court held that the Sherman Act was intended to regulate business, not political activity. Concerted action to influence government is therefore lawful, even if the techniques used are unethical and the purpose to be achieved is clearly anti-competitive. In *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965), the Court affirmed that "[s]uch conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670.

In the instant case, the determinations which Otter Tail allegedly sought to influence were all basically political in nature. In other words, the residents of each municipality decided for or against municipal power at the polls, in their capacity as electors, rather than in the marketplace, in their capacity as purchasers. The question in each instance was not which supplier would prevail in the competitive struggle, but rather whether or not local government should simply take over the retail electric business for its citizens and thereby exclude private enterprise entirely.

If this dispute had taken place at the national level, the inapplicability of antitrust would be obvious. If Congress, for example, were actively considering the outright nationalization of all electric utilities, no one would question the right of the private companies to oppose this move by political campaigns, litigation or the refusal to volunteer the use of their facilities. But the same principles

are equally controlling when a particular municipality elects to switch from private to public ownership in a given industry. Under *Noerr* and *Pennington* the Sherman Act plainly has no place in such political controversies at any level of government.

As noted above, the district court admitted in evidence, over Otter Tail's objection, a mass of political campaign material. *See* page 13, *supra*. Far from disclaiming any reliance on this evidence, the opinion below reiterates the government charge that Otter Tail monopolized by "participating in local municipal power political campaigns." (A. 31, 32). This, by itself, constitutes sufficient grounds for reversal under *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 669-670 (1965).

With respect to the lawsuits brought or supported by Otter Tail, the district court again erred by assuming—incorrectly—that the principles articulated in *Noerr* and *Pennington* apply ". . . only to efforts aimed at influencing the legislative and executive branches of the government." (A. 41). This Court recently stated precisely the opposite in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972):

> "The same philosophy [as was expressed in *Noerr*] governs the approach of citizens or groups of them to administrative agencies . . . and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right to petition."

The circumstances at bar make the application of *Noerr* and *Pennington* especially compelling in the instant case.

1. Four of the six suits considered below involved the failure of a local government to hold an allegedly required election. Two of these were mandamus actions to compel compliance with initiative petitions. *See* pages 14-18, *supra*. Such litigations are clearly as much a part of the

political process as suits to impound contested ballots or challenges to the seating of convention delegates. *Cf., O'Brien* v. *Brown*, 41 U.S.L.W. 4001 (U.S. July 7, 1972). The decision and Judgment below thus intrude upon protected political activities as well as directly depriving Otter Tail of its constitutional right to petition. This result is not only contrary to the decisions of this Court, it also has the unfortunate effect of removing a significant check which presently ensures the integrity of the democratic process.

2. There is nothing in the instant record which could possibly bring this case within the "sham" exception to *Noerr*. In contrast to *California Motor Transport*, there is no allegation here (and a fortiori no proof) that Otter Tail "sought to bar [its] competitors from meaningful access to adjudicatory tribunals and so to usurp that decision-making process." 404 U.S. at 512. No lawsuit brought by Otter Tail has had that effect. On the contrary, the municipalities in question have repeatedly availed themselves of their own rights of free access to the courts and administrative agencies. *See* pages 15-17, 19, *supra*. The district court's Judgment has thus created the exact converse of the situation in *California Motor Transport*. The municipalities may freely seek administrative or judicial redress; but the courtroom door remains barred to Otter Tail. Such one-way access to the judicial system plainly violates the most basic guarantees of equal protection, as well as the constitutional right to petition all branches of government.

3. Again in contrast to *California Motor Transport*, the court below did not find—and the record does not show—any "pattern of baseless, repetitive claims." 404 U.S. at 513. Far from being "baseless," three of the six suits considered below were at least partially successful; and two of the three which Otter Tail lost were decided upon such technical grounds that clearly "the most which can be said . . . is that the questions litigated . . .

were debatable." *Straus* v. *Victor Talking Machine Co.*, 297 F. 791, 798 (2d Cir. 1924). *See* pages 14-16, 18, *supra*. While the sixth suit was unsuccessful on the merits, the town's subsequent attempt to recover damages on account of this litigation was rejected by both the trial and appellate courts. *See* pages 16-17, *supra*.

There is thus no evidence in this case which could conceivably lead to the conclusion that "judicial processes [had] been abused." 404 U.S. at 513. On the contrary, the record plainly shows that Otter Tail did not sue in every instance, that it had no general policy with respect to such litigation, and that each decision to bring suit was made at the highest levels and based upon a careful assessment of the merits of the particular case in question. *See* page 18, *supra*."

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[1] In light of the above facts, it is clear that the authorities relied upon by the district court totally fail to support its holding. (*See* A. 41-42). In Plastic Contact Lens Co. v. Butterfield, 346 F.2d 338 (9th Cir. 1965), *cert. denied*, 385 U.S. 1009 (1967), the court rejected the plaintiff's antitrust claim, finding "nothing in the record indicates that the claims for unpaid royalties in the suits were not made in good faith." 346 F.2d at 345. In Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965), this Court found that "the enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided the other elements necessary to a § 2 case are present." 382 U.S. at 174. The Court added, however, that good faith, including an honest mistake, would be a "complete defense." *Id.* at 177. In Kobe v. Dempsey Pump Co., 198 F.2d 416 (10th Cir. 1952), in contrast to Otter Tail's carefully considered decisions to litigate, Kobe (i) brought its action without any concrete information that the Dempsey pump in fact infringed its patents, and (ii) proceeded to amend its complaint to add a totally groundless claim based on unfair competition. *Id.* at 424. In addition to being distinguishable on its facts from the instant case, *Kobe* is contrary to Virtue v. Creamery Package Manufacturing Co., 227 U.S. 8 (1913), which held that even an infringement action brought maliciously and without probable cause would not violate the Sherman Act. *See also* International Visible Systems Corp. v. Remington-Rand, Inc., 65 F. 2d 510 (6th Cir. 1933); Straus v. Victor Talking Machine Co., 297 F. 791, 797 (2d Cir. 1924).

4. No suit brought or supported by Otter Tail has had the effect of preventing the establishment of a single municipal electric system. See pages 7, 17, 19, *supra*. Nevertheless, under the Judgment below, Otter Tail is henceforth totally barred from seeking judicial redress to protect its business from a municipal takeover, regardless of how flagrantly unlawful a particular municipality's actions may be. (A. 208). The district court has thus absolutely enjoined the exercise of a constitutional right without even the color of a compelling need in terms of the objectives of the antitrust laws.

In summary, the district court has misapplied the antitrust laws so as to dictate the outcome of essentially political disputes and to deprive Otter Tail of its right of free access to the courts. Obviously, Otter Tail's constitutional rights are no less sacrosanct where its participation in local political campaigns and litigation efforts are aimed at preventing its own ouster from a particular municipality. As this Court stated in *Noerr*:

> "A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them." 365 U.S. at 139.

Indeed, if Otter Tail is barred from going to court to contest even clearly illegal municipal action that will destroy its business, Otter Tail is also effectively being deprived of its property without due process of law and is thus being stripped of yet another constitutional guarantee. Plainly, Congress never intended the Sherman Act to supersede such basic freedoms "protected by the Bill of Rights," *id.* at 138, and the lower court's decision to the contrary is clearly erroneous.

POINT IV

The Decision Below Misconstrues The Antitrust Laws And Their Application To The Facts At Bar.

As demonstrated in the preceding pages, the district court erred in invoking antitrust so as (i) to supersede the regulatory scheme of Section 202(b), (ii) to reverse Congress' determination that involuntary wheeling will not be compelled, and (iii) to deprive Otter Tail of basic constitutional rights. In this Point we shall show that the decision below is also erroneous as a matter of antitrust law, first, because the district court misconstrued fundamental antitrust principles and, second, because it applied these mistaken concepts to an electric utility as though it were dealing with a tobacco company or shoe manufacturer, without recognizing how inapposite are traditional antitrust concepts when mechanically applied to a pervasively regulated industry.

The district court commences its antitrust analysis by quoting the definition of monopoly set out in *United States v. Grinnell Corporation*, 384 U.S. 563, 570-571 (1966), to the effect that a Section 2 offense consists of (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power. (A. 32-33). The existence of monopoly power, according to the Court, depends upon the ability to fix prices or exclude competition. (A. 32). Recognizing the patent absurdity of applying the Sherman Act to condemn a monopoly conferred by state or local grant, the court predicates its finding of a Section 2 violation on the willful maintenance of a lawful monopoly. (A. 31). How one lawfully possessing monopoly power can function without willfully maintaining it in the normal operations of its business, the court does not pause to explain. Rather, it finds that Otter Tail had maintained its monopoly power in three ways. First, Otter Tail's refusal to sell at wholesale and wheel is said to be unlawful under certain "refusal to deal" cases cited by the court.

Alternatively, a utility's refusal to wheel electricity is held to be unlawful under what the court called the " 'bottleneck theory' of antitrust law." (A. 39). Finally, Otter Tail is found to have "monopolized" by bringing or supporting certain law suits relating to the municipal power issue. In addition, the district court found that certain contracts which Otter Tail had entered into with the Bureau of Reclamation and with various rural electric cooperatives were illegal *per se* because they provided that one or both parties would wheel power for the other to certain municipalities but not to those which the wheeling party was then serving at retail.

As demonstrated below, this invocation of *per se* concepts is ridden with a multiplicity of errors.

1. In holding that Otter Tail has "monopoly power," the district court distorted the meaning of Section 2 by disregarding the substantive evils at which the statute is aimed. Although it correctly observed that an essential element of a monopoly condemned by the Sherman Act in the unregulated sector is the ability to fix prices or exclude competition (A. 32), the court never paused to consider whether Otter Tail—a regulated utility—actually has such power. In fact, Otter Tail does not possess the power to "fix prices." In Hankinson, Finley and Velva—the only towns considered below which Otter Tail is still serving at retail—its rates are thoroughly regulated by the North Dakota Public Service Commission.[45] In South Dakota[46] and Minnesota[47] its retail rates are regulated at the municipal level. Throughout its service area, Otter Tail may sell at wholesale only at rates and upon terms and conditions approved by the Federal Power Commission. 16 U.S.C. §§ 824, 824d-824g. It is thus a contradiction

[45] N. D. Century Code, §§ 49-02-01 to -03, -15 to -20 (1960), *as amended* (1971 Supp.).

[46] S. D. Compiled Laws § 9-35-1 (1967).

[47] Minn. Statutes §§ 300.03-04, 454.041-.043 (1967).

in terms to speak of the power to fix prices in a regulated industry context where the regulatory bodies are the ones that determine how much a company may charge. In this setting, regulation provides a surrogate control over price in lieu of the competition which antitrust is designed to foster.

Otter Tail's power to exclude competition is likewise limited as a matter of law by state and federal regulation;[48] and its impotence in this regard is demonstrated as a practical matter by the fact that every municipality considered below which voted for public power now has its own electric system. *See* pages 7, 17, 19, *supra*. In fact, the power to exclude competition in this case rests solely with the municipalities, since it is they who may terminate Otter Tail's franchises and take over its retail business if they choose to do so.

In short, the regulatory framework within which Otter Tail operates is of determinative significance. It is obviously meaningless to characterize a regulated utility as a "monopolist" without regard to the state and federal laws which deprive it of the very indicia of monopoly power that the Sherman Act proscribes.

2. The folly of a simplistic application of *Grinnell* is that it would make it an antitrust violation for a utility to take any action to preserve or expand its system to meet the needs of the public. For example, under *United States v. Aluminum Co. of America*, 148 F. 2d 416, 430-31 (2d Cir. 1945), the persistent and continued increase of capacity to meet expanded demand was deemed the equivalent of exclusionary maneuvers. Yet such expansion of capacity is precisely what every electrical utility in the United States is trying to accomplish today and, indeed, must accomplish if massive blackouts and brownouts are

[48] *See, e.g.*, N. D. Century Code §§ 49-02-02 thru 49-02-04, 49-02-15, 49-04-01 thru 49-04-02, 49-04-07; S. D. Compiled Laws §§ 49-41-9.1 thru 49-41-9.8 (1972 Supp.); 16 U.S.C. §§ 824d, 824e.

to be avoided. The rigid application to electric utilities of rules established in other, quite different, industrial contexts will thus inevitably serve to undermine policies of crucial importance to the national welfare.

3. The alternative market analyses which the court relied upon in lieu of a meaningful examination of Otter Tail's true economic position are both also erroneous in themselves. The court's finding that each municipality constitutes a separate "relevant market" is plainly a *reductio ad absurdum*. If Otter Tail is a monopolist as to the municipalities it still serves, then each municipal power system is likewise a monopolist in its particular town. Certainly nothing in the Sherman Act suggests a preference for unregulated,[49] public monopolies as opposed to private, regulated ones.[50] It is an unavoidable fact that the practicalities of electrical distribution generally require that a small town be served by a single system. But to regard this circumstance as a sufficient predicate for invoking Section 2 of the Sherman Act would make it equally unlawful both for a municipality to seek to replace Otter Tail and for Otter Tail to defend itself against such a total ouster. Under the district court's analysis, any such effort by either side would have to be condemned as a willful attempt to acquire or maintain monopoly power. (A. 32-33).

[49] Municipalities are generally exempt from state and federal regulation. *See, e.g.*, N. D. Century Code, § 49-02-01.1; 16 U.S.C. § 824(f). Municipal regulation obviously has no application where the municipality itself takes over the business of furnishing electricity at retail.

[50] In this connection, it is incongrous that the district court's Judgment would enjoin Otter Tail from litigating with, or refusing to sell at wholesale or wheel to, established municipal electric systems—such as Elbow Lake's—which have already assumed a "monopolistic" position. (*See* A. 130). It is surely a strange antitrust decree which serves to support entrenched "monopolists" in this manner.

Furthermore, to the extent that public versus private power disputes may be regarded as "competition",[51] the entity whose custom is being competed for is the town as a whole, rather than each resident acting individually. In other words, the citizens of a particular municipality must make a collective decision as to whether their town will be served by Otter Tail, or will establish its own electric system. The municipality's business can only be won or lost as an indivisible unit, on an all or nothing basis. In this context, the lower court's construction of the Sherman Act—which would prohibit any attempt to gain or preserve the patronage of a particular municipality—in effect makes competition a *per se* offense. Surely, Congress never intended that the antitrust laws be given such a bizarre reading.

The error of the district court's holding that Otter Tail may not defend its business in particular municipalities is further demonstrated by the decision of the First Circuit in *Union Leader Corporation* v. *Newspapers of New England, Inc.*, 284 F. 2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961). Dealing with the activities of competing newspapers in a small town which could support only one paper, the court held:

> "We do not think the fact that competition is in a natural monopoly climate can limit a defendant's right to defend itself. We have already pointed out that Union Leader was not restricted by this circumstance. What is sauce for the goose is sauce for the gander, and, while there may be two different flavors, the stock is the same. In the one situation we have recognized that entry into a monopoly market without more does not taint otherwise legal conduct; now we are saying that the existence of such a market cannot circumscribe conduct which might otherwise be justified as defensive. Essentially, we refuse to permit the inevitable

[51] As shown in Point III, *supra*, the outcome of such controversies are determined by the citizens of the town acting as electors in the political process rather than as purchasers in the market milieu to which the word "competition" normally applies in antitrust.

monopoly to give either competitor a fortuitous advantage." 284 F. 2d at 587.

The First Circuit's reasoning is a fortiori applicable to the instant case where each municipality is not only a natural monopoly but also the very unit whose collective "purchasing decision" competitors may seek to influence.

4. Apparently recognizing the conceptual difficulties of regarding each municipality as a separate market, the district court held in the alternative that the relevant geographical market consists of all towns in Otter Tail's service area. (A. 33, 34; Findings 187, 188, A. 87, 88). Here, however, it was able to attribute monopoly power to Otter Tail only by the patently illogical device of counting all towns as equal units regardless of their size. *See* page 6, *supra*. Applied to other industries, this analysis would condemn as a "monopolist" a vendor of machinery which sells twenty units to twenty small companies while its competitor sells two hundred units to the three or four largest firms. Based upon the more rational standard of the kilowatt hour volume of its total retail sales, Otter Tail commanded only 28.9% of the market in question (DX-94, A. 1204-1210, A. 873)—hardly a monopolist's share.[52]

[52] Although the alternative relevant market urged by the government was said to be "the towns in the Otter Tail service area" (A. 33), the district court's computation is not in fact based upon all such towns, but rather upon a highly limited selection. The court thus eliminated all municipalities served by other investor-owned systems on the ground that these utilities do not compete for the business of municipalities served by Otter Tail. (A. 90; *but see* A. 897, 898, 912, 913). The court further suggested that the 105 towns served by rural electric cooperatives likewise not be counted since REA's purportedly also do not compete as to Otter Tail's municipalities. (A. 34). By a parity of reasoning, towns having their own municipal systems should likewise be omitted since they do not typically seek to expand service to other political subdivisions. Thus, as with its finding that each municipality constitutes a separate market, the court's analysis resolves itself to the absurdity that every electrical supplier is a monopolist as to its own customers.

5. The court further erred in its holdings as to the particular means by which Otter Tail purportedly "monopolized". As shown in Point II, *supra*, the court's imposition of a duty to wheel directly contravenes Congress' clear policy determination on the very same subject. The court's holding as to wheeling is also erroneous, however, as a matter of antitrust law. Here, the court relied upon the so-called "bottleneck theory" devised by a British civil servant, A.D. Neale (*see* Neale, THE ANTITRUST LAWS OF THE U.S.A. 131-137 (1960)) (A. 39). In fact, no such theory has ever been recognized by the courts, and none of the cases cited by either Mr. Neale or the district court support the conclusion that antitrust requires a company to make its individually-owned capital facilities available to competitors. To the extent they involve the use of capital facilities at all,[53] the illegality found in these decisions is invariably predicated upon an unlawful combination or group boycott.

In *United States* v. *Terminal Railroad Association*, 224 U.S. 383 (1912),[54] for example, a group of railroads joined

[53] The refusal to deal cases cited by Mr. Neale and the court all involve a refusal to buy or sell products or services—not a refusal to allow competitors the use of the defendant's own capital assets. *See, e.g.*, Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); United States v. Klearflax Linen Looms, Inc., 63 F. Supp. 32 (D. Minn. 1945); Packaged Programs, Inc. v. Westinghouse Broadcasting Co., 255 F.2d 708 (3rd Cir. 1958); Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc., 365 F.2d 478 (5th Cir. 1966). Thus, while the court held in *Lorain Journal* that a newspaper may not seek to maintain its monopoly position by refusing to sell advertising to customers who also advertise with a competing radio station, the case nowhere suggests that Lorain Journal had a duty to affirmatively help its competitor take away particular accounts by (for example) furnishing it with confidential customer lists.

[54] *See* A. 39; Neale, *supra* at 131-132.

together in the defendant association to acquire for their own exclusive use all of the bridges whereby competitors might gain access to the City of St. Louis. The Court found that such *concerted* activity conducted for a plainly anticompetitive purpose "resulted in a *combination* which is in restraint of trade within the meaning and purpose of the Anti-Trust Act." *See* 224 U.S. at 394 (emphasis added).

Similarly, in *Associated Press* v. *United States*, 326 U.S. 1 (1945),[55] the government attacked as a contract in restraint of trade that portion of AP's by-laws which made it virtually impossible for a newspaper to join the association if a competing newspaper in the same community was already a member. Under the by-laws, this meant that the excluded newspaper was not only deprived of the AP wire service, but also that all member papers were forbidden to supply it with news on an exchange basis. The Court held:

> "While it is true in a very general sense that one can dispose of his property as he pleases, he cannot 'go beyond the exercise of this right, and *by contracts or combinations, express or implied*, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade.' . . . The Sherman Act was specifically intended to prohibit independent businesses from becoming *'associates'* in a *common plan* which is bound to reduce their competitor's opportunity to buy or sell the things in which *the groups* compete. Victory of a member of such a *combination* over its business rivals achieved by such *collective means* cannot consistently with the Sherman Act or with practical, everyday knowledge be attributed to *individual* 'enterprise and sagacity'; such hampering of business rivals can only be attributed to that which really makes it possible—*the collective power of an unlawful combination.*" 326 U.S. at 15 (emphasis added).[56]

[55] *See* Neale, *supra* at 68-72.

In sum, the decision below propounds a radically new and totally unprecedented principle of antitrust law which, if affirmed, would drastically alter the ground rules by which business is conducted in this country. The district court's holding in this regard is predicated upon its finding that Otter Tail had "dominance" over transmission with respect to two towns (Elbow Lake and Hankinson),[57]

[56] Ganco, Inc. v. Providence Fruit & Produce Building Inc., 194 F.2d 484 (1st Cir. 1952) (*see* A. 39; Neale, *supra* at 132), again involved a jointly controlled facility—this time a building used as a marketplace and operated, in effect, as a cooperative by wholesale fruit and produce merchants in the City of Providence. A price-cutting wholesaler brought suit against the jointly owned building corporation upon the latter's refusal to renew his lease. While the court found that the exclusion of this wholesaler from the marketplace violated the Sherman Act, the decision is plainly predicated upon the facts of joint ownership and concerted conduct involved in that case. The court certainly did not suggest that an individual vendor who had his own building would have to grant access to competitors. Macy's is under no antitrust duty to give floor space to Gimbel's, even if Macy's happens to be the only department store to open an outlet in a particular suburban community.

[57] The district court discusses at some length the number of miles of the various types of transmission lines included in Otter Tail's system. (A. 34-36). All of these lines taken together amount to only 8% of the total mileage of electric lines in Otter Tail's marketing area. *See* page 9, *supra*. Furthermore, although the court found that Elbow Lake and Hankinson could not be served by 12.5 kv. lines (A. 36), the fact is that such distribution facilities were perfectly adequate with respect to all four of the other towns which the district court considered in any detail. *See* pages 8-9, *supra*. The record thus contains no evidence that Otter Tail had dominance over transmission with respect to a single town other than Elbow Lake and Hankinson. As demonstrated above, Otter Tail in fact did not even have dominance with respect to these municipalities. *See* pages 8-13, *supra*.

both of which had feasible (although somewhat more expensive) alternatives available. *See* pages 10-12, *supra*. On this basis, a business would be under an obligation to allow access to any advantageous capital asset (whether a distribution system, a laboratory, or a trade secret) wherever such use would be economically desirable for its competitors. Surely Congress never intended that the Sherman Act compel such a sweeping communalization of private property.

6. The district court likewise erred in holding that Otter Tail's refusal to furnish wholesale power to municipalities is unlawful under the "refusal to deal" cases. (A. 38, 39). *See Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951); *United States* v. *Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (D. Minn. 1945). These cases, in effect, provide an analogue in the unregulated sector to the statutory duty to serve in regulated industries. It has never been suggested that such decisions are applicable where, as here, there is a specific legislative enactment setting forth the circumstances and conditions under which the duty to sell at wholesale may be decreed. *See* Point I, *supra*. Furthermore, none of the "refusal to deal" cases require that a company which is in the business of selling at retail must sell at wholesale to its competitors or former retail customers. Combined with its holding as to wheeling, this aspect of the lower court's decision would, for example, require a department store to aid potential competitors by furnishing them with both retail outlets and stocks of merchandise at wholesale prices. No court has heretofore even suggested that this is the law.

7. The district court again erred in holding that Otter Tail's contracts with the Bureau of Reclamation and various rural electric cooperatives were illegal *per se*

because the parties agreed to allow their transmission lines to be used for certain purposes, but not for the transmission of competing energy to their existing customers. The court assumed, without analysis, that such arrangements constitute agreements "to allocate customers or territories". (A. 43). In fact, they are nothing of the kind. In no case did any party bind itself to refrain from selling in any area or from soliciting the business of any customers. *Cf. United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972); *Montana-Dakota Utilities Co.* v. *Williams Electric Cooperative*, 263 F. 2d 431 (8th Cir. 1959). All that the parties did was to allow others to use their property upon the reasonable condition that the facilities in question would not be utilized to harm them competitively. If any supplier wished to compete without using the other's property—that is, by building its own lines or using those of a third party—it remained perfectly free to do so.

Unlike market allocations, conditions such as those at bar which are ancillary to the purchase or use of another's property, have never been held to violate the antitrust laws. On the contrary, the legality of such restrictions has been recognized in innumerable decisions both before and since the enactment of the Sherman Act. As stated by Judge (later Chief Justice) Taft in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899):

> ". . . covenants in partial restraint of trade are generally upheld as valid when they are agreements . . . by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold. . . ."

Similarly, as this Court held in *Oregon Steam Ship Navigation Co.* v. *Winsor*, 87 U.S. 64, 68 (1873):

> ". . . a stipulation by the vendor of an article to be used in a business or trade in which he is himself engaged, that it shall not be used within a reasonabl

region or distance, so as not to interfere with his said business or trade, is also valid and binding."

See also Tri-Continental Finance Corp. v. *Tropical Marine Enterprises, Inc.*, 265 F.2d 619 (5th Cir. 1959).

The agreements to allow the use of transmission lines in the instant case are legally indistinguishable in this regard from any other form of lease of real or personal property. They are thus governed by the well settled principle of the common law, which was codified by the Sherman Act (*Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 498 (1940); *United States* v. *American Tobacco Co.*, 221 U.S. 106, 179 (1911); *Addyston Pipe & Steel Co.* v. *United States*, 85 F. 271, 279, 281-282 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899)), that a covenant by a lessee not to use the leased property to compete with the lessor, is not an unreasonable restraint of trade. *See* RESTATEMENT OF CONTRACTS § 516 (1932); 6A CORBIN ON CONTRACTS § 1389 (1962); 14 WILLISTON ON CONTRACTS § 1642 (3d ed. 1972). *See also Hondfinger* v. *Steveluw Realty Corp.*, 102 N.Y.S. 2d 688 (Sup. Ct. 1950); *California Bldg. Co.* v. *Holic*, 80 Cal. App. 2d 229, 181 P.2d 404 (Dist. Ct. App. 1947). Numerous other decisions upholding a wide variety of restrictions on the use which may be made of leased premises by the lessee are collected in Annot., 148 A.L.R. 583 (1944).[58]

[58] A covenant not to compete on the part of the lessor similarly does not constitute an unreasonable restraint. Export Liquor Sales, Inc. v. Annex Warehouse Co., 426 F. 2d 251 (6th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971); Annot., 97 A.L.R.2d 4, 14 (1964). *See also, e.g.*, Utica Square, Inc. v. Kenberg's Inc., 330 P. 2d 876 (Okla. 1964); Uptown Food Store, Inc. v. Ginsberg, 255 Iowa 462, 123 N.W.2d 59 (1963); Vaughan v. General Outdoor Advertising Co., 352 S.W.2d 562 (Ky. 1961); Nagy v. Ginsberg, 282 App. Div. 842, 124 N.Y.S. 2d 400 (2nd Dep't 1953); Berman v. Bergenfield Plaza, Inc., 16 N.J. Super. 520, 85 A. 2d 222 (Super. Ct. 1951); Lien v. Northwestern Engineering Co., 73 S.D. 84, 39 N.W.2d 483 (1949); Goldberg v. Tri-States Theatre Corp., 126 F. 2d 26 (8th Cir. 1942).

(footnote continued on following page)

In short, the district court fundamentally misconceived the nature of the contracts in question, and thus erred as to the consequent legal effects.

8. Throughout its decision, the district court relies exclusively on mechanical *per se* concepts and eschews any reasoned analysis based upon the particular economic realities and congressional objectives relevant to electric utilities. The court thus disregards the special problems of "those areas, loosely spoken of as natural monopolies or—more broadly—public utilities, in which active regulation has been found necessary to compensate for the inability of competition to provide adequate regulation." *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 92 (1953). As one court of appeals has observed, the enactment of Part II of the Federal Power Act "evidences congressional recognition that competition can assure protection of the public interest only in an industrial setting which is conducive to a free market and can have no place in industries which are

(footnote continued from preceding page)

Similar restrictions have been upheld with respect to vendees of real property, *see, e.g.* Boughton v. Socony Mobil Oil Co., 231 Cal. App. 2d 188, 41 Cal. Rptr. 714 (Dist. Ct. App. 1964); Colby v. McLaughlin, 50 Wash. 2d 152, 310 P.2d 527 (1957); Carneal v. Kendig, 195 Va. 605, 85 S.E. 2d 235 (1955); Stachler-Kempf Oil Co. v. Mac's Auto Mart, Inc., 329 Mich. 351, 45 N.W.2d 346 (1951); Calumet Council Bldg. Corp. v. Standard Oil Co., 167 F.2d 539 (7th Cir. 1948); Dick v. Sears-Roebuck & Co., 115 Conn. 122, 160 A. 432 (1932); Hodge v. Sloan, 107 N.Y. 244, 17 N.E. 335 (1887), and vendees of chattels, *see, e.g.*, United States v. Newbury Mfg. Co., 36 F. Supp. 602 (D. Mass. 1941), *motion to vacate judgment denied*, 123 F.2d 453 (1st Cir. 1941); Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 A. 631 (1937); Meyer v. Estes, 164 Mass. 457, 41 N.E. 683 (1895); Gano v. Delmas, 140 Miss. 323, 105 So. 535 (1925), as well as vendors, *see, e.g.*, Hercules Powder Co. v. Continental Can Co., 196 Va. 935, 86 S.E. 2d 128 (1955); Bogart v. Caldwell, 66 So. 2d 629 (La. Ct. App. 1953); Raney v. Tompkins, 197 Md. 98, 78 A. 2d 183 (1951); Lampson Lumber Co. v. Caporale, 140 Conn. 679, 102 A. 2d 875 (1954).

monopolies because of public grant, the exigencies of nature, or legislative preference for a particular way of doing business." *Pennsylvania Water & Power Co.* v. *FPC*, 193 F.2d 230, 234 (D.C. Cir. 1951), *aff'd*, 343 U.S. 414 (1952).

The irrational results flowing from a simplistic application of antitrust to the complex facts of a regulated industry are proof positive that antitrust is inapposite to the issues at bar, that the procedures and criteria set forth in Section 202(b) must be deemed exclusive as to compulsory wholesaling and that the congressional policy against forced wheeling must not be subverted. Thus, the district court's imposition on Otter Tail of an absolute duty to sell at wholesale and wheel to all municipalities, regardless of the circumstances, not only contravenes Congress' intent; it also directly subverts the most essential objectives of the Federal Power Act. For example, the court refused even to consider the erosion and possible destruction of Otter Tail's business as a factor relevant to its decision. (A. 45). It thus failed to take account of the effects of its Judgment on those of Otter Tail's customers who either do not wish, or are unable, to establish their own power companies. An electric utility is able to furnish economic service only if enough customers are available to share the fixed costs of generation and distribution. As municipalities begin to opt out of Otter Tail's system, those who remain will necessarily have to pay increasingly higher rates to maintain service. It would be difficult to conceive of a result more at odds with the aim of protecting "power consumers against excessive prices" which this Court has recognized as a "major purpose of the whole [Federal Power] Act." *Pennsylvania Water & Power Co.* v. *FPC*, 343 U.S. 414, 418 (1952).

The district court invoked a similar *per se* rule to condemn Otter Tail's contracts with the Bureau of Reclamation and rural electric cooperatives. (A. 43, 95, 98, 99, 208, 209). As a result, Otter Tail is enjoined from enforcing

or claiming any rights under these agreements, and utilities will be unable to enter into any similar arrangements in the future unless they are willing to risk having their own facilities used against them. The district court's blind application of antitrust has thus created a major obstacle to "the voluntary interconnection and coordination of facilities" which Congress has expressly sought "to promote and encourage." Federal Power Act § 202(a).[59]

In sum, the district court's decision is totally at odds with the principles which Congress intended to govern in an area of crucial importance to the national welfare. The simple fact is that no *per se* rule can assure "an abundant supply of electric energy throughout the United States" in accordance with Federal Power Act goals. This objective can only be achieved by the specialized expertise and informed discretion of the FPC operating within the regulatory framework which Congress provided. The district court has in effect sought to use a sledgehammer on a mechanism requiring the careful application of precision tools. The resulting chaos is unjustifiable as a matter of antitrust, and destructive of the nation's welfare.

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[59] The district court has even applied an erroneous *per se* notion to enjoin the exercise of essential constitutional rights. As a result, and even though it has never abused judicial processes, Otter Tail is permanently and unconditionally barred from seeking judicial redress in the protection of its business.

CONCLUSION

For The Reasons Stated Above, The Decision Below Should Be Reversed And Remanded With Instructions To Dismiss The Government's Complaint.

Respectfully submitted,

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No. 71-971

In the Supreme Court of the United States

OCTOBER TERM, 1971

OTTER TAIL POWER COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

BRIEF OF AMICUS CURIAE FOR THE CITY OF CASSELTON AND
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OTTER TAIL POWER COMPANY, APPELLANT

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UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF OF FEDERAL POWER COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANT

OPINION BELOW

The opinion of the district court (App. 1-21)[1] is reported at 331 F. Supp. 54.

JURISDICTION

The Court below entered Findings of Fact and Conclusions of Law (App. 22-107) and its Original

[1] "App." references are to the appendix to the jurisdictional statement filed by Appellant Otter Tail Power Company, No. 71-991.

Judgment (App. 108-111) on October 22, 1971. By order dated November 10, 1971, the Court below denied Otter Tail Power Company's (Otter Tail) motion for new trial or amended findings and conclusions and amended judgment, except to the extent it modified its judgment to require the Federal Power Commission's approval of the terms and conditions of any wholesale or wheeling service (App. 112-13). The amended judgment was entered November 10, 1971 (App. 114-17). Otter Tail filed a Notice of Appeal in the District of Minnesota, Sixth Division, on December 7, 1971 (App. 118-19). This Court noted probable jurisdiction on May 22, 1972. 40 U.S.L.W. 3556. The jurisdiction of this Court is invoked under 15 U.S.C. § 29.

QUESTION PRESENTED

Whether the Federal Power Commission has primary jurisdiction under the Federal Power Act to order compulsory interconnections with public utilities subject to its jurisdiction and to consider anticompetitive factors in determining whether a compulsory interconnection is in the public interest.

STATUTES INVOLVED

Sections 201 and 202 of the Federal Power Act, 16 U.S.C. §§ 824 and 824a, and Section 2 of the Sherman Act, 15 U.S.C. § 2, are set forth in this brief's appendix, *infra*, pp. 26-32.

STATEMENT

This case involves the primary jurisdiction of the Federal Power Commission (Commission) under Section 202 of the Federal Power Act, 16 U.S.C. § 824a, to order a public utility subject to its jurisdiction to interconnect with any person if the Commission finds the interconnection to be in the public interest after considering all relevant issues including anticompetitive factors. In a civil suit brought by the United States Department of Justice, a federal District Court found Otter Tail guilty of attempting to maintain a monopoly and monopolizing the retail distribution of electric power in cities located in its service area, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. The Court's decision was based *inter alia* on Otter Tail's refusal to sell at wholesale to municipal power systems within its service area. To remedy this situation the District Court enjoined Otter Tail from such refusal.

One of the municipal power systems which was refused wholesale service by Otter Tail was that of the Village of Elbow Lake, Minnesota, a former retail customer of Otter Tail. Prior to and during the civil suit in the District Court, the Commission conducted proceedings under Section 202(b) of the Federal Power Act, 16 U.S.C. § 824a(b), to consider the application of Elbow Lake for a compulsory interconnection with Otter Tail. After considering all relevant factors and finding it to be in the public interest, the Commission ordered a short-term interconnection on No-

vember 6, 1968,[2] and a long-term interconnection on September 13, 1971.[3]

A. The Antitrust Suit In The District Court

In the civil antitrust suit filed by the government on July 14, 1969, Otter Tail was charged with attempting to preserve a monopoly over the retail sale of electric power to municipalities, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, by refusing to sell at wholesale and refusing to wheel electric power to municipal power systems, and by engaging in other activities to defeat municipalities' attempts to establish municipal power systems (App. 3). After finding that Otter Tail had monopoly power in the relevant market (retail sales of electric power to towns in Otter Tail's service area) (App. 7-8) and had strategic dominance in transmission facilities in its service area (App. 8-10), the Court found that Otter Tail had sought wrongfully to maintain its monopoly power (1) by refusing to use its transmission facilities to sell at wholesale or to wheel power to several municipalities (App. 11-13), (2) by engaging in court litigation to defeat attempts of four municipalities to establish municipal power systems

[2] *Village of Elbow Lake, Minnesota* v. *Otter Tail Power Co.*, FPC Docket No. E-7278, 40 FPC 1262, affirmed *sub nom. Otter Tail Power Co.* v. *Federal Power Commission*, 429 F.2d 232 (CA 8), certiorari denied, 401 U.S. 947.

[3] *Village of Elbow Lake, Minnesota* v. *Otter Tail Power Co.*, FPC Docket No. E-7278, appeal pending *sub nom. Otter Tail Power Co.* v. *Federal Power Commission*, CA 8, No. 72-1088.

(App. 14-16), and (3) by enforcing the provisions of its contracts with the Bureau of Reclamation and with electric power cooperatives which prohibit the use of Otter Tail's transmission lines to transmit power to former retail customers of Otter Tail (App. 16-18). The Court found these contracts not to be immune to antitrust (App. 18-20). Rejecting Otter Tail's "erosion" argument that a requirement to sell power at wholesale or wheel power to former retail customers would force it to contribute to its own demise because increasing numbers of municipal customers would convert to municipal power systems, the Court stated that such erosion was unlikely because other municipalities could not rely upon the Bureau for power and that the threat of losing business does not justify or excuse violating the law (App. 19-21). The Court thus enjoined Otter Tail from certain conduct, including refusal to sell electric power at wholesale (App. 21, 115-16). The Court's injunction that Otter Tail not refuse to sell at wholesale has the effect of a compulsory interconnection order. It is this portion of the Court's opinion which is the subject of the Commission's brief as *amicus curiae*.

B. The Interconnection Proceedings Before The Commission

Prior to and concurrently with the civil antitrust suit, Otter Tail's refusal to sell power at wholesale to municipal systems was also the subject of proceedings before the Commission. In *Village of Elbow Lake, Minnesota* v. *Otter Tail Power Co.*, *supra* n. 2, 3, the Commission considered the application of

one of Otter Tail's former retail municipal customers, Elbow Lake, for an order pursuant to Section 202 of the Federal Power Act, 16 U.S.C. § 824a, directing interconnection between Elbow Lake and Otter Tail. Elbow Lake alleged that it had an operating municipal electric utility, that it had requested Otter Tail to provide wholesale electric service and wheeling service, that it had two sources of power but no means of transmission to Elbow Lake without Otter Tail's assistance, and that Otter Tail had refused to provide either wholesale or wheeling service (App. 121). By order dated November 6, 1968, the Commission found that a short-term interconnection was in the public interest because Elbow Lake suffered a shortage of installed reserves and because an interconnection would not pose an undue physical burden on Otter Tail (App. 130-131). Accordingly, the Commission ordered a short-term interconnection pursuant to Section 202(b) of the Federal Power Act, 16 U.S.C. § 824a(b), until the completion of studies and hearings on the question of the best long-term transmission and supply arrangements (App. 120-35). 40 FPC 1262, affirmed, *Otter Tail Power Co.* v. *Federal Power Commission*, 429 F.2d 232 (CA 8), certiorari denied, 401 U.S. 947.

Subsequently, on September 13, 1971, the Commission ordered a long-term interconnection between Elbow Lake and Otter Tail (App. 136-153). The interconnection was found to be in the public interest in accordance with Section 202(b) standards, because Elbow Lake's consumers needed assistance and because Otter Tail would sustain no undue burden, no enlargement of facilities, nor any impairment of its ability to serve its customers thereby (App. 140). The Commission considered fully the possible erosion of Otter Tail's system but found the public interest to be far broader than the economic interest of a particular power supplier (App. 141). The Commission agreed with the Examiner, however, that Elbow Lake had engaged in "an ill-advised excursion into the power business" and the parties' actions had resulted in serious economic waste (App. 140-41). The Commission emphasized that municipalities should identify and study all alternatives and probable consequences before entering into the power business (App. 142). After deciding that an interconnection was in the public interest, the Commission determined the terms it considered fair to the parties and their customers (App. 143-53).

On December 23, 1971, the Commission denied rehearing of its order of September 13, 1971, review of which now is pending in the United States Court of Appeals for the Eighth Circuit, *sub nom. Otter Tail Power Co.* v. *Federal Power Commission*, No. 72-1038.[4]

SUMMARY OF ARGUMENT

Public utilities subject to the Commission's jurisdiction face duplicative litigation of antitrust issues

[4] The only issue which Petitioners have raised in this appeal concerns the terms and conditions of the interconnection order.

in a growing number of administrative and judicial forums. The controversy here involves repetitive judicial and Commission proceedings, both arising out of a federally regulated public utility's refusal to sell at wholesale to a former retail customer and both resulting in compulsory interconnection orders. We submit that the Court below erred in enjoining Otter Tail from refusing to sell at wholesale because Section 202 of the Federal Power Act gives the Commission primary jurisdiction over compulsory interconnections with public utilities subject to its jurisdiction.

A.

As numerous decisions of this Court reveal, the doctrine of primary jurisdiction requires submission to an administrative agency of all issues regarding the legality of conduct subject to its regulatory jurisdiction. This principle has been held many times to bar antitrust actions in federal courts and require parties to litigate all issues, including anticompetitive questions, before the appropriate agency. Under Section 202 of the Federal Power Act the Commission has full authority to coordinate electric facilities and to compel interconnection where it is in the public interest, in order to assure consumers an adequate and economical source of electric power. The decision of the Court below to enjoin Otter Tail from refusing to sell power at wholesale has the effect of a compulsory interconnection order and abrogates the Federal Power Act's grant of such authority to the Commission. Accordingly, the decision should be reversed under the doctrine of primary jurisdiction.

B.

Section 202(b) prescribes a strict public interest standard for compulsory interconnections, yet the Court below applied only antitrust principles before in effect ordering Otter Tail to interconnect with any municipal power system which makes a request. This is contrary to the many decisions of this Court that antitrust laws are just one tool to be used in determining the public interest, and that competition is neither the single nor controlling element in that determination.

Under Section 202(b) the protection of all consumers and the possible alternatives to interconnection are factors in the public interest equation. In addition to anticompetitive factors the Commission is required to consider *inter alia* the possibility of an undue burden upon the public utility, whether an enlargement of generating facilities is required, and whether the public utility's ability to render adequate service to its customers would be impaired. While the Court below failed to consider any issue except anticompetitive effects, the Commission's established practice is to evaluate all factors bearing on the public interest, including potential anticompetitive effects, in compulsory interconnection proceedings. The Commission must be permitted to bring this experience to bear, thereby giving full effect to the requirements of the Federal Power Act and the antitrust laws.

C.

Application of the doctrine of primary jurisdiction is necessary to protect consumers of electric power from the ill effects of dual regulation of public utilities under the Federal Power Act and antitrust laws. This Court and others have recognized the dangers of the collision of these two regimes and the operational chaos which can result from court's independent application of antitrust principles to regulated conduct of public utilities. Faced with the requirements of duplicative litigation of antitrust issues and the probable inconsistency of decisions in various forums, it is increasingly difficult for public utilities to take necessary steps to meet the growing energy demands of consumers. For the consumers' protection within the comprehensive regulatory scheme of the Federal Power Act, such issues must be submitted to the Commission, which has the authority and the experience to properly determine whether the conduct subject to its regulatory jurisdiction is in the public interest.

ARGUMENT

The Federal Power Commission Has Primary Jurisdiction Under The Federal Power Act To Order Compulsory Interconnections With Public Utilities Subject To Its Jurisdiction And To Consider Anticompetitive Factors In Determining Whether A Compulsory Interconnection Is In The Public Interest.

This case presents a classic example of the problem of accommodating antitrust policy to regulatory policy, within a bifurcated system of enforcement.

Public utilities subject to the Commission's jurisdiction under Section 201 of the Federal Power Act, 16 U.S.C. § 824, face a growing antitrust gauntlet of repetitive administrative agency hearings and court litigation each time they act. Decisions of United States Courts of Appeals have subjected them, erroneously we have argued elsewhere, to duplicative litigation of antitrust issues in numerous administrative forums, even in proceedings where antitrust allegations are not directly related, such as the authorization of securities issuances. See *e.g.* Brief for the Federal Power Commission in *Gulf States Utilities Company* v. *Federal Power Commission*, No. 71-1178. The decision of the Court below superimposes on the various agency proceedings a judicial arena in which the same antitrust issues can be tried, regardless of administrative jurisdiction and public interest standards. The resulting burdens and potentially inconsistent results from such multiplicitous litigation of antitrust issues will have dire effects on such public utilities' ability to fulfill their responsibility to meet the energy needs of consumers. If these companies are to be effectively regulated so as to protect the public interest, courts must be required to apply the doctrine of primary jurisdiction,[5] to permit the Com-

[5] This Court should properly apply the doctrine of primary jurisdiction even if it is not raised at an earlier stage in the proceedings for, being a question of the proper allocation of business between the courts and administrative agencies, it is not subject to waiver. *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 63; *Louisiana & Arkansas Ry.* v. *Export Drum Co.*, 359 F.2d 311, 311 (CA 5).

mission to employ its regulatory experience and to evaluate all factors, including anticompetitive issues, relevant to a determination of whether an interconnection should be ordered.

A. *The Doctrine of Primary Jurisdiction Requires Initial Submission To The Commission Of All Issues Regarding Compulsory Interconnections Subject To Its Jurisdiction.*

As this Court has stated, "The doctrine of primary jurisdiction * * * applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its view." *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 63-64. The doctrine is based on the principle "that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over," *Far East Conference* v. *United States*, 342 U.S. 570, 574, and "requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme," *United States* v. *Philadelphia Nat. Bank*, 374 U.S. 321, 353. The Federal Power Act presents just such a regulatory scheme for the coordination of electric facilities, with one ex-

pert agency charged with the task of coordination and with a specialized public interest standard prescribed for compulsory interconnections, which the District Court erroneously ignored in enjoining Otter Tail from refusing to sell power at wholesale.

Following an extensive federal investigation of public utilities,[6] Congress enacted Parts II and III of the Federal Power Act,[7] authorizing the Commission to regulate both the financial practices and operations of public utilities subject to its jurisdiction. As part of this comprehensive regulatory scheme for the protection of consumers and investors, Congress provided for the regional coordination of electric facilities, under the supervision and direction of the Commission. Section 202, 16 U.S.C. § 824a. In addition to delegating to the Commission the task of coordination, Congress committed the question of interconnection in most instances to voluntary agreement by public utilities. Section 202(a), 16 U.S.C. § 824a(a), provides in pertinent part:

> For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country

[6] See Federal Trade Commission, *In Response to Sen. Res. No. 83, Monthly Reports on the Electric Power and Utilities Inquiry*, S. Doc. No. 92, Pts. 1-81II, 70th Cong., 1st Sess. (1928-36).

[7] Title II of the Public Utility Act of 1935, 49 Stat. 838.

> into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy * * *. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. * * *

However, Congress was not unaware that situations like the one at bar would develop in which voluntary agreement to an interconnection could not be reached. Accordingly, it authorized the Commission to order compulsory interconnections and prescribed a public interest standard to be applied in such instances. Section 202(b), 16 U.S.C. 824a(b), provides in pertinent part:

> Whenever the Commission * * * finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. * * *

Jurisdiction to coordinate electrical facilities and order compulsory interconnection is thus clearly

vested in the Federal Power Commission. The order of the District Court, which has the effect of ordering a compulsory interconnection, constitutes an abrogation of these provisions of the Federal Power Act.

Since 1922 this Court has forbidden judicial intrusion into the administrative bailiwick by consistently applying the doctrine of primary jurisdiction to require submission to regulatory agencies of cases involving antitrust issues. In *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156, the doctrine was held to bar an antitrust suit for treble damages for rates allegedly fixed conspiratorially by railroads subject to the ICC's regulatory jurisdiction. This Court pointed out that parties had a remedy before the ICC for rates found to be unreasonably high or discriminatory and could not believe "that Congress intended to provide the shipper, from whom illegal rates have been exacted, with an additional remedy under the Anti-trust Act . . ." *Id.* at 162. In ruling in another case that a party could not bring an antitrust action based on conduct subject to the provisions of the Shipping Act, this Court ruled that when the enumerated of antitrust charges are so interrelated with provisions of regulatory legislation, the remedy is that afforded by such legislation, which to that extent supersedes the antitrust laws. *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 485.

The same "firmly established principle" of primary jurisdiction was held to bar the government

from suing for an injunction of shipping companies' use of a dual-rate system as a violation of the Sherman Act. *Far East Conference* v. *United States*, *supra*. This Court held in that case that the question of the legality of the dual-rate system must be submitted to the federal agency. In *Terminal Warehouse Co.* v. *Pennsylvania R.R.*, 297 U.S. 500, this Court held that a warehouse owner could not bring an antitrust action attacking an exclusive arrangement between a railroad and a warehouse, saying (*id.* at 514):

> • • • Certain then it is that the Anti-Trust Laws are inapplicable in all their apparent breadth to carriers by rail or water. A consignor or consignee aggrieved by such a wrong must resort to the appropriate administrative agency, at least for many purposes. If he is remitted to the Commerce Act or the Shipping Act to cancel the illegal preference, may he pass over those acts and revert to the Clayton or the Sherman Act for the purpose of recovering damages? The Commerce Act like the Shipping Act embodies a remedial system that is complete and self-contained. It provides the means for ascertaining the existence of a preference, but it does not stop at that point. As already shown in this opinion, it gives a cause of action for damages not only against the carrier, but also against shippers and consignees who have incited or abetted. For the wrongs that it denounces it prescribes a fitting remedy which, we think, was meant to be exclusive. • • •

Section 202 of the Federal Power Act similarly embodies a complete system for the coordination of electric facilities, stopping not with the Commission's authority to plan and encourage voluntary agreements but instead granting it plenary authority to order compulsory interconnections it finds to be in the public interest. In *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, this Court held that the government's suit under the Sherman Act against two airline companies for their agreement allocating territories and routes was banned because the problem of division of territories and routes lay within the purview of the CAB under the Civil Aeronautics Act of 1938, as amended by the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.*

Under these cases it is clear that the only remedy for Otter Tail's refusal to sell power at wholesale is provided by Section 202(b) of the Federal Power Act, and that the Commission has primary jurisdiction to consider the legality of such refusal and whether a compulsory interconnection would be in the public interest. This Court recently recognized the Commission's authority over compulsory interconnection orders, *Gainesville Utilities Dept* v. *Florida Power Corp.*, 402 U.S. 515, 521-2, yet this authority was ignored by the Court below.

In addition to Section 202's express grant of authority to the Commission, this Court's reasoning in *Far East Conference* as to why cases should be submitted to the administrative agency dictates the same procedure in the case of compulsory interconnections:

> Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure. 342 U.S. at 574-5.

The "circumstances underlying legal issues" in this case involve Congress' provision in the Federal Power Act for the planned coordination of the electric power industry, in order to assure customers an adequate and the most economical supply of electric energy. The Senate Report interpreted Section 202 as follows:

> Under this subsection[(a)] the Commission would have authority to work out the ideal utility map of the country and supervise the development of the industry toward that ideal. The Committee is confident that enlightened self-interest will lead the utilities to cooperate with the Commission and with each other in bringing about the economies which can alone be secured through the planned coordination which has long been advocated by the most able and progressive thinkers on the subject.
>
> When interconnection cannot be secured by voluntary action, subsection (b) gives the Commission limited authority to compel interstate utilities to connect their lines and sell or exchange energy * * *. S. Rep. No. 621, 74th Cong., 1st Sess. 49 (1935).

This legislative scheme of planned coordination by the Commission, voluntary cooperation by public utilities, and compulsory interconnection when in the public interest, is defeated by the District Court's *ad hoc*, narrow application of *per se* antitrust standards to Otter Tail's refusals to sell or exchange power. Therefore, if Congressional goals under the Federal Power Act are to be achieved, the decision must be reversed.

B. *Compulsory Interconnections With Public Utilities Subject To The Commission's Jurisdiction Should Be Ordered Only If They Meet The Public Interest Standard Of Section 202(b) Of The Federal Power Act.*

Section 202(b) prescribes a public interest standard for compulsory interconnections, and the law is clear that the public interest requires the consideration of more than merely antitrust principles. Indeed, this Court and others have specifically held that if a regulatory agency determines a company's action to be in the public interest, it can authorize the action, though it might otherwise violate antitrust laws. *Seaboard Air Line R.R.* v. *United States*, 382 U.S. 154, 156-7; *Northern Natural Gas Co.* v. *Federal Power Commission*, 399 F.2d 953, 961 (CADC). Antitrust laws are another tool which a regulatory agency may employ to a greater or lesser degree to give "understandable content to the broad statutory concept of the 'public interest.'" *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 244.

The decision of the Court below effectively destroys public interest standard which Congress intended to govern compulsory interconnection, and substitutes instead the single narrow antitrust standard. No adequate consideration was given to the continued viability of Otter Tail or its ability to render adequate service to other customers. Neither was there any consideration of whether some other power arrangements might afford better and more economical protection, yet the Commission considered both of these items in the orders in its Otter Tail-Elbow Lake interconnection proceedings (App. 130-1, 141-3). In contrast, the Court below asked only (1) if Otter Tail had monopoly power and (2) if Otter Tail had tried to preserve that monopoly; it found affirmative answers to these questions and therein *per se* antitrust violations. The Court dismissed Otter Tail's "erosion theory" with general findings about the probable future generating capacity of only one competing source of power and with the statement that the "threat of losing business does not justify or excuse violating the law" (App. 20-21). Such a sterile application of antitrust law clearly does not satisfy this Court's decision that the encouragement of competition is not the single or controlling reliance for safeguarding the public interest. *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 93.*

* In *RCA Communications* this Court ruled that the regulatory agency had to do more than assume the advantages of competition before licensing radiotelegraph facilities which duplicated existing facilities. It follows that a federal court should not be able to order Otter Tail to interconnect with all willing competitors in order to promote competition. What may substantially lessen competition in those areas where competition is the main reliance for regulation of the market cannot be automatically transplanted to areas in which active regulation is entrusted to an administrative agency. 346 U.S. at 98.

The assertion of primary jurisdiction in this case is entirely consistent with the Commission's established practice of evaluating potential anticompetitive effects in compulsory interconnection proceedings. In its opinion of September 13, 1971, in the Elbow Lake proceedings the Commission considered the possible consequences of increased municipal competition and the loss of Otter Tail as a competitor (App. 141). Moreover, in a recent leading interconnection case, the Commission evaluated the alleged competition between a public utility and a municipal system and found that it did not impose any undue burden on the public utility required to interconnect. *Gainesville Utilities Dept.* v. *Florida Power Corp.*, 40 FPC 1227, 1241, affirmed *Gainesville Utilities Dept.* v. *Florida Power Corp.*, *supra*. The Commission has thus complied with this Court's requirement that an agency utilize its "insight gained through experience" in examining the factor of competition when determining the public interest. *Federal Communications Commission* v. *RCA Communications, Inc.*, *supra* at 93-97. The Commission is clearly the only forum which can bring experience to bear in evaluating all factors, including anticompetitive issues, in determining if a compulsory interconnection with a public utility is in the public interest.

C. *Public Utilities Subject To The Commission's Jurisdiction Should Not Be Subject To Duplicative Litigation Of Anticompetitive Issues.*

The need to prevent the dual regulation of companies has been frequently recognized. As one authority accurately phrased the problem:[*]

> The doctrine of primary jurisdiction is essential to effective regulation. Without it members of regulated industries would be subject to the commands of two masters—the regulatory statute as administered by the agency and the antitrust laws as administered by the courts.

These different laws can be coordinated only if the Commission is permitted to apply both. As this Court stated in *Pan American World Airways*, *supra* at 310, "if the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide."

The decision of the Court below permits parallel litigation in at least two or more arenas, placing public utilities in the untenable position of having to litigate the same antitrust issues in different forums, subject to different standards and subject to judicial review in different Courts of Appeals. The burden of meeting such heavy litigation demands can spell the ruin of a public utility, to the certain detriment of consumers depending upon it to supply their power needs. The probable inconsistency in different decisions reviewing a Commission order and a judicial antitrust decision, given the dichotomy of public interest and *per se* antitrust standards, can paralyze even a healthy public utility and prevent it from taking action necessary to supply consumers' power needs. "[T]he time has come when this duplicative and . . . anachronistic system of dual regulation should be reexamined." *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 664 (separate opinion).

[*] Von Mehren, *The Antitrust Laws & Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 Harv. L. Rev. 929, 965 (1954).

The Court of Appeals for the District of Columbia Circuit has also recognized this problem of multiple forums in holding that the Federal Communications Commission has primary jurisdiction over a telephone company's alleged prohibition against its customers dealing with the producer of a new phone device. *Carter* v. *American Tel. & Tel. Co.*, 365 F.2d 486 (CA 5), certiorari denied, 385 U.S. 1008. While such conduct might constitute a *per se* violation of antitrust laws, the Court in *Carter* stressed its relationship to matters within the Commission's jurisdiction and held that the Commission must be permitted to rule on the conduct's legality, in order to prevent operational chaos. *Id.* at 496. This Court can and should prevent such chaos in the instant case by giving effect to Congress' delegation of primary jurisdiction over compulsory interconnections to the Commission. "The extravagant brandishings of antitrustees, the repetition of inflammatory epithets of . . . monopolistic aim, the frequent incantation of the antitrust laws, and the fervent desire to keep the case . . . in a Federal Court cannot extinguish the [Federal Power Act]

. . ." *Id.* at 494. This Court should reverse the decision of the Court below, which has "the effect of placing the Department of Justice in the driver's seat even though Congress has lodged primary regulatory authority elsewhere." *United States* v. *El Paso Natural Gas Co.*, *supra* at 661 (separate opinion).

While advocating that the District Court erred in in the present case through its failure to apply the doctrine of primary jurisdiction, we recognize that public utilities may in some situations engage in conduct raising antitrust issues which can be reached by litigation in the District Court. However, where the remedy sought is clearly within the jurisdiction of the Commission—such as a compulsory interconnection—the administrative process should not be avoided, and the Commission should be permitted to make its decision on the basis of all public interest considerations, including the impact upon competition. Otherwise, there can be no adequate protection for the broad consuming public which is the intended beneficiary of the Federal Power Act.

CONCLUSION

For the reasons stated, the judgment of the District Court should be reversed.

Respectfully submitted.

LEO E. FORQUER,
Acting General Counsel,

GEORGE W. MCHENRY, JR.,
First Assistant Solicitor,

JOAN E. HEIMBIGNER,
Attorney,
Federal Power Commission.

I authorize the filing of the above brief.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

FPC Relaxes Electric Rate Process

By Stephen M. Aug
[illegible]

The Federal Power Commission has been following for months an unannounced policy of aiding investor-owned electric utilities and is being criticized by municipal power companies which have learned about it.

[illegible], the policy is to [illegible] their rates immediately and investigate later, rather than to follow the traditional path of investigating first and granting [illegible] later.

Even in the expedited [illegible] [illegible], the FPC [illegible] end, if it [illegible] refunds with 7 percent interest.

THE COMMISSION never formally enunciated this change in policy, but those who watch its activities closely began to catch on in early September.

Alex Radin, general manager of the American Public Power Association, which represents municipally owned power systems, wrote FPC Chairman John N. Nassikas [illegible] questioning the new policy.

Radin notes that the agency had been suspending proposed increases in wholesale electric rates (the FPC regulates only wholesale [illegible]) [illegible] whereas it has the authority to suspend them for as long as five months.

The one-day suspension is essentially a legalism, allowing the FPC to investigate, but setting a date for eventual refunds if the new rates should be proven too high.

"THIS PATTERN of action appears to be the result of an unannounced and unexplained commission policy decision," Radin wrote, adding, "Its impact on local public power systems which purchase power from these companies is both unfair and harmful."

Radin contended that [illegible] claims of private power companies. He said they force public power consumers "to become involuntary bankers for the companies" because they are "compelled to grant subsidized loans without hope of recouping their losses."

He explained this by pointing out that the 7 percent interest on rebates compares to a current prime lending rate of about 12 percent.

Radin complained, too, that a one-day suspension doesn't allow sufficient time for the local public power system to [illegible] the new wholesale rates [illegible] retail [illegible] major economic difficulties."

Kenneth F. Plumb, the FPC's secretary, contended in a letter to Radin on behalf of the commission, that suspending rate increases for the full five months—as the public power group wants—"could result in highly discriminatory treatment against the supplier."

HE CRITICIZED the public power group for ignoring "what inflationary pressures and [illegible] increases of capital, materials, labor and fuels, as well as regulatory lag (the delays caused by regulatory processes, since cases can take a year or more to [illegible]) [illegible] against the investor-owned sector wholesale supplier, as a matter of administrative policy."

Plumb neither admitted nor denied that the commission had in fact embarked on a new policy, but he included a tabulation of proposed electric rate increases from July 1, 1972 through Aug. 31, 1974.

The tabulation shows that of 73 rate increases proposed from July 1, 1972, through the end of October 1973—the time of the Arab oil embargo, when fuel oil prices [illegible]—there were only nine one-day suspensions. In [illegible] cases higher rates were blocked for [illegible]

Washington Star-News

Business Finance

FRIDAY, OCTOBER 4, 1974 A-16

By contrast, from Nov. 1, 1973, through Aug. 31, 1974, there were [illegible] [illegible] were suspended for only one day and 11 were blocked for the maximum five months [illegible]

Quick State Action on Utility Rate Rises Urged by Simon and Other U.S. Officials

By The Wall Street Journal Staff Reporter

WASHINGTON—Federal energy and financial officials urged state regulators to help bail out financially ailing electric utilities by granting them quick rate increases.

But state utility regulators weren't overly receptive to the proposal, which was made at a conference sponsored by the Treasury Department.

Treasury Secretary William Simon said utilities need rate relief because of steadily increasing costs, mainly for fuel and to build facilities. Federal Energy Administration Chief John Sawhill and Federal Power Commission Chairman John Nassikas also supported the plan.

Mr. Simon said state utility regulators should allow automatic passthroughs for power companies' costs and should permit construction work in progress to be used in rate calculations. He said these changes are needed so utilities "can finance their expansion in an orderly fashion and investors will again support the industry."

Utilities recently have complained that high oil prices and other inflationary pressures have created financial problems and hurt their ability to raise capital. Because of these problems, some electric utilities have delayed or canceled significant portions of their construction programs. As a partial solution, the House Ways and Means Committee recently voted to increase the investment tax credits for utilities to 7% to 4%, but some utilities want a bigger increase.

Several state utility regulators sharply objected to the proposals that they speed electric rate increases. Some say they resented the federal government attempting to make recipients of the state regulatory bodies for what they called economic mistakes of the Nixon and Ford Administrations.

Bill Davis, chairman of the Florida Public Service Commission, said further price boosts there would be "an unjust additional burden on consumers. In Florida we have 1.5 million retirees, and they have just about been priced out of the cost of a loaf of bread."

A utility regulator from Montana, Robert McDermott, said the federal government should take steps to lower interest rates and boost pressure to reduce the high cost of foreign oil to aid the utilities.

William G. Rosenberg, chairman of the Michigan Public Service Commission, complained that much of the increased rates granted by state agencies to utilities are being taken away as federal income taxes. He promoted emergency tax law changes that would exempt from federal income tax the revenue from whatever rate boosts are needed to bring a utility's equity earnings up to the generally authorized 12%.

The federal officials at the conference didn't comment on the utility industry proposals for the federal government to guarantee new debt financing for utilities.

FPC Chairman Nassikas said that the investment tax credits for utilities be increased and that there be more widespread use of tax-exempt bonds for pollution-control facilities. He also suggested that the federal government study a tax change that would permit stockholders of electric utility common stock to choose either a tax-sheltered stock dividend or a taxable cash dividend.

He also recommended that state regulatory commissions study whether they should allow plants under construction to be used in computing rate bases and said the FPC is considering such a move.

The FPC chairman said that, to reduce regulatory lag and improve cash flow for utilities, the agency more frequently has been using rate suspensions of only one day rather than the five months allowed by law for electric rate increase requests.

Normally, the FPC suspends any proposed rate-increase proposals for several months, often the maximum two-month period, while it considers the merits of the proposal. The agency typically has suspended the increases for only one day, then letting utilities immediately put into effect the higher rates they want, but subject to any refunds the agency may order, Mr. Nassikas said that state regulators use the same approach.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

WHOLESALE ELECTRIC RATES - Denial of Rehearing

Before Commissioners: **John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., and William L. Springer.**

Southern California Edison Company) Docket No. E-8176

ORDER DENYING REHEARING AND
AMENDED PETITION TO INTERVENE

(Issued September 21, 1973)

On July 25, 1973, we issued an order in this proceeding which granted certain petitions to intervene with the condition that the participation of the intervenors would be limited to matters other than the anticompetitive activities alleged in their respective petitions. 1/ We found that the intervenors had not specified the facts relied on, the anticompetitive practices challenged, nor the relief which this Commission could grant. We stated that our decision was based on our Indiana and Michigan Electric Company (I&M) order, Docket No. E-7740 issued on May 31, 1973.

On August 24, 1973, Cities filed an Application for Rehearing of that order, alleging that they complied with the requirements of the I&M order, and that this Commission was imposing unreasonably strict pleading requirements on Cities. Cities also seeks to clarify the issues they raised in their initial petition to intervene, to support Cities' claim that it has complied with the I&M Order.

On August 10, 1973, Anza Electric Cooperative, Inc. (Anza), filed an Amended Petition For Intervention, which it states complies with the requirements of our I&M Order. 2/

1/ Intervenors alleging such activities are Cities of Anaheim Azuza, Banning, Colton, and Riverside, California, jointly (Cities) and Anza Electric Cooperative, Inc. (Anza).

2/ Southern California Edison Company (SCE) filed an Answer to Anza's pleading on August 27, 1973. Anza replied to that pleading on September 6, 1973.

Both petitioners, at the outset, suggest that our order in I&M must not be construed to impose overly strict pleading requirements on intervenors. However, the I&M order does not impose unreasonably strict pleading requirements but rather sets forth guidelines to insure that an antitrust issue is presented which is capable of resolution by this Commission in the context of the proceeding at hand. As the Supreme Court in its Gulf States Opinion clearly states, its ruling in that case is not to be interpreted as saying the Commission must always hold a hearing on the antitrust issue. 3/ The Court also noted, without objection, that the Court of Appeals had observed that the summary disposition of the antitrust argument in a proceeding might be acceptable provided such disposition does not go unexplained. 4/ Accordingly, our requirements in I&M are designed to elicit such information as is necessary in order for the Commission to determine whether a hearing is appropriate on the antitrust issue. We therefore do not believe we have burdened the parties with overly technical pleading requirements.

Cities Application For Rehearing

Cities' application is directed specifically to a "price squeeze" which, they allege, could result from the proposed rates. Cities states that SCE has filed for an industrial rate increase before the California Public Utilities Commission (CPUC) as well as for the wholesale increase requested in this proceeding. Since the retail rate cannot be raised without a final decision by the CPUC, Cities argues that they will be in a "price squeeze" and will be unable to compete with SCE for industrial loads. Moreover, Cities states that, even if both increases were made effective simultaneously, the proposed retail industrial rate would still be lower than the proposed wholesale rate, and could result in a permanent "price squeeze" situation. The specific relief Cities seeks in the context of the proceeding is, "that the Commission fix the rates of SCE to Cities at a level which will at no time result in higher charges to Cities for any given large size load than would result from application of SCE's then effective large industrial retail rate" (Application, P. 4).

3/ Gulf States Utilities Co., v. F.P.C., et al., 41 LW 4637, 4642 (1973).

4/ Ibid

Upon review of Cities pleading, we find no grounds for reversal of our July 25, 1973,order. The relief sought by Cities is beyond the authority granted to us under the Federal Power Act. This Commission is directed by the Federal Power Act to review rate applications to insure that the rates proposed are just and reasonable, and we fully intend to perform that function in this proceeding. SCE submitted a full cost of service as well as testimony and exhibits of their witnesses which they state support the increase. That evidence, including SCE's allocation of costs to its wholesale service, is, of course, subject to review and cross examination by the Commission Staff and the intervenors in hearing, as well as being subject to our review. Wholesale rates must recover allocated wholesale costs. Cities suggested relief is a rate related not to wholesale costs but rather related to SCE's retail rates. However, SCE's retail rate level and the accounting and rate making principles underlying that rate level is under the sole jurisdiction of the CPUC and not the Federal Power Commission. Cities' proposal would subordinate our authority to set wholesale rates to the retail ratemaking jurisdiction of the CPUC. We cannot permit our jurisdiction to be limited by events and regulatory affairs over which we have no control. Cities' allegation of "price squeeze", in and of itself, does not constitute anticompetitive behavior by SCE given the fact that any rates we approve must be based on fully allocated wholesal costs. To approve rates which recover less than those costs would produce grave consequences, since such action would be tantamount to imposing confiscatory rates on SCE and possible subsidization of SCE's wholesale service by SCE's retail customers. Accordingly, we find that Cities petition for rehearing should be denied.

Anza's Petition

We likewise find Anza's petition insufficient to justify an antitrust issue in the hearing on this proposed rate increase. Although Anza states that its amended petition satisfies the Commission's requirements specified in the I&M order, in our opinion it does not. No facts are provided to support the charge of anticompetitive behavior. Anza makes reference to a

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
Albert B. Brooke, Jr., Rush Moody, Jr.,
and William L. Springer.

WHOLESALE ELECTRIC RATES - Rehearing, Intervention, Antitrust

Union Electric Company) Docket No. E-8215

ORDER DENYING MOTION TO REJECT AND PERMITTING
ADDITIONAL INTERVENTIONS

(Issued January 3, 1974)

On May 18, 1973, Union Electric Company (Union) tendered for filing proposed changes in its FPC Electric Tariff M-2 and its FPC Rate Schedule No. 49. Public notice of this filing was issued on June 18, 1973, with protests or petitions to intervene due by July 5, 1973. On July 16, 1973, the Commission, inter alia, accepted the proposed changes for filing, suspended them for five months, established hearing procedures, and granted intervention to several petitioners.

In the July 16, order we also deferred action on a July 5, 1973, motion to reject, protest, and petition to intervene jointly filed by the City of Kirkwood, Missouri, and the Citizens Electric Corporation (Petitioners), until all parties had the opportunity to answer as provided by Section 1.8(e) of the Commission's Rules of Practice and Procedure. No responses to such pleading have been received.

Petitioners request that the Commission reject Union's filing as being contrary to the requirements of the Federal Power Act. Specifically, Petitioners assert that the rate filing is discriminatory because Union's Rate Schedule FPC No. 47, governing sales between Union and Missouri Utilities Company (Missouri) will continue in effect for a period of two to seventeen years at rates not less than 40% below those proposed for Kirkwood. The Petitioners also allege that the proposed M-2 rate is unfairly high when compared to Union's direct industrial rates and will limit

Petitioners' ability to compete for new industrial customers. According to Petitioners, this has the effect of squeezing them out of the market for industrial customers.

Upon review of the anticompetitive allegations contained in Petitioner's motion, we note first that Union's Rate Schedule No. 47, of which Petitioners complain, consists of a fixed rate contract which cannot be modified by this Commission except upon the conclusion of an investigation. We cannot determine whether the alleged discrimination actually exists until the conclusion of the evidentiary hearing ordered in this docket. Following the hearin the just and reasonable rate proper for Union to charge Petitioners will be determined. On the basis of the pleadings alone, we are unable to determine whether the resulting rate will be greater than, equal to, or less than the rate Union charged under Rate Schedule No. 47. Whatever the eventual decision, Union's wholesale rate applicable to Petitioners will be determined on the basis of properly allocated wholesale costs and not on the basis of a pre-existing contractually fixed rate applicable to another customer in the same class. Consistent with the foregoing, evidence on this issue is proper for examination in this docket.

As to the allegations concerning price squeeze with regard to industrial sales, we shall refer to our recent order denying rehearing in the Southern California Edison Company case. 1/ There, we discussed at some length our position that remedies for alleged anticompetitive conduct similar to those suggested here are beyond the authority granted us by Sections 205 and 206 of the Federal Power Act. We shall adhere to that decision and limit the participation of petitioners as hereinafter ordered.

Kirkwood also requests that the Commission reject the proposed W-2 rate as being in violation of Phase III price stabilization standards. In our July 16, 1973 order we indicated, in ordering paragraph (G), that Union has the responsibility to comply with the Economic Stabilization Act, the enforcement of which is charged to the Cost of Living Council and not this Commission.

1/ Southern California Edison Company, Docket No. E-8178, Order issued November 2, 1973.

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1/ Southern California Edison Company, Docket No. E-8178, Order issued November 2, 1973.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

OPINION NO. 681

Commonwealth Edison Company	)	Docket No. E-7578
	)	
City of Geneva, Illinois	)	
v.	)	Docket No. IN-989
Commonwealth Edison Company	)	
	)	
City of Batavia, Illinois	)	
v.	)	Docket No. IN-991
Commonwealth Edison Company	)	

OPINION AND ORDER ACCEPTING
RATE INCREASE SUBJECT TO CONDITION

Issued: January 7, 1974

5. The Company filed with us a new cities' rate in 1970. The new rate involved an increase of about 10%. Six of the seven affected cities became intervenors and protested, focusing upon the demand charge in the higher (above 1000 kw) brackets, where the new cities' rate would be 10¢ higher than the industrial rate. The six Cities did not and do not contend that the rate to them is, in absolute terms, too high. That rate would result in an overall return to the Company of 5.89%, a figure accepted by the Administrative Law Judge as just and reasonable and not challenged by any party. The Cities instead contend that the 10¢ differential deprives them of the opportunity to compete with the Company for industrial loads.

6. Following a one-day suspension, the new rate went into effect on February 2, 1971. The following December 13, however, the Company's industrial rate was increased by action of the Illinois Commission, so that it thereafter became equal to or higher than the cities' rate. The Cities' complaint, therefore, ceased as of December 13, 1971, but it continues to apply to the locked-in period of 314 days (about 10 months) from February 2, 1971, to December 13, 1971. Very little money is involved. The increase is found by the Administrative Law Judge to be under 2% in the amount paid by each city to the Company, or about $71,000 for all of them for the ten months.

The Question of Comparing a Jurisdictional and a Nonjurisdictional Rate

7. The Initial Decision of the Administrative Law Judge rests on his conclusion that in a case involving alleged discrimination, there is no bar to our comparing a rate that is subject to our jurisdiction with a rate that is subject to the jurisdiction of a State commission. In this case, Commonwealth Edison's rate to its municipal customers is subject to our jurisdiction; its rate to the industrial customers is subject to the jurisdiction of the Illinois Commerce Commission. On the basis of the foregoing conclusion, plus his further conclusion (discussed below) that the two services are comparable, the Administrative Law Judge ultimately ordered that Commonwealth Edison's rate to its municipal customers be reduced to a level no higher than its rate to its industrial customers.

8. The issue of comparing jurisdictional and nonjurisdictional rates, and the remedy proposed in the Initial Decision, have lately been before us in Southern California Edison, Docket No. E-8176. In our Order of September 21, 1973, in that case, we stated:

> We have no jurisdiction over SCE's /Southern California Edison's/ retail rates, and we do not choose to open this hearing to an examination of the relationship between the wholesale and retail rates of SCE. Such an action would require a detailed analysis of SCE's retail cost of service. . .and would result in this Commission interjecting itself into an area in which it has no jurisdiction. (p. 4)

In connection with the request of the municipal intervenors in that case, that the rates to them be no higher than Southern California Edison's rate to its large industrial customers, we said in part:

> Cities' proposal would subordinate our authority to set wholesale rates to the retail ratemaking jurisdiction of the CPUC /California Public Utilities Commission/. We cannot permit our jurisdiction to be limited by events and regulatory affairs over which we have no control. (p. 3)

9. Most recently, in our further order in Southern California Edison, issued on November 2, 1973, we stated our views at greater length. The Anza Electric Cooperative ("Anza") took the position that we should consider the retail business of a utility when we set rates that are subject to our jurisdiction. We therein responded:

> . . .we fully intend to design wholesale rates which recover properly allocable wholesale costs, and we certainly shall consider the cost responsibility of SCE's direct industrial sales in determining costs properly allocable to SCE's wholesale service. This is, however, an entirely different matter from Anza's suggestion that we must subordinate our jurisdiction to that of the state commissions by basing wholesale rates on retail rates.

In a similar vein, Anza attempts to draw an analogy between our jurisdiction to eliminate discrimination and anticompetitive rate provisions between wholesale customers, and what Anza asserts should be our jurisdiction to review discrimination between customers where one of the customers is nonjurisdictional. Our jurisdiction to eliminate discrimination and anticompetitive rate provisions extends only to sales which are jurisdictional. Even if we assume, arguendo, that we have the authority to review discrimination between customers where one of the customers is nonjurisdictional, the exercise of such authority would necessitate an extensive review of SCE's direct industrial rates to determine the basis upon which such rates were fixed. However, rates fixed by contract with industrial customers are subject to review by the state commission. Such contract rates may be established by utilizing such principles as a reproduction-cost of investment, value of service, or the state commission's recognition of the propriety of arms-length bargaining in contract rate negotiations without relationship to cost. This Commission, in designing wholesale rates, however, does not intend to utilize any standard other than the cost-plus-fair-return standard traditionally applied in determining just and reasonable electric rates pursuant to Section 205 of the Federal Power Act. Under Anza's theory, we would presumably be required to utilize the state commission's standards and thus allow our jurisdiction to be subordinated to that of the state commission. On the other hand, if we were to simply accept Anza's proposition that SCE's wholesale rates should be keyed to the direct sale industrial rates, we would also be accepting the assumption implicit therein that Anza's rates are not competitive due to misdesign of SCE's rates. However, Anza's alleged inability to compete with SCE for industrial loads may be attributable to its own retail rate design which may require Anza's industrial rates to bear a disproportionate share of the retail costs. (pp. 2-3)

We thereupon affirmed our earlier conclusions that the relief requested was beyond our jurisdiction, contrary to the purposes of the Federal Power Act, and inappropriate, inasmuch as the purpose of the proceeding was to inquire into the justness and reasonableness of proposed wholesale rates. */

10. Our conclusions there apply here. In summary, if we undertake to explore rates that are subject to the jurisdiction of the Illinois Commission, we will be interjecting ourselves into an area that is beyond our business; we will be undertaking to make judgments concerning the appropriateness of standards that we may not ourselves apply; and, if we were to key jurisdictional wholesale rates to nonjurisdictional retail rates, we would be abdicating our own responsibilities. In its Initial Brief in the instant case, the Staff suggests that

> . . .non-jurisdictional business has relevance to the determination of jurisdictional rates, but only under unusual and special circumstances. Where a company's business is so completely integrated that expenses and plant related to jurisdictional activities cannot be or have not been separately determined, then the non-jurisdictional business has obvious relevance in making the necessary judgments in order to establish jurisdictional rates. (p. 14)

We agree. And conversely, as a general rule we will not be willing to explore questions that relate to rates or other matters that are outside of our jurisdiction.

The Question of Comparability of Service

11. A second conclusion, crucial to the ultimate decision of the Administrative Law Judge, is that the service offered by Commonwealth Edison to its municipal and its industrial customers is comparable. We think it is not.

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*/ Cf. Duke Power Co., Opinion No. 641, December 18, 1972, mimeo. at 5, 11-12.

APPENDIX E

UNITED STATES OF AMERICA

BEFORE THE FEDERAL POWER COMMISSION

IN THE MATTER OF THE APPLICATIONS OF:	
The Detroit Edison Company and Consumers Power Company for amendment of Order Authorizing Transmission of Electric Energy to Canada and Superseding Prior Authorization, issued October 10, 1972	Docket No. E-7206
and	
The Detroit Edison Company for further amendment of Presidential Permits issued October 12, 1953, March 1, 1966 and September 15, 1972, for the construction, operation, maintenance and connection at the borders of the United States of facilities for the transmission of electric energy between the United States and Canada.	Docket No. E-6516 E-5305 Docket No. E-7207

APPLICATION

Now come The Detroit Edison Company ("Edison") and Consumers Power Company ("Consumers"), the applicants herein, and respectfully petition the Commission pursuant to Section 202(e) of the Federal Power Act and Executive Order 10485, issued September 3, 1958, as follows:

(a) The exact legal names of the applicants are:

THE DETROIT EDISON COMPANY

CONSUMERS POWER COMPANY

(b) Correspondence in regard to this application shall be addressed to:

F. M. Kehoe, Secretary
The Detroit Edison Company
2000 Second Avenue
Detroit, Michigan 48226

P. A. Perry, Secretary
Consumers Power Company
212 West Michigan Avenue
Jackson, Michigan 49201

APPENDIX E

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F. M. Kehoe, Secretary
The Detroit Edison Company
2000 Second Avenue
Detroit, Michigan 48226

P. A. Perry, Secretary
Consumers Power Company
212 West Michigan Avenue
Jackson, Michigan 49201

8. Subsequent to the establishment of the third interconnection facility between Edison and Hydro in 1966, peak loads on the systems of the applicants have increased by about fifty percent, and sizes of generating units have increased more than two-fold. The largest generating units in service in Michigan and Ontario in 1966 were rated at 330,000 kilowatts and 282,000 kilowatts respectively. Two 800,000 kilowatt units are now in service in Michigan and units rated at 800,000 and 1,150,000 kilowatts are now under construction. Similarly, Hydro has several 500,000 kilowatt units in service and has 750,000 kilowatt units under construction. For reliable operation of large interconnected networks such as those of Edison, Consumers and Hydro, interconnection capacity between systems should be adequate to provide emergency assistance during periods of multiple forced outages of the larger generating units in the system, as well as to provide significant seasonal diversity exchanges and other interconnection services such as those described in paragraph 3 above. The construction of the proposed interconnection as described in paragraph numbered 6 above is required, in view of the additional and larger generation in both Ontario and Michigan, to maintain the degree of system reliability which has previously been provided by the three existing interconnections between Edison and Ontario. Moreover, as previously discussed, applicants have interconnections, and coordinate their activities, with other electric utilities in the United States under the so-called "MIIO" agreements, and Ontario Hydro has interconnections, and coordinates its activities, with Niagara Mohawk and PASNY. The construction of the proposed interconnection will also be of significant value in maintaining reliability of electric service in the areas served by the MIIO companies, Niagara Mohawk and PASNY.

9. The effective interchange capability between Ontario and Michigan is assumed to be the amount of electric energy which can be transferred over all available facilities (without exceeding circuit ratings)

following the loss of any single or double circuit transmission line. The thermal limits of the existing and proposed interconnections between Edison and Ontario Hydro are significantly greater than the effective interchange capability, which is dependent upon a variety of operating conditions (for example, load and generation distribution, availability of transmission facilities and scheduled interchanges between electric systems) in both the United States and Canada. This arises from the circumstance that Edison, Consumers and Ontario Hydro are part of a large and complex network of interconnected electric systems, all of whose operations may be affected by actions in other parts of the United States and Canada. At the present time (with existing interconnections), the design interchange capability is approximately 1,450 MW for transfers to Ontario and 1,300 MW for transfers to Michigan. The present design interchange capability to Ontario is considerably less than the rates (2,200,000 kVA) at which applicants are currently authorized to export electric energy to Canada. The availability of the new interconnection proposed herein will increase such design interchange capability to 1,950 MW for transfers to Canada and 2,100 MW for transfers to Michigan. (These design interchange capability values assume 400 MW of "Lake Erie circulating power"* on the interconnections between Edison and Ontario Hydro.) The significant increase in design interchange capability which will be provided by the proposed interconnection (500 MW to Canada and 800 MW to Michigan) will only permit applicants to more closely approach the rates of export currently authorized by the Commission.

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*Circulating power is power which flows between any electric system and other electric systems to which it is interconnected at more than one point. The characteristics of the electric systems of Edison, Consumers, Ontario Hydro and other systems surrounding Lake Erie to which they are interconnected are such that a large circulating power flow generally exists in a clockwise direction around Lake Erie.

10. If the interconnection proposed herein is not constructed, the operating flexibility available to applicants through coordination with Ontario will be largely lost, because rates of export approaching those currently authorized cannot be consistently attained over the existing and limited interconnection facilities. More serious, a failure to uprate the interconnection facilities between Edison and Ontario Hydro could eventually prevent the parallel operation of the systems in Michigan and Ontario.

11. The benefits provided by import-export with Ontario Hydro capability could alternatively be provided by the installation of new generating capacity by applicants; however, the costs of installing such new generating capacity are approximately 20 times the cost of installing the new interconnection facilities proposed herein and would represent an unnecessary and duplicative employment of resources better committed elsewhere.

12. The amount of electric energy which applicants are currently authorized to export, and which applicants do not herein seek to increase, represents a very small percentage of applicants' total annual production of electric energy, amounting to an estimated 6.3 percent of anticipated 1973 production, 6.0 percent of anticipated 1974 production and 4.1 percent of anticipated 1980 production. More importantly, there will be offset against these exports of electric energy, imports by applicants from Ontario Hydro under the arrangements described in paragraph numbered 3 above. Net deliveries of electric energy on an annual basis will normally be only a small fraction of applicants' annual export authorization. A compilation of gross receipts of electric energy by applicants from Ontario Hydro and gross deliveries by applicants to Ontario Hydro over the past five years is contained in Exhibit X-3 attached hereto. As shown in this exhibit, gross receipts by applicants during the 5-year period ended December 31, 1972 have exceeded gross deliveries by almost two billion kilowatthours.

An estimate of future deliveries of electric energy between Applicants and Ontario Hydro is shown in Exhibit X-4 attached hereto. As shown in this exhibit, applicants' potential annual exportation or importation of electric energy from and to Canada may approach 3,700,000 megawatthours.

13. For the reasons described above, the construction of the proposed interconnection, as described in paragraph numbered 6 hereof, and the transmission of electric energy as proposed herein, will improve the reliability and sufficiency of, and will make more economical, the supply of electric energy in both the United States and Canada, and most particularly in Michigan, Ontario, and New York. Further, the increased design interchange capability will not impede or tend to impede coordination of electric energy supply in the United States, but will rather greatly improve applicants' ability to coordinate their operations with other electric systems to which they are interconnected.

14. The total cost of the proposed interconnection and related facilities is estimated to be approximately $7,350,000, of which $3,050,000 will be spent in respect of facilities to be constructed in the United States. All costs of the proposed interconnection and related facilities will be shared equally by (i) applicants and (ii) Ontario Hydro.

15. Additional Information

(a) The source of the electric energy to be exported by applicants as proposed herein, as in the case of the energy currently exported by them, will be applicants' total resources, including energy generated or purchased by them. All electric energy exported will not impair the ability to supply the requirements of accessible United States markets at the time of its exportation.

CONSUMERS POWER COMPANY
MIDLAND UNITS 1 AND 2
AEC DOCKET NOS. 50-329A, 50-330A

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Memo, R. L. Paul to File; re- Suggested purchase price for Alpena Power Company, dated May 28, 1971	1024	2
Letter, J. B. Falahee to W. R. Boris; re- Agreement to purchase the City of Charlevoix's municipal electric facilities, executed on January 31, 1963, dated February 1, 1963	1025	14
Letter, T. P. Martin to Maurice Gerhard; re- City of Charlevoix Earnings, dated January 31, 1963	1026	4
Letter, B. G. Campbell to Mayor and City Council, Charlevoix, Michigan, dated December 13, 1962	1027	2
Letter, J. W. Kluberg to B. G. Campbell re- City of Charlevoix, dated August 11, 1961	1028	1
Letter, J. W. Kluberg to D. E. Karn, et al; dated June 22, 1961	1029	1
Statistics and Information, City of Charlevoix, prepared August 1961, Consumers Power Company	1030	15
Resolution adopted by Allegan City Council on March 14, 1966	1032	1
Letter, A. H. Lee to Mayor and Council of City of Allegan, dated June 13, 1966	1033	3
Minutes, Allegan City Council Meeting dated July 28, 1966	1034	1

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Resolution adopted by Allegan City Council on August 8, 1966	1035	1
Letter, Signature illegible to B. G. Campbell; re- Benefits to the City of Allegan from the sale of its electrical system to Consumers Power Company, dated May 27, 1966	1036	8
Letter, B. D. Hilty to Judd L. Bacon, dated December 13, 1965	1037	1
Resolution adopted by Petoskey City Council on November 15, 1965, dated December 8, 1965	1038	1
Letter, J. W. Kluberg to B. G. Campbell; re- Kegomic Area Distribution Facilities, dated October 20, 1965	1039	1
Telegram, B. D. Hilty to City Commission Petoskey, Michigan, dated October 29, 1965	1040	1
Letter, R. L. Paul to Ralph Hahn, dated September 22, 1966	1041	3
Letter, R. L. Paul to B. G. Campbell, dated September 19, 1966	1042	9
Letter, R. L. Paul to G. R. Lambke, dated July 29, 1965	1044	1
Letter, R. L. Paul to Ralph Hahn, re- Approved proposal to be submitted to the City of St. Louis for the purchase of its electric system, dated July 29, 1965	1045	7

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Letter, C. E. Waits to W. J. Jefferson, re- Appraisal of City of St. Louis' municipal system, dated July 9, 1965	1046	1
Report and appraisal of electric distribution system of St. Louis, Michigan dated July 6, 1965	1047	28
Report of examination, City of St. Louis electric utility, St. Louis, Michigan dated June 30, 1965	1048	15
Letter, J. L. Bacon to B. D. Hilty; re- Kegonic Line Purchase, dated December 24, 1965	1049	1
Notes, Value of Municipal Electric System, (Allegan, St. Louis), dated 1966	1050	1
Notes, Incremental Expense Factors	1051	1
Notes, Value of Municipal Electric System, (St. Louis)	1052	1
Notes, Value of Municipal Electric System, (Allegan)	1053	1
Letter, unsigned to Mr. Nash, dated April 18, 1967, re- letter of March 23, 1967 on proposed new contract for electric service beyond May 21, 1967	1054	1
Letter, H. F. Small to A. F. Brewer, dated November 21, 1966, re- Michigan Pool Study	1055	3
Letter, Keith B. Norris to Al Southwick dated January 23, 1963, re- Lakewood Public School	1056	2

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Generation Reserve Comparison	1058	1
Memo, Division Managers from R. D. Davey, Jackson, Michigan, dated September 27, 1971	1060	7
Comparison of Estimated Annual Power Costs Platte, River Hatchery, Phase I, II and III	1061	4
Letter, R. L. Paul to State of Michigan Department of Conservation, Attention: Mr. H. C. MacSwain, Lansing, Michigan dated November 12, 1968	1062	1
Letter, Matthew L. Bruce to R. L. Paul, dated January 23, 1966	1063	2
Letter, D. T. Egly, R. R. Pegg to R. L. Paul, dated September 14, 1971	1064	1
File Memo, re- Northern Electric Coopera-tive, dated August 27, 1964	1065	1
Letter, Leonard Lamb, et al., to B. G. Campbell, dated October 15, 1965	1066	1
Letter, M. A. Beach to A. H. Lee, dated October 1, 1969	1067	1
Letter, R. L. Paul to F. M. Hoppe, dated June 22, 1970	1068	2
Letter, G. Elenbaas to R. L. Paul, dated June 17, 1970	1069	2
Letter, B. D. Hilty to H. R. Wall, dated February 12, 1969	1070	1

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Letter, W. C. Allen to R. L. Paul, dated June 27, 1969	1071	3
Annual Report, Top-O-Michigan, REA 1961, dated April 17, 1962	1072	1
Letter, Jensen to Paul, dated February 17, 1970, re- Petoskey State Park	1073	1
Letter, Paul to Campbell, dated July 28, 1969, re- City of Harbor Springs	1074	1
Letter, Bruce to Stutesman, dated June 10, 1969, re- Wholesale power supply to Coop.	1075	2
Memo, Paul to Campbell, dated January 16, 1968, re- purchase of Presque Isle Electric Coop.	1076	1
Letter, Eugene J. Yehl to Glen Phillips re- Brook Hollow Recreational Project Barryton, Michigan, dated April 20, 1965	1077	2
Memo, E. H. Kaiser to A. H. Aymond, etal re- Letter Agreement, dated January 26, 1971(1079)	1078	1
Letter, E. B. Easson to W. J. Mosley, et al; re-Agreement dated January 5, 1971	1079	5
Study MIIO System Performance during extreme emergencies (1970 System)	1080	9
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Letter, H. C. Reasoner, et al; re- Consumers Power Co. - Detroit Edison Company, dated January 21, 1969	1082	1

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Letter, H. R. Wall, et al; to Toledo Edison Company, dated October 16, 1968	1083	2
Letter, H. R. Wall, et al; to Toledo Edison Co., dated October 16, 1968	1084	1
Study, Interconnection effects on Michigan reserve requirements, dated September 18, 1963	1085	10
Letter, E. H. Kaiser to G. L. Heins, re- Memo, (017171 - 017172), dated June 23, 1972	1086	1
Memo, E. H. K. to file; dated June 23, 1972	1087	2
Memo, E. H. Kaiser to file; re- MIIO Companies responses to Consumers Power initial offer to lease pumped storage, dated September 27, 1967	1088	3
Letter, G. L. Heins to E. H. Kaiser, et al; re- Lulu-Allen Junction 345 KV line, dated February 25, 1972	1089	2
Letter, G. L. Heins to W. J. Mosley; re- Argenta-Alkhart 345 KV double circuit tower line, dated October 10, 1969	1090	1
Letter, H. R. Wall et al to T. J. Hagel dated October 29, 1969	1091	3
Letter, W. Jack Mosley to J. H. Campbell re- Cost sharing for Argenta-Elkhart line, dated March 4, 1970	1092	2
Study, E. H. K. to file; re- MIIO Group Prototype generation expansions, dated March 1963	1093	2
Memo, Possible solution to Michigan-AEP- CE problem, dated February 10, 1969	1094	1

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Memo, A. H. Lee to H. P. Graves, et al; re- 17595, dated August 18, 1967	1095	1
Letter, Mary A. Simons, Executive Secretary, Allegan Area Chamber of Commerce to Federal Power Commission dated August 17, 1967	1096	1
Letter, R. A. Condon to M. W. Balfour; re- Alpena Power Company, dated July 31, 1964	1097	1
Letter, Ralph G. Fletcher to Louis A. Vaupre, dated July 28, 1964	1098	1
Letter, B. G. Campbell to A. H. Aymond, dated May 19, 1966	1099	2
Letter, R. L. Paul to R. A. Lamley, dated April 22, 1966	2000	1
Study Draft, M.C.R. to File; re- Michigan Pool Data for EEI Task Force on Power Capacity for Pooling, dated July 20, 1959	2001	15
Map/Chart, Michigan Pool Interconnections as of December 1958	2002	1
Letter, Leo W. Hoffman to H. P. Graves, 17858 - 17861, dated November 2, 1967	2003	1
Letter, Leo W. Hoffman to Editor, Allegan News Gazette	2004	3
Letter, William B. Barrons, City Manager, City of St. Louis to Ralph Hahn, dated January 11, 1966	2005	1
Letter, William B. Barrons, City Manager City of St. Louis to Ralph Hahn, dated April 20, 1965	2006	1
Letter, R. L. Paul to Division Managers et al; dated July 8, 1966	2007	1

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Letter, E. H. Kaiser to R. A. Lamley et al; re- Supplement C-4 (18247-18262), dated February 19, 1970	2008	1
Supplement C-4 Consumers Power-Detroit Edison Electric Power Book - Pool Unit No. 4 Capacity and Energy Sharing and Costs, approved as revised on July 4,1969 and August 7, 1969	2009	17
Letter, H. R. Wall to H. C. Reasoner, dated March 21, 1972	2010	2
Letter, E. H. Kaiser to A. K. Falk; re- 18274-18276, dated March 21, 1972	2011	1
Draft, E.H.K. to file; re- New Consumers Edison Agreement, dated March 17, 1972	2012	3
Memo, W. J. Mosely to H.R.W., re- 18310-18322, dated February 3, 1965	2013	1
Study/Presentation Consumers Power Detroit Edison Power Pool, dated January 15, 1964	2014	13
Letter, H. P. Graves to Hubert H. Nexon, dated February 25, 1966	2015	3
Minutes Regular Meeting of the Board of Directors of the Rogers City Power Company, held on July 25, 1966	2016	2
Minutes, Special Meeting of the Board of Directors of the Rogers City Power Company, held on November 10, 1966	2017	2
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Chart, Rogers City Power Company's Customers Receiving Increases when billed on Consumers Power Company's Rates, 12 months ending November 1966, dated May 23, 1967.	2020	4

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Chart, CE Nuclear Fuel Cycle Cost Estimates, dated June 1, 1966	2021	1
Letter, W. H. Whitley, publisher, Presque Isle County Advance to B. G. Campbell, dated July 15, 1964	2022	1
Letter, A. H. Aymond et al to W. H. Whiteley, President Rogers City Power Company, dated July 8, 1964	2023	3
Study, RLP to File; re- City of Hillsdale Power Supply and Cost Study, dated December 29, 1966	2024	10
Memo/Address RLP to file; re- Municipal, REA, Other Wholesale Power Business and Related Problems, dated May 17, 1966	2025	7
General Memo, RLP to File; re-review of the City of St. Louis Report on Electric Power Survey and Analysis of Total Power Purchase, dated May 4, 1966	2026	4
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Letter, R. L. Paul to John N. Malone; re- Contract No. 65-05-DR-(5)-20014, dated November 4, 1971	2028	1
Letter, Gerritt Elenbaas to Robert L. Paul; re- Bill of sale for East Bay View Electric distribution system; dated January 18, 1966	2029	1
Memo, R. L. Paul to W. C. Allen; re- Camp Grayling - Purchase of distribution line, dated July 9, 1969	2030	1
Memo, R. L. Paul to B. E. Hagen; re- Bill of Sale, Camp Grayling Line, dated June 5, 1969	2031	1

Study, City of Portland: Wholesale Electric Service Proposal, dated November 9, 1971	2032	6
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Letter, A. H. Lee to B. G. Campbell; re- 19798, dated January 5, 1966	2036	1
Letter, N. L. Adamson, Village Clerk, Paw Paw, Michigan to Arthur Lee; re- 19798, dated January 4, 1966	2037	1
Resolution, Village of Paw Paw, Michigan adopted December 27, 1965 and dated January 4, 1966	2038	1
Study, (incomplete) City of Hillsdale: Power Supply and Cost Study, dated December 30, 1966	2039	3
Study, Consumers Power Company Purchase Proposal City of Grand Rapids Street Lighting System	2040	3
Study/Memo/Brochure, Some Questions and Answers on Electric Rates and Service in Bay City	2041	8
Letter, W.E. Sherwood to M.H. Gerhard; re- City of Holland: Information Regarding Municipal Utilities, dated February 15, 1962	2042	1

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Charts, H.J. Neal to file; re-Competition Report, dated February 23, 1966	2043	2
Study, Bay City Proposal, etc.	2044	13
Letter, L.A. Vaupre to W.A. Hedgecock; re- City Light Department, Bay City, Michigan (21917-21918), dated September 27, 1965	2045	1
Memo, L. A. Vaupre to file re- Ad Hoc Meeting, dated September 10, 1965	2046	1
Memo, L. A. Vaupre to file; re- Bay City Light: Advertising Program-Competitive, dated September 27, 1965	2047	1
Letter, L. A. Vaupre to W. J. Jefferson re- Ad Hoc Committee Report: Bay City Electric Light Department, dated July 23, 1965	2048	1
Letter, L. A. Vaupre to W. A. Hedgecock dated June 24, 1965	2049	1
Letter, L. A. Vaupre to M. W. Balfour; re- Kiesel Substation, dated June 4, 1965	2050	1
Study, Report on Bay City Competitive Situation, presented by W. J. Jefferson et al; dated April, 1965, Section II (13 pages).	2051	13
Letter, W. J. Jefferson to L. A. Vaupre, dated March 26, 1965	2052	1
Memo, R. D. Davey to Division Managers re- 2054, dated July 26, 1971	2053	1
Chart, typical net monthly bills for residential electric service, dated July 1971	2054	1

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Letter, Unsigned to B. G. Campbell, dated December 6, 1967	2056	1
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Letter, B. D. Hilty to C. A. Mulligan; re- East Bay View or the Kegonic Area, dated December 3, 1964	2058	2
Letter, B. G. Campbell to D. E. Karn; re- Kegonic Line Acquisition: Petoskey dated January 14, 1965	2059	2
Letter, R. J. Van Ess to William Reid; re- Hydroelectric plant abandonment losses, dated April 18, 1966	2060	2
Memo, G.L.H. to file; re- Rural Electrification Association Study, dated January 23, 1964	2061	3
Letter, J. W. Kluberg to B. G. Campbell; re- City of Grayling, dated August 11, 1961	2062	1
Study, City of Grayling: General Information and Physical Inventory	2063	4
Study/Memo, A.M.N. et al; re- Economic Analysis of Southern Interconnections 1969 versus 1970, dated July 17, 1964	2064	3
Memo, Illegible to R. L. Paul et al; re- 2066, dated August 12, 1968	2065	1
Draft, No. 2 Supplement E; Principles Relating to Extension of Pooling Privileges to Third Parties	2066	4
Minutes (extracts) Meeting of Board of Directors of Consumers Power Company, held on April 11, 1972	2067	1
Service Schedule E, Sale of Portion of Generating Capability of Ludington Pumped Storage Plant by Consumers to Commonwealth, under Agreement dated March 1, 1966 among Consumers Power Company, et al.	2068	10

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Memo, B. G. Campbell to Executive Officers et al; re- 23555-23562, dated December 3, 1965.	2069	1
Letter, R. L. Paul to Division Managers; re- 23723-23724, dated March 28, 1966	2071	1
Exhibit A, Case No. U-2291 Rules Governing the Extension of Single-Phase Electric Service in Areas Served by Two or More Utilities	2072	2
Rate Instruction Bulletin No. 13-5; re- Rate Schedule MPSC No. 7-Electric, dated April 14, 1966	2073	6
Letter, H.J. Jensen to R.C. Youngdahl; re- Petoskey State Park, dated February 17, 1970.	2074	1
Service Inquiry No. 189, Village of Paw Paw, dated September 22, 1966	2075	1
Letter, Harry R. Wall to A. H. Aymond et al; re- Pumped hydro discussion with MIIO Representatives (024177 - 024184), dated August 23, 1967	2076	1
Data, Blue Ridge Pumped Storage, dated August 30, 1967	2077	4
Memo, Review of City of St. Louis Report	2078	2
Memo/Study, Northern Michigan Electric Cooperatives, dated February 7, 1963	2079	15
Memo, A.F.G. to H.R.W., et al; re- City of Big Rapids Surplus Power, dated November 21, 1962	2080	1

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Charts, Alpena Power Company, dated July 25, 1969	2082	5
Letter, Tom G. Fletcher to A. H. Aymond, dated June 15, 1971	2084	1
Memo, "Virginia" to A.H. Aymord, dated November 9, 1962	2085	1
Letter, Unsigned to Nolan E. Isom, Onaway News, Onaway, Michigan; re-2087 dated April 5, 1966	2086	2
Charts, Comparison: Consumers Power Comp./ Presque Isle Electric Corporation/Presque Isle Electric Cooperative, dated April 4, 1966	2087	6
Letter, Earl C. Hurley, Manager, O & A Electric Cooperative, dated December 7, 1965	2088	1
Letter, Paul to Hilty, dated March 19, 1968	2089	2
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Letter, Kluberg to Vaupre, dated October 2, 1964, re- Bay City Report	2105	2
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Letter, Unsigned to A. H. Lee, Kalamazoo, dated August 13, 1968; re- letter from C.C. Burns to F.C. Voss of August 1, 1968 re- requested information on City of Allegan	2108	1
Telegram, dated July 29, 1964, from Louis L. Sappanos to Consumers Power Co., re- South Haven Power Plant	2109	1

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Memo, dated August 24, 1966, re- Consumers Power Company's offer to the City of Allegan for purchase of electric distribution	2117	2
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Letter, Willis C. Allen to Omar Garbenson, dated April 9, 1968	2130	1
Memo, W.K. Markus to W.C. Allen, re- Traverse City	2131	2
Letter, Unsigned to B.D. Hilty, dated April 16, 1962; re- Professional Club Subdivision	2132	1
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Letter, Philip C. Webb to Board of Trustees, Glen Oaks Community College Centreville, Michigan, dated January 10, 1966	2139	2
Letter, Philip C. Webb to Norman Haas, dated February 6, 1967	2140	2
Letter, P. C. Webb to G. W. Howard, et al; dated December 28, 1966; re- Glen Oaks Community College	2141	2
Letter, Robert E. Brewster to Dr. Eleanor M. Gillespie, dated November 22, 1966	2142	2
Questions & Answers, Power Plant Expansion	2143	1
Biographical Data, Paul H. Todd	2144	1
Memo, E. A. Riedel to C. J. Herron, dated May 12, 1972; re- Traverse City	2145	1
Letter, B. D. Hilty to Lyle E. Beattie, dated March 18, 1968	2146	1
Letter, W. A. Hedgecock to G. W. Howard et al; dated November 1, 1965	2147	1
Memo, B. G. Campbell et al; to R. L.Paul dated August 19, 1968 (?) re- Draft No. 2, Supplement E, Power Pool Agreement	2148	1
Memo, W. J. Mosley et al, to R. C. Paul, et al., dated September 11, 1968, re- Pooling Agreement	2149	1
Letter, R. L. Paul to W. C. Allen, dated March 26, 1970, re- Cherryland Cooperative	2150	2
Memo, R. L. Paul to R. A. Conden, et al., dated February 20, 1970, re- Status of Appraisals	2151	2
Memo, L. L. Novak to H. J. Jensen, et al., dated February 18, 1970; re- Appraisal Review	2152	1

DISCOVERY DOCUMENTS (cont.)	Number	Pages
Minutes, Meeting of Executive Committee of Board of Directors	2153	5
Memo, C.E.M. to file, dated October 31, 1968; re- City of Manton Purchase	2154	1
Memo, R. L. Paul to H. J. Jensen, et al., dated January 6, 1970; re- City of Eaton Rapids	2155	1
Letter, R. A. Conden to B. G. Campbell, dated April 1, 1968; re- Alpena Power Company	2156	1
Letter, B. G. Campbell to Executive Officers et al., dated December 3, 1965	2157	1
Routing slip, unsigned to G. W. Patterson re- South Haven (handwritten notation) dated April 23, 1962	2160	1
Letter, R. E. Doyle, Jr., Indiana and Michigan to V. M. Marquis, dated April 18, 1962	2161	1
Letter, V. M. Marquis to Mr. Cook, re- City of South Haven, Michigan, dated April 19, 1962	2162	2
Deposition, Patterson, by Grossman, re- Justics Department Exhibits 106, 107, 108	2163	4
Memorandum of Understanding, dated August 26, 1969	2164	1
Economic Analysis 1979 Generation Addition Nuclear and Intermediate, dated March 26, 1971	2165	31

DISCOVERY DOCUMENTS (cont.)	Number	Pages
Consumers Power Company EHV Transmission System Development 1972-1982	2166	29
Remarks of James G. Campbell, Press Conference, dated June 19, 1960	2167	7
Memo - E. H. Kaiser to R. C. Youngdahl, dated May 20, 1970, with attachments Subject Delay of Palisades.	2168	7
Memo - C. F. Brown to B.G. Campbell, dated February 25, 1972 - Proposed 50% Hough Bill	2169	1
Memo - C.F. Brown to B.G. Campbell, dated April 6, 1972 - Delhi Township Association.	2170	1
Memo - R.L. Paul to L.L. Booth, H.S. Smith, B.G. Campbell, R.A. Conden, dated 7/10/67 with attached 2 pages. City of Hart.	2171	3
Memo - R.L. Paul to H.P. Graves, A.C. Fagerlund dated October 2, 1969, The City of Seton Rapids.	2172	1
Letter - G.L. Carson to B.G. Campbell dated February 26, 1960 - Lowell	2174	1
Memo - R.L. Paul to A.C. Fagerlund dated March 21, 1969 City of Essexville with attached memo and Service Inquiry.	2175	3
Memo - to. Summers to R.L. Paul, dated July 17, 1969 - Essexville Waste Treatment Plant Standby Electric Service.	2176	1

DISCOVERY DOCUMENTS (cont.)	Number	Pages
Memo - R.L. Paul to T. Summers dated July 31, 1969 City of Essexville Duplicate Service.	2177	2
Kalamazoo State Hospital - Western Michigan University - Steam Plant Operation; Report on Meeting of Consumers Power Company Study Team July 25, 1964, by R.L. Paul 7/29/64.	2178	2
Memo - Meeting of Legislative Interim Study Committee - RLP 9/10/64	2179	2
Memo - Meeting of Legislative Interim Study Committee RLP 1/14/64 with attached Cost Schedule.	2180	3
Letter from W. R. Boris to Robert W. Hartwell, May 8, 1972; Letter from A. W. Land to Garrett G. Hasper, May 2, 1972.	2181	
Letter to 35 Senators	2182	
Letter fom A. W. Land to B. R. Brown, May 16, 1972.	2183	
July 23, 1971, service	2184	
Handwritten document by A. W. Land	2185	
Senate Bill 1065-1964 Session.	2186	

VERIFICATION

I certify that I have read the foregoing Brief on Proposed Findings of Michigan Cities and Cooperatives. To the best of my knowledge the statements contained therein are true and accurate. I further certify that I am authorozed to make them.

Robert A. Jablon

Robert A. Jablon

October 9, 1974

This verification was signed October 9, 1974 to the corrected brief. Earlier copies were served October 8, 1974.

RAJ.

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