UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of)
CONSUMERS POWER)
(Midland Units, 1 & 2)

Docket Nos. 50-329A
and 50-330A

CONSUMERS POWER COMPANY

BRIEF IN SUPPORT OF ITS PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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INDEX

LEGAL CITATIONS

NOTE: Materials denoted * are included in Appendix I (Michigan Legal Materials) and those denoted ** are included in Appendix II (General Legal Materials).

Page

Page

Page

LEGISLATIVE MATERIAL:

Bills:

CITATIONS TO PROPOSED FINDINGS OF FACT

Finding of Fact — Page

Finding of Fact — Page

I. Introduction and Summary of Argument.

Consumers Power Company ("Consumers Power" or "the Company") presently holds construction permits to construct two nuclear reactors located near Midland, Michigan ("Midland Units"). This proceeding arises under the 1970 amendments to Section 105c of the Atomic Energy Act, 42 U.S.C. 2135c, and a "Notice of Antitrust Hearing on Application for Construction Permits," issued by the Commission on April 11, 1972 which established a three-man Atomic Safety and Licensing Board ("hearing Board") to conduct a hearing and to consider, inter alia, "whether the activities under the permits in question would create or maintain a situation inconsistent with the antitrust laws ....".[1/]

In addition to Consumers Power Company and the Commission staff ("the staff"), the other parties to this proceeding are the Antitrust Division of the Department of Justice ("the Department"), the Michigan Municipal Electric Association and seven cooperatives and municipal electric systems located within or adjacent to the Company's service area in the lower peninsula of Michigan ("Intervenors").

This proceeding was initiated on February 8, 1971, when the Commission transmitted the Midland application to the Department of Justice for antitrust review.[2/] The Attorney

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1/ 37 Fed. Reg. 7726.

2/ Letter from Bertram A. Schur, Esq., of the Atomic Energy Commission to Joseph J. Saunders, Esq., of the Department of Justice, February 8, 1971.

General, in a letter dated June 28, 1971, advised the Commission that a hearing should be held on antitrust questions which he considered to be raised by the Company's proposed activities under the Midland licenses. In this letter, as well as through statements of counsel and witnesses sponsored in this proceeding, the Department of Justice has in effect charged Consumers Power Company with monopolization of bulk power supply in violation of Section 2 of the Sherman Act. Throughout the course of this proceeding, the Department has assumed the lead role among the proponents of antitrust license conditions, although the staff and the Intervenors sponsored certain expert testimony.

This is the first case to be heard by a hearing Board under the 1970 amendments of the Atomic Energy Act which require pre-licensing antitrust review of all nuclear reactor license applications. As such, the case presents several important questions of first impression regarding the appropriate scope and nature of proceedings under §105c. Section II of this Brief addresses those questions in some detail.

On the merits of the antitrust allegations -- we submit -- and so demonstrate in our proposed findings of fact and in this Brief -- that the Department of Justice and the other proponents of antitrust conditions have failed to prove their case. In the first place, they have failed to demonstrate the requisite nexus between the Midland Units and the allegedly inconsistent antitrust situation in Lower Michigan. Specifically,

there is no evidence on the record supporting a finding that construction or operation of the Midland Units will change existing economic or competitive relationships between the Company and any other entity, or that the Midland Units will have a significant impact on the cost or other characteristics of the Company's operations.

In the second place, assuming arguendo that the requisite nexus is deemed to exist, the Department of Justice and the other parties have failed to show why the situation relating to bulk power supply in Lower Michigan should be considered inconsistent with the antitrust laws. Part III and IV of this brief show that such an inconsistency can result only if Consumers Power Company possesses monopoly power in a relevant market. These Parts further demonstrate that the Company neither possesses nor exercises monopoly power.

Part V shows that the Company's policies and practices within the relevant markets have not been anticompetitive in either intent or effect. Rather as Part V explains, the Company's conduct has been reasonable and consistent with accepted industry standards and with the criteria established by the Federal Power Commission.

The concluding section of the brief, Part VI, addresses issues raised by the antitrust license conditions which have been proposed in this proceeding. As to granting direct access to the Midland Units, there is uncontradicted evidence that the requests for such access were untimely and that, as a result, imposition

of such a condition would be financially burdensome and thus would not only unfairly discriminate against the Company's customers, but also jeopardize the Company's already difficult financial position. As to conditions relating to coordination and transmission (wheeling) arrangements -- assuming arguendo that such matters are within the AEC's authority -- the record demonstrates that requiring the Company to engage in such arrangements will unfairly and unduly discriminate against the Company's customers unless the arrangement provides net benefits to the Company, i.e., unless the other systems possess the willingness and capacity to provide reciprocal assistance to the Company on a comparable basis.

In sum, the evidentiary record, the proposed findings and the analysis which follows in this brief conclusively affirm that the Company's activities under the Midland licenses will not maintain a situation inconsistent with the antitrust laws and that the license conditions proposed by the Company's adversaries are discriminatory, unlawful, and contrary to the public interest.

II. The Other Parties Misconstrue the Scope and Character of the Proceedings Under §105c.

A. "Activities Under the License" Include Only Those Aspects of Consumers Power Company's Operations That Have a Meaningful Nexus to the Midland Plant.

The Department of Justice, the staff, and the Intervenors have sought to shift the focus of this proceeding from the Midland Units to issues and relief proposals which seek to alter the system-wide structure and practices of Consumers Power Company and the electric utility industry generally. Ignoring the fact that their claims are more appropriately addressed to the Federal Power Commission,[1/] the Michigan Public Service Commission[2/] or to a Federal district court,[3/] they apparently hope to sidestep the demanding requirements of proof otherwise imposed on those who seek expansive remedies under the antitrust laws and to use the opportunity of the Company's need for genera-

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

2/ See Cantor v. Detroit Edison Co., Civ. Action No. 4-70026 (E.D. Mich. July 2, 1974), App. II-7. Cf. Northern Calif. Power Agency v. Calif. PUC, 5 Cal.3d 370, 96 Cal. Rptr. 18 (1971), App. II-33.

Legal materials in the Appendices to this brief are cited in the following format: "App. I-1." The Roman numeral (I or II) denotes whether the material is in Appendix I (Michigan) or Appendix II (General) while the Arabic digits identify its item number within the Appendix.

3/ United States v. Otter Tail Power Company, 331 F. Supp. 54 (D. Minn.), aff'd in part and vacated and remanded in part, 410 U.S. 366 (1973); United States v. Florida Power Corp., 1971 Trade Cas. ¶73,637 (M.D. Fla. 1971) (consent decree), App. II-41.

tion capacity to avoid the burden of proving their antitrust claims in a conventional forum.

Consumers Power Company submits that Section 105c of the Atomic Energy Act neither compels nor permits the AEC prelicensing antitrust review process to be utilized in the manner proposed by the Company's adversaries in this proceeding. As the Commission's Louisiana Power & Light Co. decision,[4/] the legislative history of of Section 105c, and fundamental principles of administrative law make clear, the AEC regulatory concern is limited to the units to be licensed, and does not extend to ancillary aspects of an applicant's operations generally. The succeeding sections analyze with reference to the facts of this case: (a) the LP&L decision, (b) the legislative history of Section 105c, and (c) applicable administrative law principles.

1. The LP&L Decision.

Under the standards set forth in the Commission's opinion in the Louisiana Power & Light Co. antitrust proceeding license conditions relating to antitrust matters cannot be

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4/ Louisiana Power & Light Co. (Waterford Steam Electric Generating Station, Unit 3), Dkt. No. 50-382A, Memorandum and Order of the Commission, September 28, 1973, RAI 73-9, p. 619 (hereinafter "LP&L Order"). The Commission's overall approach of requiring specific allegations regarding issues and their relationship to the proceedings at hand was strongly endorsed by the United States Court of Appeals for the District of Columbia Circuit in BPI v. AEC, CCH Atom. Ener. Law Rptr. ¶3594 (July 11, 1974), App. II-6, in upholding §2.714(a) of the Commission's Rules of Practice, 10 C.F.R. §2.714(a).

imposed unless there is a causal connection between the applicant's proposed "activities under the license" and a "situation" allegedly inconsistent with the antitrust laws. Here, the proponents of antitrust license conditions have made no such showing and uncontradicted evidence sponsored by Consumers Power Company demonstrates that no such causal connection exists.

In LP&L, the Commission expressly noted that it was taking "this opportunity ... to outline some appropriate benchmarks" for antitrust review.[5/] The Commission observed that Section 105c "involves licensed activities, and not the electric utility industry as a whole,"[6/] and concluded that it is

> "the existence of that tie [between alleged anticompetitive practices and the nuclear facilities] which is critical to antitrust proceedings under the Atomic Energy Act. If activities relating to a facility have no substantial connection with alleged anticompetitive practices, there is no need for a hearing as to such practices or proposed forms of relief from them." 7/

The Commission offered several examples to illustrate the circumstances under which the requisite "substantial connection" exists. These examples are particularly significant to the instant case because they relate to the three principal areas in which the proponents of antitrust conditions raise issues

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5/ RAI 73-9 at 620.

6/ Id. (emphasis in the original).

7/ RAI 73-9 at 621 (emphasis added).

and seek relief: direct access to the licensed unit, coordination arrangements, and transmission ("wheeling") services.

(a) unit access.

As to the unit itself, the Commission held that an applicant's intention to "commingle" the output from the licensed unit with its other generation capacity does not establish the requisite causal connection between the unit and allegedly "anticompetitive practices in the electric utility industry."[8/] The basis for the Commission's holding was that commingling is "a truism applicable to all cases; power is not isolated."[9/]

In the instant case, the electric output from the Midland Units will be commingled with, and rendered indistinguishable from, the Company's other generation capacity through its transmission system.[10/] The output from Midland will be entirely utilized to meet part of the Company's load growth.[11/] Contrary to the suggestions of the Department of Justice and the other proponents of antitrust conditions in this proceeding, these circumstances are insufficient to establish the necessary connection between Midland and any antitrust-

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8/ RAI 73-9 at 621.

9/ Id.

10/ Consumers Power Company Proposed Finding of Fact 1.04. Consumers Power Company Proposed Findings of Fact are hereafter cited as "Finding of Fact".

11/ Findings of Fact 1.01,1.03.

related situation in Lower Michigan.[12/]

There are circumstances when an applicant's arrangements concerning the licensed unit standing alone could create a situation inconsistent with the antitrust laws. For example, as the Department of Justice testified in the Congressional hearings which led to the enactment of Section 105c, an applicant proposing to construct a joint venture nuclear unit from which certain parties are unfairly excluded should be subject to antitrust scrutiny by the Commission.[13/]

In the instant case, however, these circumstances do not exist. There is no evidence that the Company's construction and operation of the Midland Units will change, or have any impact whatever, upon its existing relationships

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12/ Prehearing Brief of the United States Department of Justice, pp. 70-72, Pretrial Brief of the AEC Regulatory Staff, pp. 80-85. The Department of Justice relied heavily on a commingling theory in its Prehearing Brief, p. 71. ("This power will not and cannot be marketed in isolation". "... Midland power will strengthen and expand Applicant's system and the regional power exchange ....")

13/ Hearings on Prelicensing Antitrust Review of Nuclear Powerplants Before the Joint Comm. on Atomic Energy ("Hearings"), 91st Cong., 1st Sess., pt. 1, at 127-28 (1969-70) (Acting Assistant Attorney General Comegys). See also Mr. Comegys' remarks inserted into the Congressional Record in the floor debate on the proposed legislation. 116 Cong. Rec. S. 39623 (December 2, 1970).

or arrangements with any neighboring system.[14/] The unit is to be wholly owned and operated by the Company; its electric output will be neither sold to nor exchanged with any other party except as commingled capacity from its entire system.[15/] As the LP&L decision makes clear, these facts fail to provide the requisite nexus between the unit and the antitrust "situation" in Lower Michigan.

(b) coordination arrangements.

With regard to interconnection arrangements such as coordination and pooling, the LP&L decision sets forth a clear standard which the proponents of license conditions in this proceeding do not, and cannot, meet:

> "While the propriety of pooling arrangements and physical interconnections could certainly be considered in appropriate cases, such matters in most circumstances could not be dealt with by this Commission where no meaningful tie existed with nuclear facilities." 16/

14/ Specifically, there is no evidence that construction and operation of Midland will affect the competitive retail customer relationships between the Company and any other system [Finding of Fact 1.08], that it will bestow upon the Company any unique benefits with regard to bulk power supply which it does not already possess [Finding of Fact 1.08], or that it will affect in any way the Company's coordination arrangements with other systems [Finding of Fact 1.07].

15/ Findings of Fact 1.03, 1.04.

16/ RAI 73-9 at 621 (emphasis added).

In this case, no "meaningful tie" exists. The Midland Units are not part of a staggered construction, joint ownership, unit power, or any other similar arrangement between the Company and any of the many systems with whom it has coordination agreements.[17/] The entire output of the units will be used to satisfy the load growth on the Company's system alone.[18/] Neither the size nor the feasibility of the units is dependent upon the Company's coordination arrangements.[19/]

It is true, of course, that Midland Unit power will be "commingled" in the Company's transmission system with other generation capacity and that some of the commingled power will be exchanged through the Company's transmission system with others pursuant to coordination and other interconnection arrangements.[20/] But this situation is again simply a "truism applicable to all cases", since nearly all electric utilities are interconnected with at least one other system.[21/]

Thus, the mere fact that the Company is interconnected

17/ Finding of Fact 1.03.

18/ Findings of Fact 1.06, 1.13.

19/ Finding of Fact 1.07.

20/ Finding of Fact 1.04. In fact, none of the Company's coordination agreements makes any reference to the Midland Units [Finding of Fact 1.07].

21/ In Lower Michigan, every investor-owned, municipal and cooperative electric system is interconnected with at least one other system. Finding of Fact 2.05.

and has coordination agreements with other systems is insufficient to establish the necessary "meaningful tie" between the Midland Units and the Company's allegedly anticompetitive coordination policies and practices. Since there is no evidence of such a nexus, the Company submits that the LP&L holding forecloses inquiry into the Company's coordination arrangements.

(c) transmission services.

The effort of the Company's adversaries to include issues and license condition proposals relating to the Company's transmission ("wheeling") policies and practices flies in the face of the Commission's clear mandate to the contrary in LP&L:

> "Denial of access to transmission systems would be more appropriate for consideration where the systems were built in connection with a nuclear unit than where the systems solely linked non-nuclear facilities and had been constructed long before application for an AEC license." 22/

The facts demonstrating the lack of nexus between the Midland Units and the Company's transmission system are beyond dispute in this proceeding. The Company is an integrated electric system whose transmission system long antedates its Midland application.[23/] This system connects the Com-

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22/ RAI 73-9 at 621.

23/ Finding of Fact 1.01.

pany's present 50 generating units (only two of which are nuclear) and was not constructed in connection with, or in contemplation of, the Midland Units.[24] In fact, the only transmission facilities relating to the Midland Units are 28 miles of line which will connect the units to the Company's 5,800-mile transmission network.[25]

Under the Commission's mandate in LP&L concerning transmission, issues and relief proposals relating to the Company's transmission system are beyond the "inherent boundaries"[26] of this proceeding. The reasonableness of this conclusion is confirmed by the standards applied by the Federal Power Commission in licensing hydroelectric generation units and attendant transmission facilities.

In determining whether its licensing authority extends to given transmission lines, the Federal Power Commission looks to "the basic purpose of the line in relation to other facilities."[27] Under this standard, the FPC has ruled

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24/ Findings of Fact 1.01, 1.05.

25/ Finding of Fact 1.05.

26/ RAI 73-9 at 620.

27/ Western Mass. Elec. Co., 39 FPC 723, 731 (1968), App. II-46, modified on other grounds, 40 FPC 296, aff'd sub. nom. Municipal Electric Ass'n of Mass. v. FPC, 414 F.2d 1206 (D.C. Cir. 1969). See also New England Power Co., 43 FPC 568, 573 (1970), App. II-31, amended in other respects, 43 FPC 785; Georgia Power Co., 39 FPC 930, 932 (1968), App. II-23.

that its licensing proceedings should not consider lines "used principally for the transmission and distribution of power generated at plants other than [plants to be licensed]", lines which "function as major links of a regional transmission grid", or lines which "will be built by Applicants whether or not the [license] is authorized."[28/]

In light of the standards set forth by the Commission in LP&L and the test applied by the FPC under comparable circumstances, antitrust inquiry or relief relating to the Company's transmission system is clearly inappropriate and unlawful.

2. The Legislative History of Section 105c.

Although, we submit, the hearing Board is bound by the principles enunciated by the Commission in LP&L, it is important to emphasize that these principles derive from the clear intent of Congress as reflected in the legislative history of 105c. This history confirms that the Department of Justice and the other proponents of Midland antitrust license conditions are seeking to use this proceeding contrary to the manner Congress contemplated and contrary to the express assurances of the Department of Justice.

The Joint Committee on Atomic Energy (JCAE) began considering legislation to provide for pre-licensing antitrust review of nuclear reactor applications in 1969. Among the pro-

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28/ Western Mass. Elec. Co., supra at 733.

posed legislation under consideration by the JCAE was a bill sponsored by the Commission, and endorsed by the Department of Justice, which provided for antitrust review but failed to describe under what circumstances and to what extent the Commission should impose antitrust license conditions.[29/] It was recognized that such an open-ended mandate could possibly be interpreted by the Department or the Commission to include far-ranging, industry-wide matters and, therefore, witnesses before the JCAE urged the Committee carefully to define and limit the Commission's antitrust role.[30/] Similar concerns were expressed within the JCAE itself, in at least one instance directly to the Department of Justice.[31/]

Apparently in response to such concerns, the Department offered assurances that the proposed legislation would not

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29/ H.R. 9647, S.1883, 91st Cong., 1st Sess. (1969).

30/ See e.g., Hearings, pt. 2 at 323 (Edison Electric Institute), 528-29 and 536-37 (New England Electric System).

31/ For example, one member of the JCAE staff observed to the Department of Justice witness:

> "[T]here apparently are no other statutes, and no court decisions based thereon, to which the AEC could look for guidance in implementing and interpreting section 105c. The only analogous statute, as far as I am aware, is the one you [the Acting Assistant Attorney General] mentioned, the Federal Property and Administrative Services Act. For the reasons indicated earlier, it probably would not afford much guidance." Hearings, pt. 1, at 125.

be utilized in the open-ended manner its critics suggested. For example, a Department spokesman described the scope of proposed Section 105c legislation to the Senate Antitrust and Monopoly Subcommittee in the following narrow terms:[32/]

> "... antitrust review would consider the contractual arrangements and other factors governing how the proposed plant would be owned and its output used. We would also consider the arrangements under which it would be built and supplied. No broader scope of review is contemplated, cognizant as we are of the need to avoid delays in getting atomic plants into operation. We do not consider such a licensing proceeding as an appropriate forum for wide-ranging scrutiny of general industry affairs essentially unconnected with the plant under review" (emphasis added).

This testimony was put into the JCAE hearing record by the American Public Power Association, as part of its written response to questions propounded by the JCAE. Also called to the attention of the JCAE by the public-power groups was the testimony of the AEC's General Counsel that, under the pending bills, "'the antitrust authority of Commission [sic] will be an appropriate complement to the authority of the Attorney General and, it would seem, should not be used by the Commission to duplicate authority already held by the Attorney General.'"[33/]

The restricted scope of the Commission's role under

32/ Hearings, pt. 2, at 366.

33/ Hearings, pt. 2, at 365-66.

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

> "Specifically, the industry is now going through a considerable controversy over the extent to which, and the means by which, small systems should have access to large new generation and transmission facilities. As to this, I think antitrust law provides some general guidance. Companies acting together to create or control a unique facility may be required by application of the rule of reason, to grant access on equal and nondiscriminatory terms to others who lack a practical alternative" 34/ (emphasis added).

Similarly, when the Justice Department was subsequently asked to comment on the bill reported by the JCAE, the Assistant Attorney General endorsed the bill and observed that it would enable the Commission to condition the license for a "joint venture" nuclear power plant -- that is, one owned by two or more companies. 116 Cong. Rec. S. 39623 (December 2, 1970) (emphasis added).

The central feature of this joint venture example is that the terms on which the facility is to be built raise antitrust issues without reference to the general system operations

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34/ Hearings, pt. 1, at 127-28.

of any utility. By selecting joint venture facilities as the central example of the problems to be considered by the Commission under the proposed antitrust review provisions of Section 105c, the Department of Justice impliedly represented to the JCAE that it need not fear an open-ended interpretation of those provisions which would result in extension of the Commission's antitrust review authority to encompass the entire system of which the licensed facility would be a part.[35/]

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

The bill which ultimately emerged from the JCAE and was enacted (H.R. 18679) must be interpreted in the light of

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35/ A similar disclaimer that the proposed provisions would be made the vehicle for inquiry into the general characteristics of a utility's operations may be found in the Justice Department's comment on the implications of membership in power pools. When pressed as to whether the Department's purportedly narrow concern with joint ventures was broader than it seemed, by reason of the possible argument that the owner's membership in a power pool would make a joint venture out of a nuclear facility nominally under single ownership, the Department assured the JCAE that pool membership per se would not be seized upon to subject a single-owner facility to antitrust review as if it were a joint venture. Hearings, pt. 1, at 134.

this history and the Department of Justice's comments as to its limited scope. As the Committee's report emphasized, the legislation did "not stop at the point of the Attorney General's advice, but [went] on to describe the role of the Commission."[36/] The Commission's "role", in turn, was limited by the express terms of the bill to the inquiry whether "activities under the license would create or maintain a situation inconsistent with the antitrust laws". Senator Aiken, a JCAE member who advocated broad AEC review authority, conceded that the reported bill reflected that Committee's effort "to cut back on the scope of the AEC consideration of antitrust issues".[37/]

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

36/ H.R. Rep. No. 1470, 91st Cong., 2d Sess., 1970 U.S. Code Cong. and Admin. News 4994.

37/ "Dissenting Views on H.R. 18679" (draft dated Sept. 14, 1970), p.2, attached as App. A to "Reply of the Department of Justice on Issues Other Than Disqualifications", filed June 9, 1972 in this proceeding.

> "... the views and opinions expressed in the letters from the Antitrust Division of the Department of Justice are not necessarily authoritative, and may or may not accurately represent the intent [of the bill]." (116 Cong. Rec. H. 39819, December 3, 1970).

The fact that the legislation did not reflect the open-ended approach now espoused by the Department of Justice was brought directly to the Senate's attention as well. As Senator Pastore, the floor manager of the bill, told his colleagues:

> "The committee and its staff spent many, many hours on this [antitrust] aspect of the bill, and I can assure the Senate that we consider very carefully the considerable testimony, comments and opinions we received from interested agencies, associations, companies and individuals, including representatives from the Antitrust Division of the Justice Department, from privately owned utilities, and from public and cooperative power interests. The end product, as delineated in H.R. 18679, is a carefully perfected compromise by the committee itself; I want to emphasize that it does not represent the position, the preference, or the input of any of the special pleaders inside or outside of the Government. In the committee's judgment, revised subsection 105c, which the committee carefully put together to the satisfaction of all its members, constitutes a balanced, moderate framework for a reasonable licensing review procedure." 116 Cong. Rec. S. 39619 (December 2, 1970) (emphasis added).

It is clear from the legislative history of Section 105c that the substantial limitations on the scope of the AEC's antitrust authority were prerequisites to passage of legislation

in this area. Undoubtedly, one factor prompting these limitations was the deep concern of Congress, revealed throughout the hearings, reports and floor debates on the legislation that the prelicensing review process not delay the construction or operation of nuclear facilities.

> "The committee anticipates that all the functions contemplated by these paragraphs would be carried out before the radiological health and safety review and determination process is completed, so that the entire licensing procedure is not further extended in time by reason of the added antitrust review function." 38/

The history of this proceeding itself illustrates that the scope of antitrust review now proposed by the Department of Justice and others is inherently inconsistent with the Congressional mandate for an expeditious licensing process. The Midland application was tendered to the Department for review in February, 1971.[39/] At the behest of the Department, and over the opposition of the Company, the hearing Board permitted discovery and admitted evidence concerning nearly every phase of the Company's operations as an electric utility since 1960.[40/]

38/ H.R. Rep. No. 1470, 91st Cong., 2d Sess., 1970 U.S. Code Cong. & Admin. News 4996.

39/ Letter from Bertram A. Schur, Esq., of the Atomic Energy Commission to Joseph J. Saunders, Esq., of the Department of Justice, February 8, 1971.

40/ See "Prehearing Conference Order of the Atomic Safety and Licensing Board", dated August 7, 1972, p.3; Consumers

(cont.)

A consequence has been that nearly four years will have elapsed between commencement of this proceeding and an initial decision.

Since safety and environmental aspects of the pre-license process generally consume much less than four years, antitrust review under the standards suggested by the Department would deprive the nation of much-needed nuclear energy while parties litigate issues unrelated to the construction or operation of the unit. It is therefore inconceivable that Congress, so hostile to delay in licensing proceedings, would have authorized the Commission to conduct the type of broad-based antitrust review process which the Company's adversaries now propose.

That Congress intended the scope of antitrust review to be far narrower than that proposed by the other parties to this proceeding is re-enforced by the general legislative context from which the 1970 amendments to the Atomic Energy Act emerged. In the wake of the 1965 Northeast electric black-out, legislation was unsuccessfully proposed which would have compelled electric utilities to engage in joint ventures in nuclear and other large-scale generation units, to enter into coordinated

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40/ (cont.)

Power Company's position with regard to the appropriate scope of this proceeding was first set forth in a pleading entitled "Answer to Notice of Hearing and Opposition To, And Motion to Reconsider, Delegation of Review Authority, and Disqualification of Dr. Weiss," May 9, 1972, pp. 1-3; the Department of Justice first set forth its views concerning scope in a "Reply" to aforementioned pleading dated June 9, 1972.

operations and development, and to provide transmission (wheeling) service for others.[41/] For example, the Kennedy-Aiken bill introduced in 1967[42/] would have amended the Atomic Energy Act to prohibit the Commission from issuing construction permits or operating licenses for nuclear generation units unless, inter alia,

> "(1) the applicant has granted to all other interested persons, including Government agencies and public, private, and cooperative bodies, engaged in the distribution, transmission, or production of electric energy an opportunity to participate to a fair and reasonable extent, as determined by the Commission, in the ownership of the facility for which the license is requested; . . .
>
> (3) the applicant agrees to make the output of electric energy from the facility available, during the life of such facility, for sale on fair and non-discriminatory terms to all persons, including Government agencies and public, private, and cooperative bodies, engaged in the distribution, transmission, or sale of electric energy; . . .
>
> (6) adequate transmission capacity is or will be made available to provide reasonable service to all owner-participants and purchases of electric energy; . . ."

A 1969 bill would have Congress declare, and enact legislation to compel, that

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41/ Proposed "Electric Power Reliability Act of 1967", H.R. 12322, 90th Cong., 1st Sess. (1967); S.1071, H.R. 7016, H.R. 7052, H.R. 7186, H.R. 9557, all 91st Cong., 1st Sess. (1969).

42/ S. 2564, H.R. 13828, 90th Cong., 1st Sess., App. II-52. The bill was referred to the JCAE.

> "all electric utilities and their customers should have access to the benefits of coordination and advancing technology, including advances in nuclear technology financed by the taxpayers of this country and economies of scale, on fair and reasonable terms, including access by means of capacity sharing, staggered construction, coordination of facilities and reserves, wheeling, displacement transactions and other exchanges... 43/"

Such legislation was opposed as too broad in scope and neither the aforementioned bills nor similar legislation was ever reported out of committee.[44/] Thus, although Congress had before it at that time proposals for legislation that would have compelled special unit power access to nuclear facilities, coordination arrangements and wheeling, it adopted the far more limited approach which is reflected in Section 105c.

3. Administrative Law Principles.

In our view, the foregoing analysis of Section 105c and the Commission's definitive interpretation of it in LP&L is fully confirmed by well-established principles of administrative law. Whether described in terms of "nexus", "primary jurisdiction", or administrative comity and "deference", these

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43/ Proposed "Electric Power Coordination Act", H.R. 12585, §2(7), 91st Cong., 1st Sess. (1969), App. II-48.

44/ See Hearings on Licensing and Regulation of Nuclear Reactors before the Joint Committee on Atomic Energy, 90th Cong., 1st Sess. pt. 2 (1967), Comparable legislation was again proposed in the next Congress, S. 194, H.R. 605, H.R. 3838, H.R. 5941, all 92d Cong., 1st Sess. (1971).

principles are applied so as to permit each administrative body to carry out its legislative objectives without duplicating the work of other agencies and infringing upon their ability to carry out their objectives.

Interpreting Section 105c in the manner which the other parties to this proceeding propose requires the acceptance of the hypothesis that Congress ignored these principles and commissioned the AEC to duplicate and intrude upon the authority of other agencies. We submit that these principles, embedded in administrative law, preclude giving credence to such a hypothesis. In the instant case, these principles require that the focus of Section 105c proceedings be upon the nuclear units to be licensed and that such ancillary matters as retail and wholesale service and rates, the reasonableness of wholesale and coordination agreements, the rates and other terms of transmission (wheeling) and unit access should be left for resolution by either the Federal Power Commission (FPC) or the Michigan Public Service Commission (MPSC).

The appropriate allocation of responsibility between this Commission and other agencies such as the FPC and MPSC can be discerned from the Court of Appeals decision in the City of Lafayette case. There, certain municipal electric systems had sought to present their antitrust claims both to the FPC and to the Securities and Exchange Commission. Each of the two agencies had refused to consider the municipals' allega-

tions of anticompetitive activity in the course of approving the proposed issuance of securities by Gulf States Utilities Co. The court found that the FPC should have considered the allegations, but that the SEC, lacking any regulatory authority over the operations of the utility, was justified in its refusal:[45/]

> "Where an agency has some regulatory jurisdiction over operations, it must consider whether there is a reasonable nexus between the matters subject to its surveillance and those under attack on anticompetitive grounds. But the general doctrine requiring an agency to take account of antitrust considerations does not extend to a case like the one before us where the antitrust problem arises out of operations of the regulated company (past and projected) and the agency, here the SEC, has not been given any regulatory jurisdiction over operations of the company." 46/

Consumers Power Company is an electric utility over whose operations the FPC and MPSC have authority and this Commission does

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45/ City of Lafayette v. SEC, 454 F.2d 941, 955 (D.C. Cir. 1971), aff'd on other issues sub nom. Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973).

46/ Earlier, in Alabama Electric Cooperative, Inc. v. SEC, 353 F.2d 905, 907 (D.C. Cir. 1965), cert. denied, 383 U.S. 968 (1966), the court had also refused to require SEC consideration of competitive issues. There the court held that the issues relating to system operation raised were properly for the Alabama Public Service Commission to consider and that the specialized SEC was not to enter into the "normal regulation of public utility operations." Although the holding in City of Lafayette represents a "modification in part" of Alabama Electric Cooperative, the court in the latter case reiterated its key conclusions that,

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not. For example, parallel charges of anticompetitive activity have also been raised in a wholesale rate proceeding at the FPC by virtually the same parties who have intervened here.[47/] Therefore, the regulatory purposes of the AEC will be served fully if its antitrust inquiry focuses on the Midland facility, and does not extend to Consumers Power's system-wide rates and other operating policies and practices over which it has no regulatory authority.

The principles set forth in City of Lafayette have also been expressed in terms of "primary jurisdiction" and "deference" among various agencies. Under the primary jurisdiction doctrine the agency with primary regulatory authority is in practical

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46/ (cont.)

> "The purpose of the Public Utility Holding Company Act, *** was to supplement state regulation -- not to supplant it. Nowhere in the Act is there a provision granting to the SEC the sort of regulatory power attributed to it by the petitioner. Indeed, the congressional choice of that Commission to administer the Act is, in itself, the strongest sort of proof that the general purpose of the Act was to regulate the issuance of securities which could not be reached by state commissions."

City of Lafayette, 454 F.2d at 954-55 (deletion in original).

47/ Consumers Power Co., FPC Docket No. E-7803. "Motion by the Cities and Cooperatives to Reject, Protest, Request for Hearing and Five Months Suspension, and Petition to Intervene," December 26, 1972, filed on behalf of Bay City, Charlevoix, Coldwater, Harbor Springs, Hillsdale, Marshall, Petoskey, St. Louis, Union City, Chelsea, Portland, Northern Michigan Cooperative, Wolverine Cooperative and the Southeastern Michigan Cooperative.

effect vested with exclusive jurisdiction, subject to judicial review, over matters within its sphere of administrative expertise.[48/] In the context of the AEC's prelicensing antitrust review of the Midland Units, application of primary jurisdiction doctrine forecloses consideration of factual issues unrelated to the Midland Units which are within the regulatory authority of the Federal Power Commission or the Michigan Public Service Commission.

The most recent extensive discussion of primary jurisdiction in a Supreme Court case, Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973), illustrates the application of the doctrine.[49/] Ricci brought an antitrust action in district court against the Exchange and others alleging that they conspired to damage his business in violation of the Exchange Rules by transferring his Exchange membership to a third party. Referring to the recurring question of the applicability of the doctrine of primary jurisdiction, the Supreme Court explained:

48/ See e.g., Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973); Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62 (1970); Carnation Co. v. Pacific Westbound Conf., 383 U.S. 213 (1966); Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951); Far East Conference v. United States, 342 U.S. 570 (1952); FMB v. Isbrandtsen Company, 356 U.S. 481 (1958); United States Navigation Co. v. Cunard S.S. Co., Ltd., 284 U.S. 474 (1932); see K. Davis, ADMINISTRATIVE LAW TREATISE, §19 (1958).

49/ Cf. Chicago Mercantile Exchange v. Deaktor, 414 U.S. 113 (1973) (applying Ricci in a brief per curiam opinion).

> It arises when conduct seemingly within the reach of the antitrust laws is also at least arguably protected or prohibited by another regulatory statute enacted by Congress. 50/

The Supreme Court held that the antitrust action must be stayed until the agency had an opportunity to act because,

> ...(1)...it will be essential for the Antitrust Court to determine whether the Commodity Exchange Act or any of its provisions are 'incompatible with the maintenance of an antitrust action,' [Silver v. New York Stock Exchange, 373 U.S.] at 358; (2) ... some facets of the dispute between Ricci and the Exchange are within the statutory jurisdiction of the Commodity Exchange Commission; and (3) that adjudication of that dispute by the Commission promises to be of material aid in resolving the immunity question. 51/

50/ 409 U.S. at 299-300.

51/ 409 U.S. at 302 (footnote omitted). It is important to note that the Court considered the Commodities Exchange Act not to be among the regulatory schemes which immunize the challenged activity from the antitrust law, such as the Shipping Act, Far East Conference v. United States, 342 U.S. 570 (1952) and the Federal Aviation Act, Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973). The doctrine of primary jurisdiction is quite independent of the antitrust immunity granted by those regulatory arrangements. Indeed, the Court pointed out the limited effect the Exchange Act had on the antitrust laws:

> ...[W]e [do not] find that Congress intended the Act to confer general antitrust immunity on the Exchange and its members with respect to that area of conduct within the adjudicative or rule-making authority of the Commission or the Secretary [citation omitted]. The Act contains no categorical exemption of this kind; indeed it confers no express exemption at all, not even with respect to conduct that is directed or authorized by the Commission or the Secretary. 409 U.S. at 303, n.13.

As Ricci demonstrates, application of primary jurisdiction principles need not lead to consideration of blanket antitrust exemption but rather provides a framework, derived from the agency's expert judgment, in which antitrust issues can be resolved.

While primary jurisdiction has principally evolved in the context of court/agency relations, the doctrine is equally applicable when the particular institutions are both administrative agencies. In the court/agency relationship, referral of regulatory questions to the agency is designed to give the greatest possible effect to the regulatory scheme while the court resolves those overlapping issues principally within its own authority.[52/] In the same vein, it is appropriate for agencies with overlapping responsibility to insure that to the fullest extent possible their respective regulatory programs are given effect.[53/] Thus, as with the court/agency relationship, the doctrine of primary jurisdiction requires the accommodation of overlapping regulatory schemes when coordinate agencies are involved. Certainly that is the case where, as here, one agency's role is to conduct an antitrust inquiry closely parallelling that of an antitrust court.

As with the more orthodox court/agency relationship,

52/ Far East Conference v. United States, supra, 342 U.S. at 574; United States Navigation Co., Inc. v. Cunard S.S. Co., Ltd., supra, 284 U.S. at 481-83.

53/ Cf. United States v. Borden Co., 308 U.S. 188, 198 (1939).

the question arises as to which agency is to defer to whom. In the court setting, this question is resolved by reference to the degree to which the agency possesses authority to regulate the activities being scrutinized.[54/] More specifically, where the scheme of regulation is comprehensive, antitrust courts have consistently deferred.[55/] We submit that in the present case the resolution of that balance with regard to questions unrelated to the Midland Units is plain.

The overlapping regulatory schemes here are those created by the Federal Power Act,[56/] Michigan law[57/] and the Atomic Energy Act.[58/] The authority of the FPC over rates and other conditions of wholesale service under §205 of the Federal

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54/ Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 380-81 (1973); United States v. Philadelphia National Bank, 374 U.S. 321, 354 (1963); Silver v. New York Stock Exchange, 373 U.S. 341 (1963); United States v. Radio Corporation of America, 358 U.S. 334, 349-50 (1959); United States v. Western Pacific Railroad Co., 352 U.S. 59, 63-64 (1956).

55/ See, e.g., Ricci, supra; Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963); Luckenbach S.S. Co. v. United States, 364 U.S. 280 (1960) aff'g on these issues, 179 F. Supp. 605 (D. Del. 1959).

56/ See, e.g., Federal Power Act, §§202(b)(16 U.S.C. 824a(b)), 205(a)(16 U.S.C. 824d(a)), 206 (16 U.S.C. 824e), 207 (16 U.S.C. 824f); Federal Power Commission v. Florida Power & Light Co., 404 U.S. 453 (1972); Federal Power Commission v. Southern California Edison Co., 376 U.S. 205 (1964).

57/ MSA 22.101 et seq., 22.141 et seq., 22.13(6), 22.13(6a), 22.151 et seq., App. I-24.

58/ 42 U.S.C. §§2011, et seq.

Power Act is clearly plenary. Reflecting the FPC's comprehensive responsibility, the Supreme Court has specifically barred inquiry by a court into the reasonableness of wholesale electric rates subject to FPC jurisdiction and required dismissal of an action partially dependent on that issue Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951). The FPC regulatory authority extends to coordinated operations such as reserve sharing and transmission[59/] to unit power rates and sales[60/] and to the terms and conditions of wheeling transactions.[61/] The authority and responsibilities of the Michigan Public Service Commission in the retail market are even broader and also extend into those aspects of the wholesale area that are not federally pre-empted. The MPSC is granted broad authority to regulate all "matters pertaining to the formation, operation or direction of ... public utilities."[62/]

59/ The FPC has full authority to regulate the terms of an interconnection once it is entered into voluntarily even if it would have no authority under §202(b) of the Power Act to require the interconnection. City of Huntingburg v. FPC, 498 F.2d 778, 784, n.31 (D.C. Cir. 1974).

60/ Connecticut Light & Power Co., FPC Dkt. No. E-8105 et al., Opinion No. 701 (July 22, 1974) App. II-14.

61/ Boston Edison Co., FPC Dkt. Nos. E-8187 and E-8700, Order Granting Hearing on Petition for a Declaratory Order and Consolidating Proceedings (September 25, 1974), App. II-5.

62/ MSA 22.13(6), App. I-24. The pervasiveness of the Commission's regulation of Consumers Power's affairs is illustrated by its recent instruction to the Company and its own staff

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By contrast, the Atomic Energy Act provides that "[e]very [electric] licensee [engaging in interstate commerce] shall be subject to the regulatory provisions of the Federal Power Act," §272, 42 U.S.C. §2019. An even more explicit provision assures that "[n]othing in this chapter shall be construed to affect the authority or regulations of any Federal, State or local agency with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the Commission", §271, 42 U.S.C. §2018. Indeed, the AEC has represented to Congress that it has no authority over rate matters and would presumably disclaim jurisdiction over other conditions of electric service as well.[63/]

Many of the issues concerning the Company's system-wide operations which were raised during the AEC hearing are within the scope of the FPC's regulatory jurisdiction and, in fact, were raised by the same intervening systems in a recent FPC rate pro-

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62/ (cont.)

"to establish mutually acceptable performance goals, particularly in the areas of construction planning and management, full utilization of plant capacity and other critical items of general operations." Consumers Power Co., 3 PUR 4th 321, 341 (January 18, 1974), App. I-12. See also Consumers Power Co., MPSC Case U-4174 (November 24, 1972), App. I-11, quoted in Finding of Fact 3.28 showing the Commission's review of the overall financing practices of the Company.

63/ Letter of Lee V. Gossick for L. Manning Muntzing, Director of Regulation of the AEC, to the Hon. Warren G. Magnuson, Chairman, Committee on Commerce, U.S. Senate, July 6, 1973, in S. Rep. No. 792, 93d Cong., 2d Sess. 60-61 (1974).

ceeding, Consumers Power Co., FPC Dkt. No. E-7803.[64/] The Company's wholesale and coordination contracts were filed with the FPC some years ago and any issues pertaining to their reasonableness could have been raised there as well, either in Docket E-7803 or by separate complaint under §205 of the Federal Power Act, 16 U.S.C. §824d. Antitrust issues would necessarily be considered in such a proceeding.[65/] Comparable opportunities to file complaints[66/] and raise antitrust issues[67/] exist at the MPSC.

Since the reasonableness of the Company's coordination, wholesale and retail practices and its other operations is subject to the supervision of the FPC and the MPSC, there is no occasion for the AEC to substitute its judgment for that of its sister agencies. Further, whatever might be the propriety in other settings of halting a proceeding indefinitely while an expert agency is specifically consulted,[68/] that procedure should have

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64/ Order Approving Settlement Agreement, August 30, 1974, App. II-17, see also n. 47 p. 27, supra.

65/ Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973). The intervenors in this proceeding also participated in E-7803 and were represented by the same counsel. See City of Huntingburg v. FPC, 498 F.2d 778 (D.C. Cir. 1974).

66/ MSA 22.157, App. I-24.

67/ Cantor v. Detroit Edison Co., Civ. Act. No. 4-70026 (E.D. Mich. July 2, 1974), App. II-7.

68/ That course was followed in Ricci v. Chicago Mercantile Exchange, supra, for example, where only money damages were at issue.

no place in a licensing proceeding in which promptness has been mandated both by Congress[69/] and the AEC[70/] and in which clear opportunities to raise these matters at the FPC and MPSC have been and remain available.[71/]

A principle of administrative law which parallels the primary jurisdiction doctrine is the practice of "deference" to sister agencies on matters within their area of expertise and responsibility. This practice of deference operates much like the principle of comity and is employed even though the deferring agency is also charged with the concurrent responsibility over the matters which were determined by the sister agency. We believe that the circumstances in this case present a classic case for application of the "deference" doctrine.

In National Ass'n. of Women's and Children's Apparel

69/ See p. 21, supra.

70/ Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), Memorandum and Order of the AEC, April 8, 1974, RAI 74-4, p. 307.

71/ In Port of Boston Marine Terminal Ass'n. v. Rederiaktiebolaget Transatlantic, 400 U.S. 62 (1970), the Supreme Court, in affirming the dismissal of an action held that a party which had foregone an available opportunity to participate in a tariff review proceeding before the Federal Maritime Commission could not collaterally attack a final order of the Commission in an action brought in district court to enforce the tariff.

The Supreme Court explained that Port of Boston presented "an almost classic case for engaging the doctrine" of primary jurisdiction. 400 U.S. at 68.

Salesmen, Inc.,[72] the Federal Trade Commission declined to re-examine a determination of the National Labor Relations Board that the respondent in the FTC proceeding was not a "labor organization", a status which would have immunized the respondent against the antitrust allegations involved In so holding, the FTC ruled that:

> "The Board's action has direct relevance to this proceeding for an organization found disqualified by the NLRB from acting as a labor organization cannot shelter behind labor's antitrust exemption. That result follows, since the applicability of the labor antitrust exemption is to be determined on the basis of a joint consideration of the antitrust and labor laws in order to harmonize the policies embodied therein. We agree with respondents that we should defer to the finding of the Board on the issue since, after all, it is the national agency charged with the administration of federal labor law. 77 FTC at 1092. (footnotes omitted).

In affirming the Commission's ruling the Fifth Circuit held:

> "Given this commitment, under our national labor policy, to the Board's particular expertise of the task of defining what organizations are labor organizations, we hold that it was proper for the FTC to accord dispositive weight to the Board's holding." (Footnote omitted.) 73/

The recognition by the FTC of the NLRB's pre-eminent authority

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72/ 77 FTC 988 (1970), App. II-30.

73/ National Ass'n of Women's and Children's Apparel Salesmen, Inc. v. FTC, 479 F.2d 139, 144 (1973), cert. denied, 414 U.S. 1004.

regarding matters within its primary concern in conducting an antitrust inquiry, is, we submit, a persuasive precedent for the AEC's deference regarding matters at the heart of the FPC's and the MPSC's authority and responsibilities.

Providing further support for this conclusion is the practice of the Federal Communications Commission which has held that it will "defer" to the Federal Trade Commission in determining what is false or deceptive broadcast advertising:

> "We therefore normally have not made, and do not intend to make, judgments whether particular broadcast advertisements are false and misleading. While we may indeed act in a clear, flagrant case, we shall continue our practice of generally deferring on these matters to the FTC." Consumers Ass'n. of the District of Columbia, 32 FCC 2d 400, 405 (1971). App. II-15. 74/

Whether it is termed primary jurisdiction, as is typical in court litigation, or deference, as has been done by some administrative agencies, the basic precept running through this body of law is constant: the on-going viability of an administrative agency's regulatory policy requires other adjudicators to refrain from passing on issues properly within that agency's jurisdiction. Claims relating to the Company's system-wide operations fall squarely within this principle.

No support for a contrary position can be found in

74/ To the same effect is Alan F. Neckritz, 37 FCC 2d. 528, 532 (1972) App. II-3. See also FCC Public Notice 65-965, Radio Reg. (Current Serv.) ¶11:402 (October 28, 1965) App. II-47.

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).[75/] The Court in Otter Tail noted that the relief ordered by the district court had carefully avoided conflict with the FPC's authority and hence "[a]t present, there is only a potential conflict, not a present concrete case or controversy concerning [the authority of the two forums]." (410 U.S. at 377). Regarding substantive issues, while Otter Tail rejected notions of total antitrust exemption which Consumers Power has never suggested in this proceeding (410 U.S. at 373-75), the Court in no way second-guesses the FPC or infringes upon its authority. Indeed, on a crucial point of expert judgment, the Court quotes the FPC as the basis of its holding (410 U.S. at 380 and n. 10). Thus, far from refuting the FPC's pre-eminence in the regulation of electric utilities, Otter Tail provides express support for the primary role of the FPC and MPSC.

In sum, we submit our analysis of the Commission's LP&L decision and the congressional effort to limit the scope of the Commission's review under §105c is confirmed by the aforementioned principles of administrative law.

B. The Standard of Inconsistency with the Antitrust Law Does Not Lower the Usual Standard of Proof in Antitrust Cases.

From time to time in the course of this proceeding,

75/ See Prehearing Brief of the United States Department of Justice, p. 29.

the other parties have suggested they can prevail on the basis of some showing not amounting to proof of violation or contravention of antitrust law but sufficient to constitute an "inconsistency". We disagree.

The phrase "situation inconsistent with the antitrust law" did not originate in the Atomic Energy Act. It was first used twenty-five years ago in the Federal Property and Administrative Services Act of 1949 (40 U.S.C. §488). Despite that long history, opposing counsel have pointed to no instance (and research has revealed none) in which any judicial or administrative tribunal determined under that Act that an "inconsistency" with the antitrust laws was something less than a violation. Surely, had Congress intended to work an innovation in the law through the creation of a new and less rigorous standard of proof for antitrust review in that setting, one of the many agencies active under the 1949 Act would have so noted.[76/] Rather, this silence suggests an assumption that, in using the phrase "inconsistent" instead of "violation", Congress was merely affirming that administrative agencies other than the Federal Trade Commission should not purport to usurp the classicially judicial

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76/ These have included the War Assets Administration, the Reconstruction Finance Board, the General Services Administration and the Small Business Administration as well as the Department of Justice.

of Justice's spokesman had suggested that the retention of the "tendency" test might authorize the AEC to condemn situations as improperly anti-competitive that were not violative of the antitrust laws.[79/] The Committee chose not to confer such open-ended authority on the AEC, and instead deleted the words "tend to" from the 1970 statutory standard.[80/]

The report on the bill is explicit in its explanation for this choice:

> "At the opposite pole [from the view that the AEC should ignore the antitrust matters] is the view that the licensing process should be used *** 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." H.R. Rep. No. 1470, supra at 4994. (Emphasis added.)

Thus, it is only the provisions of the antitrust laws and the established policies of the antitrust laws which Congress authorized the AEC to consider in determining whether a "situation inconsistent with the antitrust laws" would be created or main-

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79/ Hearings, pt. 1, at 90 (AEC General Counsel) and 122 (Justice Department representative).

80/ The deletion of the "tend to" phrase borrowed from §7 of the Clayton Act also flatly contradicts the suggestion made by the AEC staff in its pretrial brief (pp. 25-27) that Congress intended in §105c to apply an "incipiency" concept analogous to that under §7 to the standards of all antitrust statutes. It is clearly improbable that Congress would seek to implement parallel standards under two statutes by eliminating the textual similarities between the two laws.

tained by activities under a license. In no event is the Commission authorized to go beyond those provisions and established policies, or to condemn a situation as "inconsistent with the antitrust laws" when it does not result from contravention of those provisions and established policies.

The Commission, in adopting regulations to implement Section 105c, clearly recognized Congressional intent in this regard. These regulations provide that a "finding [of inconsistency] be based on the reasonable probability of the contravention of the antitrust laws or the policies clearly underlying these laws."[81/]

In light of the foregoing, assertions in support of a lower or divergent standard of proof for "inconsistency" than for violation are plainly without merit. Indeed, in order to accept such assertions it is necessary to reach the far-fetched conclusion that Congress intended sub silentio to create a new, less rigorous antitrust test and that it thrust the responsibility for its interpretation, without any guidance as to its application, not on the federal district courts nor on the Federal Power Commission (with its broad authority over the operational or economic relations of electric utilities), nor on the Federal Trade Commission (with its decades of antitrust expertise), but onto the AEC which has not heretofore had any such experience.

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81 10 C.F.R., Part 2, App. A, Para. X(i).

Thus, we submit that no license conditions can be imposed in this proceeding unless the hearing Board finds the Company to have violated the antitrust laws or the policies clearly underlying them.

C. A Recognition that Competition is Not Always Desirable in Regulated Industries is Among the "Established Policies of the Antitrust Laws."

In its report accompanying the bill which ultimately became Section 105c of the Atomic Energy Act, the Joint Committee on Atomic Energy noted that consideration should be given to the "established policies of the antitrust laws" in applying their provisions.[82/] No such policy is more clearly applicable in the present case, we submit, than the policy which bars any automatic assumption that the maximum possible competition in a regulated industry is a national antitrust objective. The classic statement of this principle is found in Justice Frankfurter's holding in FCC v. RCA Communications, Inc., 346 U.S. 86, 92 (1953) that:

> "Prohibitory legislation like the Sherman Law, defining the area within which 'competition' may have full play, of course loses its effectiveness as the practical limitations increase; as such considerations severely limit the number of separate enterprises that can efficiently, or conveniently, exist, the need for careful qualification of the scope of competition becomes manifest. Surely it cannot be said in these situations that competition is of itself a national policy."

82/ H.R. Rep. No. 1470 supra at 4994.

The Court went on to stress that:

> "[m]erely to assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as this one, is not enough." (346 U.S. at 97).

RCA Communications received its most recent application in Hawaiian Telephone Co. v. FCC, 498 F.2d 771 (D.C. Cir. 1974). In that case, the court of appeals overturned an FCC decision which concluded that competitive communications services should be licensed and encouraged wherever they are economically and technically feasible. There, the court of appeals stressed:

> "The whole theory of licensing and regulation by government agencies is based on the belief that competition cannot be trusted to do the job of regulation in that particular industry which competition does in other sectors of the economy. Without in any way derogating the merits of the competitive free enterprise system in the economy as a whole, we cannot accept the action of the FCC here in a tightly regulated industry, supported by an opinion which does no more than automatically equate the public interest with additional competition." 498 F.2d at 771.

That policy, concluding that competition is not always desirable in a regulated industry, has been recognized in the electric utility industry as well. The Federal Power Commission has observed:

> "In regulated industries, increased competition may sacrifice and retard the investment required for orderly growth and development so as to be contrary to the public interest. Competition among utilities need not be the primary consideration in determining how to achieve our economic, social and environmental objectives. The application of antitrust policy to public utilities requires a balancing of the public interest

> in energy supply at a reasonable price so as to achieve the most efficient allocation of our limited resources against the potential anti-competitive effects of the proposed action." Petition for Amendment of 18 C.F.R. Part 141, FPC Dkt. No. R-432, 49 FPC 588, 589 (1973), App. II-36 (footnote deleted), appeal docketed, sub nom. Alabama Power Co. v. FPC, No. 73-1436 (D.C. Cir. 1973). 83/

Indeed, in Michigan, the Public Service Commission has formally advised Consumers Power Company that the Commission has a statutory duty "to restrict the activities of a utility which desires to render service in an area already served by another utility."[84/]

Congress has on several occasions recognized that competition in the electric utility industry is not necessarily in the public interest or an accepted principle of national policy. For example, in enacting the original Rural Electrification Act in 1936,[85/] the legislation's sponsors emphasized that REA cooperatives would not compete with other systems. For example, Congressman Rayburn stated in debate:

83/ See also Utility Users League v. FPC, 394 F.2d 16 (7th Cir. 1968), cert. denied, 393 U.S. 953 (1973).

84/ Letter from James H. Inglis, Chairman, MPSC to Consumers Power Company, December 27, 1962, transmitting the MPSC's decision in Consumers Power Co., MPSC Case U-1152 of the same date, App. I-9. While this case arose with regard to gas service, the same statute, MSA 22.141 et seq., App. I-24, applies equally to electric utilities under the MPSC jurisdiction.

85/ 7 U.S.C. §§901 et seq.

> "May I say to the gentleman, that we are not, in this bill, intending to go out and compete with anyone. By this bill, we hope to bring electrification to people who do not now have it. This bill was not written on the theory that we are going to punish somebody or parallel their lines or enter into competition with them." 80 Cong. Rec. 5283 (1936).

Senator Norris, another sponsor, echoed this sentiment in the Senate debate on the bill: When asked if an REA cooperative would be allowed to extend its lines into an area presently being served by another supplier, Senator Norris answered that such action would be prohibited under the REA Act. (80 Cong. Rec. 2751 (1936)).[86/]

86/ The foregoing is confirmed by the following exchange between Representative Huddleston and REA administrator Morris Cooke in the course of House hearings on the permanent REA legislation:

* * *

> Mr. Huddleston: I am correct, am I not, in saying that the fundamental purpose of this bill is to give electric service to those who now have not that benefit?
>
> Mr. Cooke: Those who do not now have it.
>
> * * *
>
> Mr. Cooke: Yes sir; we have made the practice absolutely, Mr. Huddleston, of not building any competing lines .... In other words, at no point have we competed with existing lines.

Hearings on Rural Electrification Act before the House Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess. 72-73 (1936).

ment could be used to foster competition for the bulk power markets of the transmitting system.[88/]

More recently, Congress has exhibited a recognition that competition between electric suppliers may not be desirable with regard to bulk power service. In 1959, Congress approved legislation which restricted the territory in which the Tennessee Valley Authority -- a generation and transmission system -- could serve wholesale and other bulk power customers.[89/] The Senate Report which accompanied the legislation warned that even within the territorial boundaries established by that

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88/ For example, Representative Pettingill engaged in the following revealing exchange with FPC Solicitor DeVane, a principal author of the bill:

> "Mr. Pettingill .... 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 generation 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'."

Hearings on H.R. 5423 Before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess. (1935), at pp. 554-555.

89/ 16 U.S.C. §831n-4.

legislation, the TVA should "use extreme caution in extension of service" and should "not encroach on other communities now served by private enterprise."[90/] The Supreme Court has stressed that "one of the primary purposes of the area limitations in §15d of the Act was to protect private utilities from TVA competition". Hardin v. Kentucky Utilities Co., 390 U.S. 1, 6 (1968).

In sum, whether in the context of retail competition by cooperatives, bulk power competition facilitated by wheeling arrangements, or competition between wholesale power suppliers, the courts, regulatory authorities and Congress have made clear that competition in the electric utility industry is not necessarily in the public interest and is not a basic tenet of the nation's public antitrust policy.

Beyond recognition of the established public antitrust policy concerning the electric utility and comparable regulated industries, the reference to "established policies of the antitrust laws" in the JCAE report should not be read as a device

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90/ S. Rep. No. 271 re H.R. 3460 (86th Cong. 1st Sess.), reprinted in 1959 U.S. Code Cong. and Admin. News, 2000, 2008. Senator Randolph filed supplemental views to the Report in which he stressed that it would be "inadvisable to permit excessive competition by TVA to encroach on the areas served by these [local public] and other investor-owned utilities, to siphon off their customers and destroy the value of their properties." In fact, the Senator proposed insuring this result by enacting legislation codifying the "gentlemen's nonencroachment agreement between TVA and the investor-owned power companies." Id. at 2020, 2021 (Supplemental views of Sen. Randolph).

through which the statutory limitations imposed on this Commission's antitrust authority can be avoided. What Congress legislated with one hand, it should not be assumed to have undone with the other. If the quoted language in the JCAE report has any further meaning beyond a recognition of the special character of the electric utility industry, it must mean simply that the Commission is not bound by the technical or jurisdictional elements of the various antitrust offenses in determining whether conduct by the applicant for a license has or will result in a "situation inconsistent with the antitrust laws".

This concept is analogous to the Federal Trade Commission's authority under Section 5 of the FTC Act (15 U.S.C. §45) to proscribe conduct which would constitute a violation of the antitrust laws but for the FTC's failure to satisfy this sort of technical prerequisite. See FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968). The subsection which follows discusses this and other aspects of the FTC's authority in some detail.

D. Application of Section 5 of the FTC Act by the Atomic Energy Commission.

One of the statutory provisions to which the AEC may refer in considering whether the activities under its licenses will create or maintain a situation inconsistent with antitrust laws is Section 5 of the Federal Trade Commission Act, 15 U.S.C.

§45.[91/] Section 5 proscribes conduct which the Federal Trade Commission finds to constitute an "unfair method of competition".[92/]

Throughout the sixty-year history of this provision, the Congress, courts and commentators have consistently recognized that the phrase 'unfair method of competition' is exceedingly ambiguous and in need of careful and studied delineation through the expertise of the FTC. In view of the six decades of FTC development of Section 5, we submit that the AEC, in applying its proscription to the facts of this case, should consider only those precedents which have emerged from FTC enforcement.

In 1914, Congress delegated to the Federal Trade Commission the broad power to investigate and define "unfair methods of competition" as proscribed in Section 5. By this delegation of authority "Congress intentionally left the development of the term 'unfair' to the [Federal Trade] Commission rather than attempting to define 'the many and variable unfair practices

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91/ Section 5(a)(1) of the FTC Act reads as follows: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

92/ The proscription in Section 5 on "unfair or deceptive acts or practices" is not relevant to this proceeding, because it is part of the FTC's "consumer protection" mandate rather than its antitrust jurisdiction and function.

defining the powers and duties of a specialized administrative body charged with its enforcement," Id. at 989. Reviewing the legislative history of the FTC Act, the court found an awareness on the part of the Act's sponsors that

> "... the breadth of prohibition carried with it a danger that the statute might become a source of vexatious litigation. Expertise was called for, both to identify trade practices that posed the threat of monopoly and to avoid using the statute as a vehicle for trivial or frivolous claims. There was, furthermore, a need to develop a central and coherent body of precedent, construing and applying the statute in a wide range of factual contexts, so as to define its operative reach." Id. at 990 (footnotes omitted).

In light of this history, the court found determinative the FTC's continuing role "in providing certainty and specificity to the board [sic] proscription of the Act," and its "ability to provide for the centralized and orderly development of precedent applying the regulatory statute to a diversity of fact situations," Id. at 998.

Against this background, we submit that the term "unfair methods of competition" should be construed by the AEC to include only those practices which the FTC has heretofore found, after formal adjudication, to be within the proscription of that part of Section 5. Neither the Atomic Energy Commission, nor this Hearing Board, should become an independent source of Section 5 jurisprudence, since such a course would be contrary to judicial precedent and could ultimately serve to diminish the vitality of Section 5. Such a limitation will ensure that Sec-

tion 5 remains "canalized within banks that keep it from overflowing," A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (Cardozo, J. concurring).

In examining how the Federal Trade Commission has interpreted Section 5, the Brown Shoe,[95/] Motion Picture Advertising Service,[96/] and Atlantic Refining[97/] decisions are particularly instructive. Brown Shoe and Motion Picture Advertising Service both involved challenges to exclusive dealing arrangements which would have been reachable under Section 3 of the Clayton Act, 15 U.S.C. 14, but for essentially "technical" requirements of that section.[98/] Atlantic Refining involved a challenge to a commission sales relationship between petroleum and tire manufacturers which was found virtually indistinguishable in purpose and effect from the kind of "tying arrangement" which has long been condemned by Section 1 of the Sherman Act.[99/] Thus, while these cases establish that Section 5 is a

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95/ FTC v. Brown Shoe Co., 384 U.S. 316 (1966).

96/ FTC v. Motion Picture Advertising Service Co., 344 U.S. 392 (1953).

97/ Atlantic Refining Co. v. FTC, 381 U.S. 357 (1965).

98/ The arrangement at issue in Brown Shoe was technically not an "exclusive" dealing contract, because it simply required dealers to "concentrate" on the sale of Brown Shoe brands. The arrangement at issue in Motion Picture Advertising Service involved exclusive dealing in the context of an "agency" relationship, which is not subject to the Clayton Act prohibition on restrictive exclusive agreements.

99/ See also FTC v. Texaco, Inc., 393 U.S. 223 (1968).

flexible antitrust enforcement tool,[100/] they do not condone its use to "circumvent the essential criteria of illegality prescribed by the express prohibitions"[101/] of the other antitrust laws such as the Sherman and Clayton Acts.

In fact, the FTC's "own sense of self-restraint" has been "an important safety valve against propensity for excessive claims of Section 5 jurisdiction."[101/] A close observer of FTC practice, after reviewing all of the FTC's monopolization cases in recent years, has concluded that:

> In these monopolization cases, the Commission seems to have been guided by the judicially accepted elements of monopolization under Section 2 of the Sherman Act. It has been as though the Commission were acting as a court, finding a violation or no violation of basic antitrust law and then simply concluding that such a violation is an unfair

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100/ Two other cases often viewed as establishing the parameters of Section 5 for antitrust purposes are FTC v. Cement Institute, 333 U.S. 683 (1948), and Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941). These cases involved an industry-wide pricing system (Cement Institute) and a concerted refusal to deal (Fashion Originators' Guild) which were found to restrain competition in a manner that appears to have been as much a violation of Section 1 of the Sherman Act as of Section 5 of the FTC Act.

101/ The quoted language comes from the Report of the Attorney General's National Committee to Study the Antitrust Laws, p. 149 n. 78 (1955), urging that Section 5 should not be used to "circumvent the essential criteria of illegality prescribed by the express prohibitions of the Clayton Act."

102/ Oppenheim, Guides to Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts, 59 Mich. L. Rev. 821, 844-45 (1961).

method of competition prohibited by Section 5 of the Federal Trade Commission Act." 103/

The FTC's cases concerning general trade restraints have similarly been "guided by the judicially accepted elements" of cases brought in the courts under the Sherman Act. In its recent decision in the Coors case, for example, the FTC declined to go a step beyond established Sherman Act law to declare short-term cancellation provisions in distributorship agreements unfair per se under the broad mandate of Section 5, despite the vigorous advocacy of that position by the Small Business Administration in its capacity as intervenor in that case. 104/ Therefore, in considering Section 5, we urge the Commission and hearing Board to emulate the FTC's restraint and adhere to the FTC-established parameters in assessing whether the activities of Consumers Power Company are inconsistent with this provision.

E. The Burden of Proof Rests on the Parties Proposing Antitrust Conditions.

The Hearing Board has yet to rule on which parties to this proceeding have the burden of proof. The Department

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103/ Rockefeller, Monopolization Under Section 5 of the Federal Trade Commission Act, 41 ABA Antitrust Law Journal 635, 640-41 (1972).

104/ Adolph Coors Co., 3 CCH Trade Reg. Rep. ¶20,403, at 20, 298-99 (FTC July 24, 1973), App. II-1, aff'd in part, rev'd in part, 497 F.2d 1178 (10th Cir. 1974), petition for cert. filed, 43 U.S.L.W. 3108 (August 16, 1974).

of Justice, the Intervenors and the AEC staff are proponents of antitrust license conditions and as such, we submit, they should bear the ultimate burden of proof in this proceeding.[105/] In light of the AEC's rules of practice, of the language of Section 105c and of fundamental principles of antitrust practice and of due process, any other allocation of burden of proof would be inappropriate and unlawful.

1. AEC Rules of Practice.

Section 2.732 of the Commission's Rules of Practice 10 C.F.R. §2.732, provides as follows: "Unless otherwise ordered by the presiding officer, the applicant or the proponent of an

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105/ Burden of proof signifies the ultimate "risk of non-persuasion". See IX Wigmore, EVIDENCE §2485 (McNaughton, ed. 1961). The term imports

> "the duty of ultimately establishing any given proposition [; it] marks ... [t]he peculiar duty of him who has the risk of any given proposition on which parties are at issue,--who will lose the case if he does not make the proposition out..."

McCormick, EVIDENCE §307, n.1 quoting Se-Ling Hosiery v. Margulies, 364 Pa. 45, 50 (1970). Functionally, this means that:

> where either of two equally probable but inconsistent inferences can be drawn from the evidence, neither is deemed to be proved and decision must go against the party having the burden of proof.

Phillips v. SEC, 388 F.2d 964, 970 (2d Cir. 1968).

order has the burden of proof." Thus, where another party is "the proponent of an order" that party, rather than the applicant, bears the burden of persuading the presiding officer that the order should issue.

Accordingly, whether an applicant or another party must carry the burden in a given instance turns upon the nature of the proceeding and upon the posture of the applicant in that proceeding. Thus, while Consumers Power Company has been denominated the "applicant" throughout the Midland licensing process, this title does not necessarily determine its procedural rights in a §105c proceeding any more than the title of "plaintiff" in a civil action controls the procedural rights of that party concerning a counterclaim.

The Department of Justice, the Intervenors and the AEC staff are clearly "proponents of an order" in this proceeding. In the first place, they are proponents in the sense that they have invoked what is in essence an extraordinary remedy: Section 105c of the Atomic Energy Act provides the prelicensing antitrust hearing procedure as an optional antitrust enforcement mechanism which must be deliberately and affirmatively elected in preference to the traditional antitrust enforcement procedures explicitly made applicable to licensed activities by Section 105a of the Act, 42 U.S.C. §2135a.

These parties are also proponents in the sense that

they are the moving parties, the complainants.[106/] They have alleged that Applicant's activities under the proposed licenses will maintain an inconsistent antitrust situation and they are the parties seeking relief from such the alleged situation by imposition of license conditions.

Conversely, Consumers Power Company's position here is more analogous to that of a defendant in a traditional antitrust proceeding than it is to that of an applicant seeking a benefit from a regulatory body. In effect, an applicant who satisfies the health, safety and common defense criteria of Section 103 of the Act is defending, in a Section 105 proceeding, its right to receive its license against the threat of possible conditions -- which conditions correspond with some precision to some of the remedies available in an ordinary antitrust proceeding.[107/]

106/ As Professor McCormick states,

> Usually the party who has the duty of pleading a fact also has the first burden of producing evidence of the fact.... Likewise the pleader will ordinarily be found at the close of evidence to have [the] ultimate burden of persuasion.

McCormick, EVIDENCE §307, text at n. 3 (footnotes omitted).

107/ The validity of this characterization is particularly apparent in the instant proceeding since Consumers Power was granted its construction permit for the Midland Units in 1973; Finding of Fact 1.02. To view Applicant's efforts herein as other than an attempt to preserve privileges previously accorded thus would ignore the facts of the case.

Adjudicatory decisions within the Atomic Energy Commission have explicitly and unambiguously held that where, as here, a party seeks an order suspending, revoking or modifying an existing permit or license that party, not the license applicant, bears the burden of proof. In a decision[108/] rendered several months ago in a proceeding concerning the Midland Units, an Atomic Safety and Licensing Board held that the AEC staff (which was seeking an order modifying the construction permits on the grounds that Consumers Power was allegedly not in compliance with certain AEC quality assurance regulations) bore the burden of establishing Consumers Power's non-compliance and the absence of reasonable assurance of future compliance.[109/] The Board, relying on numerous administrative law precedents stated that the legal authorities clearly required this allocation of the evidentiary burden:

> administrative agencies have consistently imposed the burden of proof on the proponent of an order modifying an existing permit of [sic] license.

RAI 74-7, p. 114. Other AEC hearing tribunals have held to the same effect.[110/]

108/ Consumers Power Company, (Midland Plant Units 1 and 2), Construction Permit Nos. 81 and 82. Memorandum and Order of the ASLB, RAI 74-7, p. 112 (July 12, 1974).

109/ In so holding the Board reversed its previous ruling on the burden of proof question.

110/ In New York Shipbuilding Corp., 1 AEC 707 (1961), the burden of persuasion was placed on the party (the AEC

(cont.)

Section 2.732 follows the burden of proof rule of the Administrative Procedure Act, 5 U.S.C. §556(d), which provides that "the proponent of a rule or order has the burden of proof."[111/] Adjudicatory decisions of other regulatory agencies interpreting the APA rule have consistently held that the party seeking to place conditions upon a license must be deemed the proponent of an order, and that such party, not the licensee or license "applicant", bears the burden of proof at a proceeding concerning the proposed license conditions.

For example, the Federal Power Commission, in a setting parallel to that here, has also held that a party seeking imposition of a condition has the burden of proof.

110/ (cont.)

staff challenging a licensee's continued enjoyment of its license. With respect to each of the staff's allegations, the presiding officer determined that despite stipulations, the record was inconclusive and, accordingly, found for the licensee on the grounds that the AEC staff had failed to meet its burden.

An Atomic Safety and Licensing Board in Philadelphia Electric Co., (Peach Bottom Atomic Power Station, Units 2 and 3), Memorandum and Order of the ASLB, 2 CCH Atomic Energy Law Rptr. ¶11,269.05 (May 25, 1973), a §103 safety and health hearing, held that the applicant may be relieved of the burden of proof where an Intervenor challenges issuance of a license.

111/ Section 181 of the Atomic Energy Act, 42 U.S.C. §2231 provides that the Administrative Procedure Act applies to all AEC actions with the exception of national security matters not relevant to this proceeding.

In Western Massachusetts Electric Co., 112/ the Massachusetts municipal electric system intervenors sought to impose a restriction on a proposed FPC pumped storage project construction and operating license. The restriction would have required the applicants to admit the Massachusetts municipals to a regional electric coordination "council" theretofore composed exclusively of investor-owned electric companies. The Massachusetts municipals alleged that the council by excluding them, had prevented them from obtaining low-cost bulk power and transmission in violation of the antitrust laws and the Federal Power Act. The FPC rejected these allegations stating that neither the Massachusetts municipals, nor the FPC staff which supported their position, had "satisfactorily demonstrated" that these intervenors had been injured by exclusion from the council and that

> "The showing made by the Municipals and staff in connection with the restraint of trade issue has not convinced the Commission that the license issued to the Applicants should be qualified in the manner suggested ...." 39 FPC at 738 (emphasis added).

Thus, the intervenors and staff were allocated the burden of proof and failed to sustain it.

Similarly, the Interstate Commerce Commission has

112/ 39 FPC 723, 738 (1968), App. II-46, modified on other grounds, 40 FPC 296, aff'd sub nom. Municipal Electric Ass'n of Mass. v. FPC, 414 F.2d 1206 (D.C. Cir. 1969).

established rules, repeatedly endorsed by reviewing courts,[113] that where intervening protestants seek to place tacking or interlining restrictions,[114] upon another carrier's ICC certificate, the protestant has the burden of affirmatively establishing that the proposed conditions are appropriate.[115] The practice of the Department of the Interior is to the same

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113/ Garrett Freightlines, Inc. v. United States, 353 F. Supp. 1329 (W.D. Wash. 1973) (three-judge court); Frozen Foods Express, Inc. v. United States, 346 F. Supp. 254, 262 (W.D. Tex. 1972) (three-judge court); Howard Hall Co. v. United States, 332 F. Supp. 1076, (N.D. Ala. 1971) (three-judge Court); Ashworth Transfer, Inc. v. United States, 315 F. Supp. 199 (D. Utah 1970) (three-judge court).

The similarity of proceedings before the ICC concerning certificate restrictions and the instant proceeding is noteworthy, for in both settings the licensee has previously obtained a full grant of authority from the regulating agency to conduct licensed activities and rival entities, in a separate proceeding have sought, under the respective regulatory schemes, to restrict the authority initially granted in order to enhance their competitive situations.

114/ These restrictions prohibit the certificate holder from accepting shipments for destinations beyond the limits of his authorized route. See Frozen Foods Express, Inc. v. United States, supra.

115/ The ICC has followed a similar practice with respect to the imposition of certain conditions upon ICC orders approving railroad line abandonment. Where railroad unions have proposed conditions on such orders providing for the compensation of employees adversely affected by an abandonment, the unions are treated as proponents of an order and have the burden of demonstrating that the abandonment will indeed injure certain employees. St. Louis-San Francisco Ry. Co. Trustees Abandonment, 261 ICC 781, 788

(cont.)

effect.[116/] In fact, research reveals no administrative agency practice in which a licensee or a license applicant bears the burden of showing that license conditions proposed by others should not be imposed.

We therefore urge the Hearing Board to adhere to the clear precedent established at the AEC and other administrative agencies and to require the proponents of antitrust license conditions to bear the burden of proof in this proceeding.

2. Section 105c.

Even if the AEC's rules of practice were silent as to the allocation of burden of proof in this proceeding, the structure and language of Section 105c itself would suggest that the burden of proof here be placed upon the other parties as the proponents of an order, rather than upon Consumers Power Company. This is so because, as shown below, Section 105c creates a presumption, analogous to a presumption of innocence, that the issuance of a nuclear facility license will not create or maintain

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115/ (cont.)

(1946), App. II-37; Louisiana and Arkansas Ry. Co. Abandonment, 290 ICC 434, 441-43 (1954), App. II-24; New York, New Haven, and Hartford R.R. Co. Abandonment (Portion), Pomfret-Putnam, Conn., 312 ICC 465, 468 (1961), App. II-32, aff'd sub nom. Smith v. United States, 211 F. Supp. 66 (D. Conn. 1962).

116/ The practice involves Department of Interior proceedings to revoke outstanding grazing permits. See Frank Halls, 62 I.D. 344, 5 Ad.L.2d 616, 621, 622 (1955), App. II-20.

a situation inconsistent with the antitrust laws.

Section 105c, unlike §103, does not set out substantive prerequisites which must be shown to be satisfied before a license may be issued. Rather, §105c establishes a standard of conduct which if transgressed may result in the denial or conditioning of a license.[117/] Consequently, while an applicant must always affirmatively establish that it meets the tests of §103 and a hearing must always be held in these issues,[118/] many

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117/ This is apparent from the language of the provisions. Section 103(b) lists "desirable" qualities an applicant must possess to receive a license:

> b. The Commission shall issue such licenses on a nonexclusive basis to persons applying therefor (1) whose proposed activities will serve a useful purpose proportionate to the quantities of special nuclear material or source material to be utilized; (2) who are equipped to observe and who agree to observe such safety standards to protect health and to minimize danger to life or property as the Commission may by rule establish; and (3) who agree to make available to the Commission such technical information and data concerning activities under such licenses as the Commission may determine necessary to promote the common defense and security and to protect the health and safety of the public. All such information may be used by the Commission only for the purposes of the common defense and security and to protect the health and safety of the public.

In contrast, §105c(5) describes an undesirable characteristic which if, and only if, found to be present may, under §105c(6) bar the issuance of the license or otherwise penalize the applicant.

118/ Cf. §189(a) of the Atomic Energy Act, 42 U.S.C. §2239(a).

applicants -- those regarding whom the Department of Justice does not issue an adverse antitrust advice letter -- need make no affirmative showing under Section 105c, and no hearing on the antitrust issue is held.[119/] Specifically, such applicants have no obligation to present evidence that their activities under the proposed license will be consistent with the antitrust laws. In effect, their innocence is conclusively presumed absent evidence to the contrary.[120/]

This basic presumption in favor of the applicant properly persists even where the Department of Justice has advised "that there may be adverse antitrust aspects"[121/] to the issuance of the license in question. Nothing in Section 105c suggests that the initial presumption in favor of an applicant, accorded by the provision, should be removed or that a shift in burden of proof should occur. The language of Section 105c describing the advice to be rendered by the Attorney

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119/ All that is required of such applicants is the furnishing of such information as the Attorney General may require to render his advice. §105c(4).

120/ This presumption is operative elsewhere in §105, specifically in §105c(2) which provides that no antitrust review is required for operating permit applications for facilities which received construction permits under §103, unless "significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous [§105] review ...." In other words, conduct consistent with the antitrust laws is presumed, unless significant evidence to the contrary is present.

121/ §105c(5).

General -- i.e., advice as to whether "there may be adverse antitrust aspects" -- does not even amount to a charge that antitrust inconsistencies will occur; it is, rather, a preliminary assertion which does no more than place the question of antitrust consequences in issue.

It must be emphasized that the role of the Attorney General under Section 105c is only that of a party. The Department's initial advice does not amount to a formal ruling or order, but is merely an ex parte statement to the AEC. The advice at the very most thus corresponds to a complaint in a civil antitrust case, which, as noted below, would under no circumstances shift evidentiary burdens or presumptions in such a proceeding.[122/]

The Commission is specifically directed by Section 105c(5) to give only "due consideration" to the Attorney General's advice and to give comparable consideration to "such evidence as may be provided during the [antitrust] proceedings." Plainly, if the advice were given the effect of shifting the ultimate onus of persuasion from the Department of Justice (and from parties allied with it) where it initially rests and of thrusting it upon an applicant, the advice would be endowed with considerably greater weight than evidence presented at hearing --

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122/ In Consumers Power Co., Construction Permit Nos. 81 and and 82, supra, the hearing Board held that even the issuof an ex parte show cause order did not shift the burden of proof. RAI 74-7 at p. 116.

a result contrary to the statutory directive.

Finally, because shifting the burden of proof to the applicant would run directly counter to the unvarying practice in proceedings elsewhere under the antitrust laws it is inconceivable that Congress intended to shift the burden sub silentio. The rule that the party seeking relief under the antitrust laws bears the burden of proof is followed whether the government or a private party is suing,[123/] whether the action is before the courts or the Federal Trade Commission,[124/] regardless of which

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123/ See, e.g., Walker Process Equipment, Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177-78 (1965) (private party plaintiff); United States v. E.I. duPont deNemours and Co., 351 U.S. 377, 381 (1956) (government plaintiff); Shawyer & Son, Inc. v. Oklahoma Gas & Electric Co., 463 F.2d 204, 205 (10th Cir. 1972) (private party plaintiff); United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945) (government plaintiff); Telex Corp. v. IBM Corp., 367 F. Supp. 258, 335 (N.D. Okla. 1973), appeal docketed, No. 73-1874 (10th Cir. 1973) (the existence of plaintiff's burden of proof held not subject to question).

124/ The cases cited in the previous footnote and in footnotes 125 and 126, infra, provide examples of court litigation; §3.43 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. §3.43, states:

> Burden of Proof. Counsel representing the Commission, or any person who has filed objections sufficient to warrant the holding of an adjudicative hearing pursuant to §313, shall have the burden of proof ....

of the antitrust laws is invoked,[125/] and without regard to the procedural setting.[126/] There is no evidence that Congress chose to deprive applicants such as Consumers Power Company of the fundamental presumption of innocence -- or, more accurately, the presumption of full compliance with the antitrust laws -- granted unreservedly elsewhere.

In this proceeding, Consumers Power Company faces potential burdens, in the form of antitrust license conditions,

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125/ See, e.g., United States v. Arnold, Schwinn & Co., 388 U.S. 365, 374 n.5 (1967) (Sherman Act §1 suit: "The burden of proof in antitrust cases remains with the plaintiff, ..."); United States v. E.I. duPont deNemours and Co., supra (Sherman Act §2 suit); Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 20 n.5 (5th Cir. 1974) (Sherman Act §§ 1 & 2, Clayton Act §4 suit); Morning Pioneer, Inc. v. Bismarck Tribune Co., 493 F.2d 383, 385 (8th Cir. 1974) petition for cert. filed 43 U.S.L.W. 3005 (June 7, 1974) (Sherman Act §2 suit); Overseas Motors, Inc. v. Import Motors Ltd., Inc., 375 F. Supp. 499, 542, n.153, (E.D. Mich. 1974) (Sherman Act §§ 1 & 2, Clayton Act §7 suit); Nankin Hospital v. Michigan Hospital Service, 361 F. Supp. 1199, 1207-08 (E.D. Mich. 1973) (Sherman Act §§ 1 & 2 suit); United States v. Penn-Olin Chemical Co., 246 F. Supp. 917, 934 (D. Del. 1965), aff'd per curiam, 389 U.S. 308 (1967) (Clayton Act §7 suit); Shawyer & Son, Inc. v. Oklahoma Gas & Electric Co., supra (Clayton Act §§ 4 & 6 suit).

126/ See, e.g., Acme Precision Products, Inc. v. American Alloys Corp., 484 F.2d 1237, 1242 (8th Cir. 1973) (counterclaim); Cal Distributing Co. v. Bay Distributors, Inc., 337 F. Supp. 1154, 1157 (M.D. Fla. 1971) (defendant's motion for summary judgment against a Sherman Act §2 claim); Huron Valley Publishing Co. v. Booth Newspapers, Inc., 336 F. Supp. 659, 663 (E.D. Mich. 1972) (plaintiff's motion for a preliminary injunction in a Sherman Act §2 case); Chiplets, Inc. v. June Dairy Products Co., 114 F. Supp. 129, 143 (D.N.J. 1953) (antitrust claim by defendant intervenor).

as onerous as those threatened in traditional antitrust actions. The presumption in favor of the Company initially conferred by Section 105c should therefore remain intact in the §105c proceeding; and the burden of overcoming this presumption, which is the ultimate burden of proof, should rest properly upon those challenging the unconditioned issuance of the license.

The only Atomic Safety and Licensing Board decision to address the subject of burden of proof in the context of a Section 105c hearing supports this view. In Louisiana Power and Light Company (Waterford Steam Electric Generating Station, Unit 3), Memorandum and Order of the ASLB, RAI-73-12, p. 1168, 1170 (December 10, 1973), several petitioners to intervene alleged that a situation inconsistent with the antitrust laws and injurious to them would be created or maintained by the activities under the proposed license. The test applied by the Hearing Board in ruling on the petitions was whether a nexus sufficient to provide a basis for intervention existed between this alleged antitrust inconsistent situation and the licensed activities. In ruling on this question the Board stated at page 1170,

> The Board finds that these allegations [that specific antitrust inconsistent situations would be created or maintained by the activities under the proposed license], if proved, would establish the required nexus. These are, of course, matters to be proven; the Board has not determined whether these allegations are true. If at any time it becomes apparent that these allegations cannot be established, then it follows that the asserted nexus between Waterford 3 and the situa-

has been well recognized for over half a century.[127] The reason for this is plain: the burden of proof vitally affects litigants' ability to establish their rights within the legal process. As Justice Brennan stressed in Speiser v. Randall, 357 U.S. 513, 520 (1958),

> To experienced lawyers it is commonplace that the outcome of a lawsuit -- and hence the vindication of legal rights -- depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. (emphasis added).

So important are these procedures to the just adjudication of disputes that where statutes unfairly shift the burden of proof, the Supreme Court has not hesitated to strike them down as violative of due process.[128] In light of these rulings,

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127/ See e.g., Mobile J. and K.C.R. Co. v. Turnipseed, 219 U.S. 35 (1910); Western & A.R.R. v. Henderson, 279 U.S. 639 (1929); Tot v. United States, 319 U.S. 463 (1943); Speiser v. Randall, 357 U.S. 513 (1958). The Western & A.R.R. decision was cited with approval in Speiser v. Randall, 357 U.S. 513, 524 (1958), a witness to its continued vitality. See also Leary v. United States, 395 U.S. 6, 35 (1969).

128/ See e.g., Western and A.R.R. v. Henderson, supra, Tot v. United States, supra; Speiser v. Randall, supra; United States v. Romano, 382 U.S. 136 (1965); Leary v. United States, 395 U.S. 6 (1969); cf. McFarland v. American Sugar Refining Co., 241 U.S. 79 (1916) (arbitrary evidentiary presumption held violative of Equal Protection Clause).

were the Board to construe Section 105c as placing the burden of proof upon Consumers Power Company, the Board could interject a constitutional infirmity into this statutory provision and into the Commission's regulatory processes.

Where a statute creates a rebuttable presumption--i.e., where it permits the existence of the ultimate facts upon which liability depends to be assumed absent evidence to the contrary -- it shifts the burden of proof by requiring the party against whom the presumption operates to rebut it affirmatively in order to avoid liability. Such a reallocation of burden of proof is unconstitutionally arbitrary where the presumption is irrational -- i.e., where there is no sound basis in experience for inferring the ultimate fact from the presence of the proven one.

Thus in Western & A.R.R. v. Henderson, supra, an action against a railroad for personal injuries arising from a grade crossing collision, the Court struck down a Georgia statute making a railroad company civilly liable for an injury caused by its operations "unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company." 279 U.S. at 640. The Court found this inference, which placed the burden of proof on the carrier to be unconstitutionally arbitrary, stating:

> The mere fact of collision between a railway train and a vehicle at a highway grade

> crossing furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company, or of the traveler on the highway, or of both, or without fault of any one. Reasoning does not lead from the occurrence back to its cause. 279 U.S. at 642-43. 129/

Similarly, in Leary v. United States, the Court struck down the inference contained in former 21 U.S.C. §176(a) 130/ which imposed criminal punishment upon every person who, inter alia, bought, sold, transported, or concealed any marijuana illegally imported into the U.S. "knowing the same to have been imported or brought into the United States contrary to law." The challenged presumption, contained in a subsequent paragraph, stated that where possession of imported marijuana is established, "such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury" (395 U.S. at 30) (emphasis added).

The Court noted that the statute's presumption authorized a jury to infer from a defendant's possession of marijuana two necessary elements of the crime first that the marijuana was illegally imported and, second, that the defendant knew of

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129/ See also McFarland v. American Sugar Refining Co., supra, (presumption that person who systematically pays lower price for sugar in Louisiana than he pays for it elsewhere is a party to a monopoly or other illegal restraint of trade held unconstitutionally arbitrary; cited with approval in Speiser v. Randall, supra at 524).

130/ Narcotic Drug Import and Export Act, ch. 1, §106, 70 Stat. 570 (July 18, 1956).

its illegal importation. Upon analysis of materials by various authorities dealing with marijuana use, however, the Court held both inferences to be unwarranted on the basis of experience, since the Court found that a considerable amount of marijuana used here was not imported into this country and that few users know the origin of the marijuana they possess. Applying the rational connection test, the Court held the statutory inferences violative of due process.[131/]

Section 105c of the Atomic Energy Act, to be sure, does not contain the express presumptions found in the statutes which the Supreme Court has struck down. However, if §105c is construed as placing the burden of proof unvaryingly upon the applicant (i.e., the burden of establishing that the activities under a proposed license will not create or maintain a situation inconsistent with the antitrust laws) the burden upon the applicant would be quite similar to the burden imposed by the

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131/ See also Tot v. United States, supra, (where statute criminalized receipt of firearm in interstate transaction by one previously convicted of a violent crime, statute's presumption that mere possession of firearm by such a person evidenced it was received through an interstate transaction, held unconstitutionally arbitrary because of lack of connection in experience between mere possession and fact presumed); United States v. Romano, supra, (in statute concerning illegal stills, provision authorizing jury to infer from defendant's presence at still that he had possession, custody, or control thereof and thus placing burden on defendant to prove otherwise, held unconstitutionally irrational and arbitrary because connection between presence and control, etc., was too tenuous to support inference).

laws which the Supreme Court has proscribed. In effect, each and every time an applicant applied for a construction permit for a nuclear plant this allocation of the burden of proof would operate as a presumption that the construction of the plant under the permit will, in fact, cause adverse antitrust consequences; unless rebutted this presumption would invoke imposition of conditions or other restrictions on the permit.[132/]

There is plainly no rational basis for presuming from the mere application for a nuclear facility construction permit that the activities under the permit will result in situations inconsistent with the antitrust laws or for placing the burden upon the applicant to prove otherwise. The fact of filing an application in no way evidences in itself an applicant's capacity or intention to use the license in a manner inconsistent with the antitrust laws; one need not, in other words, have

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132/ In some instances, of course, evidence submitted to the Justice Department prior to its rendering antitrust advice to the Commission would completely rebut this presumption and persuade the Department that no §105c hearings were needed. This factor in no way detracts from the validity of the analogy made in the text between statutes containing express presumptions and the implicit presumption which would arise under §105c if construed to place the burden of proof on applicant, for there were, of course, many instances under the former statutes where, despite a favorable statutory presumption, a plaintiff or prosecutor, as the case might have been, decided not to pursue his cause for lack of evidence. The availability of this discretion did not in any way, however, eliminate the statutory presumption nor would it in the case of §105c.

the ability or the predilection to monopolize a relevant market in order to file an AEC permit application. Similarly, it cannot be said that experience has taught that licensed activities so often lead to antitrust inconsistencies that such consequences may be presumed in the absence of contrary proof. The field of nuclear facility licensing is simply too new and too complex to permit such a conclusion.

Thus, there would be no rational connection between the fact given -- the permit application -- and the fact presumed -- adverse antitrust consequences -- were Section 105c construed to shift the burden to Consumers Power Company in this proceeding. It was precisely this want of a rational nexus which rendered the presumptions contained in the statutes which the Court voided in Leary and elsewhere unconstitutionally arbitrary and deprived the defendants therein of due process. Were Consumers Power Company required to bear the burden of proof here, similar constitutional questions would be raised.

We submit that, as discussed previously, the AEC's rules of practices and the principles implicit in Section 105c fully establish that the burden of proof should rest on the proponents of antitrust conditions in this proceeding. The Board's adoption of that position would also avoid raising the substantial constitutional issues inherent in placing the burden on the Company.

III. The Company's Definition of Relevant Markets is Consistent with Antitrust Principles and the Commercial Realities of Power Supply in Lower Michigan.

According to the 1970 amendments to the Atomic Energy Act, the antitrust laws of which the Commission must take account of in Section 105c proceedings include the Sherman Act, the Wilson Tariff Act, the Clayton Act, and the Federal Trade Commission Act.[1/] However, with minor exceptions discussed elsewhere in this brief,[2/] the other parties to this proceeding have, through their pleadings and evidentiary presentations, relied upon a theory of "monopolization". That is, they have in effect charged the Company with a violation of Section 2 of the Sherman Act, 15 U.S.C. §2 which makes it a misdemeanor, inter alia, to "monopolize . . . any part of trade or commerce among the several states . . . ."

In assessing whether the monopolization provision of Section 2 of the Sherman Act has been violated, the courts have established well-defined analytical principles. As shown

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1/ §105a, 42 U.S.C. §2135(a).

2/ The Staff appears to rely in part upon Section 5 of the Federal Trade Commission Act. Such reliance, however, does not alter the appropriate analytical framework of this proceeding for the reasons set forth in Part II, Section D, pp. 50-57, supra. To the extent that the Department may rely upon Section 7 of the Clayton Act in assessing the Company's acquisitions, that law is discussed at pp. 205-12, infra.

more fully below, under these principles, the courts first analyze in what product and geographic markets the defendant operates and then assess whether the defendant possesses and has unlawfully exercised monopoly power in any of these markets. Only where a court finds that a party has unlawfully exercised monopoly power in a relevant market is a Section 2 "monopolization" violation established.

In light of the primary reliance which the other parties to this proceeding have placed on a Section 2 theory of monopolization, this Part of the Brief sets forth what we deem to be the appropriate boundaries of the relevant markets in this proceeding; the following Parts explain why we believe that the Company neither possesses nor exercises monopoly power in these markets and, therefore, is not guilty of monopolization.

For antitrust purposes, relevant markets are defined in terms of the products bought and sold within the market and the geographic areas in which such products are exchanged. It is our view that two product markets are relevant to this proceeding: (1) bulk power (electric power sold or exchanged between electric suppliers for re-sale to others); and (2) retail power (electric power distributed to ultimate customers). As explained more fully below, with regard to geographic markets, we submit that the relevant bulk power market consists of the bulk power requirements of the smaller systems within and adjacent to the Company's service area; and that the retail power

areas within and adjacent to the Company's service area.

According to the Supreme Court, the criteria used in defining the relevant product and geographic markets are "essentially similar"; i.e., both must correspond to "commercial realities".[3/] Thus, as the Court emphasized, these definitions are not "formal" or "legalistic"; rather, the antitrust laws prescribe "a pragmatic, factual approach". In the following sections, we set forth the applicable principles of relevant market definition, with regard to the bulk power and retail power markets, and then apply those principles to the facts of the instant case.

A. Bulk Power Market.

There is only a single bulk power market relevant to this proceeding: that market in which the Company's small neighbors look for their bulk power supply requirements. By contrast, we understand the Department of Justice to contend that coordination power transmitted in the context of coordination arrangements is a separate product which is not part of the bulk power market and that the Company's bulk power requirements should be included market should be analyzed with regard to three distinct geographic within that market. As shown more fully below, the Department's position cannot be reconciled with basic principles of antitrust law or with the "commercial realities" of bulk power supply in

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3/ Brown Shoe Co. v. United States, 370 U.S. 294, 336-37 (1962).

Lower Michigan.

1. Coordination Power is Part of the Bulk Power Product Market.

Under the relevant market definition criteria established by the Supreme Court in the duPont-Cellophane case,[4/] products must be viewed as part of the same relevant product market which have "reasonable interchangeability." In holding products so seemingly different as adhesive saran wrap and aluminum foil to be within the same relevant market, the duPont-Cellophane court explained the "reasonable interchangeability" concept as follows:

> "The ultimate consideration in such a determination is whether the defendants control the price and competition in the market for such part of trade or commerce as they are charged with monopolizing. Every manufacturer is the sole producer of the particular commodity it makes but its control in the above sense of the relevant market depends upon the availability of alternative commodities for buyers: i.e., whether there is a cross-elasticity of demand between cellophane and the other wrappings. This interchangeability is largely gauged by the purchase of competing products for similar uses considering the price, characteristics and adaptability of the competing commodities." 351 U.S. at 380-81.

Later in the opinion, the duPont-Cellophane case further elucidated the standards for defining relevant markets:

> "The 'market' which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. That market is composed of prod-

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4/ United States v. E.I. duPont deNemours & Co., 351 U.S. 377 (1956).

> ucts that have reasonable interchangeability for the purposes for which they are produced -- price, use and qualities considered." 351 U.S. at 404.

The duPont decision and later lower court decisions have made clear that "reasonable interchangeability" is measured by the "availability of alternate commodities for buyers" and does not require that the goods be "fungible".[5/] Thus, products in the same product market need not be similar as to such factors as price[6/] or physical characteristics[7/] if they are

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5/ 351 U.S. at 394.

6/ In duPont-Cellophane, the price per 1000 square inches of flexible packaging materials found to be in a single indivisible market ranged from 6.1 cents to 0.7 cents with two of the twelve products being priced at more than twice the price of moisture-proof cellophane and four at less than half the price of that material. See 351 U.S. at 400-403. In Acme Precision Products, Inc. v. American Alloys Corp. 484 F.2d 1237, 1244 (1973) the Eighth Circuit summarized duPont's holding on this point: "[T]he 'end use' has a greater influence on the determination of 'cross elasticity' than the higher price of a more desirable product." See also Bendix Corp. v. Balax, Inc., 471 F.2d 149, 161 n.9 (7th Cir. 1972) cert. denied, 414 U.S. 819 (1973) (including in a single market two products one of which sold for twice the price of the other but lasted ten times as long).

7/ In addition to duPont-Cellophane, see United States v. Chas. Pfizer & Co., 246 F. Supp. 464, 469 (E.D.N.Y. 1965) ("It is not necessary in establishing reasonable interchangeability to show the same or similar physical characteristics and chemical composition or reaction."); Huron Valley Publishing Co. v. Booth Newspapers, Inc., 336 F. Supp. 659, 662 (E.D. Mich. 1972); CASS Student Advertising, Inc. v. National Educational Advertising, Inc., 374 F. Supp. 796, (N.D. Ill. 1974) appeal docketed, No. 74-1518 (7th Cir. 1974) (both holding that all advertising was in a single market). Cf. Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391, 399 (4th Cir. 1974) (question of fact whether television and radio advertising in same market as newspaper advertising).

reasonably interchangeable. For example, in the Grinnell case, the Supreme Court found "no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities".[8/]

Later cases have also emphasized duPont's crucial conclusion that products which are frequently substituted may be in a single indivisible market even though some or all of them may be unsuitable for the needs of particular buyers. As the leading case of United States v. Chas. Pfizer & Co.,[9/] noted "functional interchangeability does not require complete identity of use."

The United States Court of Appeals for the District of Columbia Circuit made this conclusion equally clear in National Aviation Trades Ass'n v. CAB, 420 F.2d 209 (1969). In that case, the court upheld the CAB's determination that the relevant market in which to test contentions of monopolization included both airports capable of handling "high performance aircraft" and those without this capability even though some of the "buyers" in the market, those with high performance airplanes, could not use the more limited facilities. And in the very recent case of Pacific Engineering & Production Co. v. Kerr-McGee Corp.,

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8/ United States v. Grinnell Corp., 384 U.S. 563, 572 (1966).

9/ 246 F. Supp. 464, 468 (E.D.N.Y. 1965). The stature of the Pfizer case has been widely recognized. See e.g., ABA ANTITRUST SECTION, ANTITRUST DEVELOPMENTS (1968), 26-27.

1974-1 Trade Cas. ¶75,054 (D. Utah, February 28, 1974), App. "I-35, at 96,737-38, the court held that the chemicals produced by two manufacturers were in competition even though one producer could not presently sell to many major consumers because its product had not been approved by the requisite Defense Department agencies.[10/]

As the foregoing cases suggest, courts looked to the marketplace (i.e., "the patterns of trade"[11/]) to determine whether "reasonable interchangeability" of certain products exists. Specifically, the courts examine the behavior of the purchasers, i.e., "purchaser reaction -- the willingness or readiness to substitute" one product for another.[12/] In the Pfizer case, for example, the court cited the substitution of one product for another during the latter's unavailability as an indicia of "interchangeability".[13/] Similarly, products that may be either manufactured by the users or purchased by them in the market are deemed to be within a

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10/ See also Judge Friendly's opinion in H.E. Fletcher Co. v. Rock of Ages Corp., 326 F.2d 13, 17 (2d Cir. 1963); Bendix Corp. v. Balax, Inc., 471 F.2d 149, 161 (7th Cir. 1972), cert. denied, 414 U.S. 819 (1973); Acme Precision Products, Inc. v. American Alloys Corp., 484 F.2d 1237 (8th Cir. 1973).

11/ United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 303 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 ("the problem of defining a market turns on discovering patterns of trade which are followed in practice.")

12/ United States v. Chas. Pfizer & Co., supra, 246 F. Supp. at 468.

13/ Id. at 469.

single market to the extent the "make or buy" option is actually considered.[14/]

The applicable case law therefore clearly establishes that relevant product markets are defined in terms of the options reasonably available to most consumers in the marketplace.[15/] Consequently, the occasional specialized requirements of a particular purchaser or the intermittent unavailability of a specific source of the product cannot justify segregating that product from a given relevant product market.

14/ United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945) (ingot fabricated internally in the same market as that sold to others for fabrication). This principle has also received extensive recognition in cases arising under §7 of the Clayton Act. International Tel. & Tel. Corp. v. General Tel. & Electronics Corp., 351 F. Supp. 1153 (D. Haw. 1972) appeal docketed, No. 73-1513 (9th Cir. 1973) (telephones produced by vertically integrated companies for the use of their operating subsidiaries are in the market for the manufacture and sale of telephone equipment); United States v. International Tel. & Tel. Corp., 1971 Trade Cas. ¶73,619 (N.D. Ill. 1971) App. II-42 (institutional food service provided by outside vendors not in separate sub-market from food service provided by the institutions themselves). United Nuclear Corp. v. Combustion Engineering, Inc., 302 F. Supp. 539 (E.D. Pa. 1969) (nuclear fuel used by integrated atomic equipment manufacturer in same market with nuclear fuel produced by specialist firm.) Cf. United States v. Ford Motor Co., 286 F. Supp. 407 (E.D. Mich. 1968) aff'd 405 U.S. 562 (1972) and United States v. Greater Buffalo Press, Inc., 402 U.S. 549 (1971).

15/ See Judge Weinfeld's often-cited comment in a §7 Clayton Act case that "Any definition of line of commerce which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful." United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 592 (S.D.N.Y. 1958).

With these principles in mind, the bulk power supply situation in Lower Michigan's electric industry must be analyzed in some detail. We submit that the record clearly shows Consumers Power's smaller neighboring systems to have available to them the following reasonably interchangeable sources of bulk power supply: (1) self-generation, (2) wholesale bulk power purchases from other systems, or (3) as a supplement to either power derived from self-generation or wholesale purchases, coordination power.[16/]

The record demonstrates that for the smaller systems in Lower Michigan self-generation and wholesale purchases are almost completely interchangeable. Some of these systems purchase all of their needs at wholesale, others utilize self-generation to meet all of their needs, while many systems utilize both sources in a wide variety of combinations.[17/] In recent years, some of these neighboring systems have lowered their reliance on wholesale power and increased self-generation while, at the same time, others have maintained the same proportion or have experienced an opposite trend.[18/] In addition, the engineering studies made by these systems evaluating how best to meet load growth usually consider both the wholesale purchase and

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16/ Finding of Fact 3.11.

17/ Findings of Fact 3.12, 3.13.

18/ Findings of Fact 2.63, 2.64.

self-generation alternative; in some cases self-generation is deemed to be the most economic alternative, in other cases, wholesale purchase.[19/]

Coordination power is also reasonably interchangeable with wholesale purchases and self-generation.[20/] Thus, some lower Michigan systems choose not to exchange coordination power, but rather to rely exclusively on wholesale purchases and self-generation.[21/] Other systems such as the MMCPP members chose to self-generate and to exchange coordination power among themselves and with Consumers Power Company.[22/] Before entering into arrangements to exchange coordination power, these neighboring systems compare the coordination option with the wholesale purchase or self-generation alternatives.[23/] For example, in 1967 the Traverse City system, after such an analysis, opted for self-generation in combination with coordination with the MMCPP instead of wholesale purchases from the Company.[24/]

19/ Findings of Fact 2.65, 3.12.

20/ Finding of Fact 3.13.

21/ Finding of Fact 3.13.

22/ Findings of Fact 2.68, 2.80.

23/ Findings of Fact 3.12, 3.13. To be sure, some systems are so deficient in generation capacity that only wholesale power purchases or self-generation expansion will satisfy their needs.

24/ Finding of Fact 3.13.

Thus, it is clear that in the Lower Michigan electric industry, coordination power is, under many circumstances, a viable alternative source of bulk power. Consequently, coordination power must be deemed "reasonably" if not totally interchangeable with other bulk power alternatives and must be included in the relevant bulk power product market.[25/]

It is apparently the Justice Department's contention that coordination power is a separate product and should not be included as a part of the relevant bulk power product market. In its pre-hearing brief, the Department's distinction between

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25/ Congress has itself recognized this interchangeability between bulk power sources in considering the level of subsidization appropriate for the rural electrification program.

> "The construction of power generating facilities is a secondary function considered to be necessary to preserve the bargaining position of REA Cooperatives in securing power at reasonable rates and under reasonable terms. The Administrator of REA is expected to observe these basic concepts in carrying out his responsibilities under the law. The Congress has always attempted to protect the bargaining power of the REA with respect to negotiation of power contracts with private utility companies, through the approval of adequate loan funds to provide REA-financed power generation facilities where alternative sources of power are not available on proper terms."
>
> H.R. Rep. No. 1446, 89th Cong. 2d Sess. 46-47 (1966).

> "The committee recognizes the importance of the availability of G. and T. loan funds to the bargaining positions of the REA cooperatives."
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> H.R. Rep. No. 1335, 90th Cong. 2d Sess. 56 (1968).

coordination power and other bulk power sources turned on the alleged reliability or "firmness" of the respective sources.[26] This analysis ignored the fact that power from each generation unit which makes up a system's self-generated capacity is no more "firm" than the availability of coordination power from a single source. In any event, the Department sponsored no testimony at the hearing in support of the firm/non-firm product market distinction and thus the record is devoid of any factual foundation for this position.

At the hearing the Department of Justice offered expert testimony which sought to segregate from the bulk power market a product called "regional power exchange".[27] In defining this market, the Department's witness abandoned the theory offered in the pretrial brief. Rather he purported to analyze the Company's coordination agreements with other systems and to exclude from his "regional power exchange market" those agreements which he deemed not to be "comprehensive".[28]

This analysis obviously ignores the "reasonable interchangeability" standard that the Supreme Court has mandated in defining relevant product markets. It also ignores the fact

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26/ Prehearing Brief of the United States Department of Justice, pp. 29-31.

27/ Finding of Fact 3.19.

28/ Finding of Fact 3.20.

that the Company's smaller neighboring systems, the "buyers" in this market, possess and exercise a viable option to substitute other bulk power alternatives for the coordination power transactions which make up the so-called "regional power exchange" market.[29/]

Even on its own terms, the testimony of the Department's witness as to which of the Company's coordination agreements are, or are not, "comprehensive" is belied by uncontradicted facts of record in this proceeding. For example, there is no factual basis for this witness' conclusion that the Company's coordination agreements with Lansing and the MMCPP members are not "comprehensive" while its agreements with Ontario Hydro and the MIIO systems are "comprehensive". For instance, Consumers Power Company exchanges economy energy and supplemental capacity and energy with Lansing and the MMCPP while it does neither with Northern Indiana Public Service Company.[30/] Similarly, the Company's agreement with Lansing, Holland and the MMCPP systems each provide for the same type of coordination power exchange transactions as that with Ontario Hydro -- except for diversity power exchange which, as the Department's witness conceded, is plainly infeasible between systems lacking time or climactic diversity.[31/] Obviously,

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29/ See pp. 87-89, supra.

30/ Findings of Fact 2.80, 2.83.

31/ Findings of Fact 2.82, 3.21.

no such differences exist among the systems in Lower Michigan.

The witness' conclusions about the "comprehensiveness" of the Company's agreement with Lansing compared to its agreements with the privately-owned systems such as the MIIO companies is further belied by the testimony of Lansing's system manager, Mr. Brush. Mr. Brush testified that the coordination arrangement between Lansing and Consumers Power was a "good agreement" and that "we were able to get them to treat us as an equal partner and have negotiated an agreement which contains the more important terms and conditions found in the interconnection agreement between two private utilities."[32/]

Because coordination agreements reflect the unique generation, transmission and load characteristics of each of the signatories and are the product of negotiations which occurred at different points in time, it is not surprising that the terms of the various agreements are not identical.[33/] However, these differences hardly provide a basis for excluding coordination power as part of the relevant bulk power market in this proceeding.

2. The Company's Requirements Are Not Part of the Relevant Market.

The Department of Justice's contention that the bulk

32/ Finding of Fact 3.22.

33/ Finding of Fact 2.78.

power requirements of the smaller municipal and cooperative systems in the Company's service area are within the same market as the Company's bulk power needs ignores the "commercial realities" of the bulk power market in Lower Michigan.

The consistent pattern of bulk power commerce in Lower Michigan has been, and is, that Consumers Power Company plans its system in contemplation of generating almost all of its needs.[34/] Except for statistically insignificant exchanges of coordination power, the Company does not consider bulk power alternatives other than self-generation in its planning, and it has not been offered the opportunity to purchase bulk power supplies from other systems.[35/]

These patterns of trade in the bulk power market are explained and reinforced by the legal barriers on bulk power sales by the cooperatives and municipal systems. The cooperatives are barred by the terms of their REA financing from selling firm bulk power to non-members on a regular basis[36/] and from initiating wholesale or retail service to customers living in communities exceeding 1500 in population.[37/] Indeed, the Rural Electrification Administration lacks the legal power to finance

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34/ Finding of Fact 3.17.

35/ Id.

36/ Finding of Fact 3.17.

37/ Finding of Fact 2.37; 7 U.S.C. §§ 904, 913.

generation or transmission facilities except for the purpose of furnishing power "to persons in rural areas who are not receiving central station service..."[38/] A cooperative seeking to meet Consumers Power Company's bulk power requirements would confront all three of these legal barriers.[39/]

Also, until very recently the municipals could not sell to other systems (or at retail outside their boundaries) an amount of electricity exceeding 25% of their retail sales within their city limits.[40/] Since the municipals made an average of 20% of their retail sales outside their limits, they had

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38/ 7 U.S.C. §904.

39/ Even cooperatives seeking to finance generation and transmission facilities with which to meet the requirements of their own retail customers face a restrictive REA loan policy. See, for example, REA Bulletin 20-6 (Exhibit 7), May 7, 1969. See also REA Bulletin 111-3, August 4, 1969, App. II-51, providing that no loan exceeding $2,000,000 for generation or transmission facilities will be made except "upon certification by the Administrator to the Secretary of Agriculture that the loan has been approved after the completion of a power supply survey which shows that the loan is ... (c) needed because existing and proposed contracts to provide the facilities or service to be financed were found to be unreasonable, each supplier involved was advised of the provisions that made its contract unreasonable, REA attempted to have such contracts made reasonable, and the existing or other proposed supplier had failed or refused to do so within the time set by the Administrator."

40/ Mich. Const. 1963, Art. VII, §24, App. I-23, imposing the limitation unless modified by statute. Finding of Fact 2.38.

little lawful surplus to sell to the Company as bulk power.[41]

There is even stronger evidence for excluding the Company's bulk power needs from the relevant market in this case than under comparable circumstances in International Tel. & Tel. Corp. v. General Tel. and Electronics Corp., 351 F. Supp. 1153, 1175-77 (D. Haw. 1972), appeal docketed, No. 73-1513 (9th Cir. 1973). In that case, the question was whether the market for telephone equipment should include the equipment needs of Bell Telephone. The court held that, as a matter of commercial reality, the market for sales of telephone equipment to Bell was foreclosed by Bell's own production of such equipment -- even though no legal barriers prevented such sales and even though Bell occasionally purchased such equipment from other suppliers. Other cases[42] have also excluded products obtained through in-

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41/ Finding of Fact 3.17. The constitutional limitation was modified by a very recent statute, as permitted by its provisions. Wholesale service by a municipality is now permitted without any quantitative restriction but subject to the consent of the former supplier. MSA 5.4083, 5.1534, 1974 PA Nos. 157, 174, App. I-24. However, in view of the substantial time intervals between bulk power arrangements, no significant impact on actual market conditions can have arisen from this legislative change to date. See United States v. Connecticut National Bank, 94 S. Ct. 2788 at 2792 (June 26, 1974) in which the Supreme Court held that recent changes in state law permitting savings banks to compete for checking accounts could not be considered for purposes of market definition because insufficient time had elapsed to permit alteration of existing trading patterns.

42/ United States v. Associated Press, 52 F. Supp. 362, 374 (S.D.N.Y. 1943) rev'd on other grounds, aff'd in other

(cont.)

ternal production under comparable circumstances where the manufacturer makes no substantial purchases of the product on the outside market.[43/]

In the instant case, the evidence establishes that Consumers Power's bulk power needs are satisfied by self-generation and that other systems lack the legal ability and/or the desire

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42/ (cont.)

respects, 326 U.S. 1 (1945) (AP's photo service used only by members not in the same market as independent service); United States v. International Tel. & Tel. Corp., 324 F. Supp. 19, 27 (D. Conn. 1970) (Sales of sprinklers "practically all" of which are installed by manufacturer not in same market as sales of other sprinklers); Elco Corp. v. Microdot Inc., 360 F. Supp. 741, 748 n.3 (D. Del. 1973) (electronic manufacturers who consistently make their own metal plate connectors not in market for sale of connectors).

In Otter Tail Power Company v. United States, 410 U.S. 366, 369 n.1 (1973), "some towns in Otter Tail's areas" served at retail by Northern States Power Company were excluded from the relevant market because of the actual trading pattern that "the two companies do not compete in the towns served by each other."

43/ More generally, a prominent case recently stressed the principle that where there are factors "influencing the choice of suppliers by ... consumers which can effectively segregate ... producers in one area from those in another", those limitations must be recognized in defining the relevant markets. United States v. General Dynamics Corp., 341 F. Supp. 534, 556 (N.D. Ill. 1972) aff'd on other grounds, 415 U.S. 486 (March 19, 1974). Such factors acquire special importance where, as here, they result in substantial part from conscious governmental design. United States v. Connecticut National Bank, 94 S. Ct. 2788, 2797 (June 26, 1974); United States v. Marine Bancorporation, 94 S. Ct. 2856, 2870 (June 26, 1974); United States v. Philadelphia National Bank, 374 U.S. 321, 358 (1963); United States v. Phillipsburg National Bank, 399 U.S. 350, 362-363 (1970).

to serve these needs.[44/] Thus, because the Company purchases only a statistically insignificant part of its needs under coordination arrangements with others, inclusion of its bulk power requirements in the relevant bulk power market would produce a significant and misleading distortion under antitrust principles. Hence, the market for Consumers Power's bulk power needs must be excluded from the relevant bulk power market in this proceeding.

B. The Retail Power Market.

We do not understand the parties to this proceeding to disagree about the definition of the relevant retail power product market -- power distributed by electric utilities to retail (i.e., ultimate) customers.[45/] However, there is apparently disagreement about the relevant geographic markets in which this product is distributed. It is the Company's contention that any analysis of the "commercial realities" of retail power distribution in Lower Michigan must take account of various legal and attendant economic barriers which affect the choice of suppliers available to retail power purchasers. These barriers differ so significantly in different geographic areas, we submit, as to establish two distinct relevant geographic markets and two sub-

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44/ Finding of Fact 3.17.

45/ Finding of Fact 2.06.

markets within one of these markets.[46/] It would be improper in defining relevant geographic markets to fail to take account of the legal and economic barriers to competition in the retail power market.

In two recent bank merger cases, the Supreme Court held against the Department of Justice's position on market structure because it failed to take adequate account of regulatory constraints on competition.[47/] Similarly, in the Otter Tail case, the Court endorsed the district court's exclusion of cooperative systems from the retail geographic market because of statutory restrictions on the areas which cooperatives may serve.[48/]

The Supreme Court's recent Connecticut Bank case is particularly in point. There, even though the service areas of the two banks in question overlapped over a considerable area,

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46/ The concept of submarkets within markets was developed in Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) and has been applied in appropriate §2 Sherman Act cases, see e.g. Case-Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449, 456 (9th Cir. 1966) rev'd on other grounds, 389 U.S. 384 (1967).

47/ United States v. Connecticut National Bank, 94 S. Ct. 2788 (June 26, 1974); United States v. Marine Bancorporation, 94 S. Ct. 2856 (June 26, 1974). Earlier, in United States v. Philadelphia National Bank, 374 U.S. 321, 361 (1963), the Court had also noted state regulatory policy in the form of bank branching prohibitions as an important factor in market definition.

48/ Otter Tail Power Co. v. United States, 410 U.S. 366, 369 n.1 (1973).

the Court reversed the district court's finding that the relevant geographic market for banking services consisted of these service areas. Rather, the Court held that the Connecticut branch banking statute (which prohibits the entry of a second bank in some towns) creates a "checkerboard of 'open' and 'closed' towns" and remanded the case to the lower court to give crucial effect to this situation in defining the relevant geographic markets.[49/]

In United States v. Marine Bancorporation, 94 S. Ct. 2856, 2874 (June 26, 1974), another potential competition case, the Supreme Court again rejected the Department of Justice's position on market structure because it failed adequately to take account of regulatory limitations on competition. In so doing, the Court cited eight district court decisions in which the Department's thesis was similarly rejected because it gave insufficient weight to government regulation of banks.[50/]

49/ 94 S.Ct. at 2792 n.1. It should also be noted that the Supreme Court fully recognized that the resulting markets will not be "readily definable, completely covered areas ...." Gaps are to be excluded from the relevant market. 94 S.Ct. at 2789. Cf. Brown Shoe Co. v. United States, 370 U.S. 294, 339-43 (approving the district court's use of a "fair sampling" of more than 100 geographically separate cities and generally dealing with the cities as a group).

50/ United States v. Marine Bancorporation, 1973-1 Trade Cas. ¶74,496 (W.D. Wash. 1973) App. II-43; United States v. Connecticut National Bank, 362 F. Supp. 240 (D. Conn. 1973), rev'd on other grounds, 94 S. Ct. 2788 (June 26, 1974); United States v. United Virginia Bankshares, Inc., 347 F. Supp. 891 (E.D. Va. 1972); United States v. First National

(cont.)

In defining the relevant geographic markets for retail power in the instant case, the principles set forth in Connecticut Bank require that account be taken of the fact that, as a result of legal and economic restraints, some areas in Lower Michigan are "open" while others are "closed". In the "open" areas purchasers presently have a choice of electric suppliers. In the "closed" areas no present choice exists and, as explained below, there is little likelihood that such a choice will exist in the foreseeable future. For the reasons explained below, these "open" and "closed" areas clearly constitute separate geographic markets for the distribution of retail power.

1. The "Open" Market.

In this proceeding, the "open" relevant market where purchasers of retail power presently have a choice of electric suppliers consists of: (1) the municipalities of Bay City and Traverse City, (2) the areas immediately surrounding the twenty-three neighboring municipalities which operate electric systems where the distribution facilities of these systems overlap or

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Bancorporation, Inc., 329 F. Supp. 1003 (D. Colo. 1971), aff'd per curiam, 410 U.S. 577 (1973); United States v. Idaho First National Bank, 315 F. Supp. 261 (D. Idaho 1970); United States v. First National Bank of Maryland, 310 F. Supp. 157 (D. Md. 1970); United States v. First National Bank of Jackson, 301 F. Supp. 1161 (S.D. Miss. 1969); United States v. Crocker-Anglo National Bank, 277 F. Supp. 133 (N.D. Cal. 1967) (three-judge court).

interface with those of Consumers Power Company, and (3) the areas where the distribution facilities of the Company and the cooperatives overlap -- to the limited extent that the MPSC's restrictions discussed below permit retail customers a choice of electric suppliers.[51/] The most significant of these "open" areas consists of the municipali es of Bay City and Traverse City where the Company and the respective municipal systems have duplicated distribution facilities throughout these cities.[52/]

The other "open" areas are considerably less significant. For example, in the areas immediately outside of the boundaries of the various municipalities which operate their own systems there is some duplication of facilities but, except but the areas surrounding Bay City and Traverse City, the number of retail power purchasers who have a choice of electric suppliers is very small.[53/]

Until this year, a provision of the Michigan constitution limited a municipal system's sales outside of its corporate boundaries to a sum equal to 25% of its sales within its limits.[54/] Recently-enacted state legislation removed the

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51/ Finding of Fact 3.03.

52/ Finding of Fact 2.47.

53/ Findings of Fact 2.46, 2.47.

54/ Mich. Const. 1963, Art. VII, §24; App. I-23; Finding of Fact 2.37.

25% restriction and substituted therefor a new law explicitly prohibiting municipal competition for the Company's existing customers and permitting municipal systems to render extra-territorial service only in cities, villages and townships which, as of June 1974, were either contiguous to the municipality or already being served by the municipal system.[55/] Thus, the number of customers able to choose between the Company and a municipal system as their electric supplier is unlikely to increase significantly, if at all, in the future.[56/]

Similarly, the number of retail customers which have a choice between the Company and a cooperative or another investor-owned system is very small and likely to remain so.[57/] This is the result of legal constraints imposed by Michigan Public Service Commission's regulations which require the nearest system to serve single-phase (residential and small commercial) customers under most circumstances.[58/] The MPSC also prohibits existing single-phase customers from changing suppliers, and discourages duplication of facilities to serve the few three-phase (large commercial and industrial) customers which locate

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55/ Finding of Fact 2.37. MSA 5.4083, 5.1534, 1974 PA Nos. 157, 174, App. I-24.

56/ Finding of Fact 2.40.

57/ Findings of Fact 2.48, 2.50, 2.52.

58/ Findings of Fact 2.33, 2.34, 2.35; Adoption of Rules Governing the Extension of Single-Phase Electric Service, MPSC Case U-2291 (1966), App. I-1.

in the rural areas where the facilities of the cooperatives and the Company overlap.[59/] Thus, Michigan regulatory rules and policies has greatly limited the number of customers which have a choice of electric suppliers in areas where both the Company and a cooperative serve.[60/] In addition to these constraints, the terms of their REA financing prohibit the cooperatives from initiating service to communities over 1500 in population.[61/] This restriction completely forestalls expansion by a rural cooperative into many areas now served by the Company.

In sum, with the exception of a few instances in which the facilities of the Company and those of other systems overlap or interfere with each other, the "open" markets for electricity at retail are confined to areas in and around Bay City and Traverse City.

2. The "Closed" Market.

All of the other areas in which retail power is sold must be deemed "closed", either because only one supplier has distribution facilities in the area or because the Michigan law and MPSC's regulations prevent power purchasers from exercising

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59/ Findings of Fact 2.34, 2.35; Cherryland REC v. Consumers Power Co., MPSC Case U-3200 (1968), App. I-2 and Southeastern Michigan REC v. Consumers Power Co., MPSC Case U-3366 (1969), App. I-20. Cf. Cherryland REC v. Consumers Power Co., MPSC Case U-3387 (1969), App. I-3.

60/ Findings of Fact 2.31, 2.34.

61/ Finding of Fact 2.37; 7 U.S.C. §§904, 913.

a choice between two available suppliers.[62]

In this closed market, not only are there no presently existing competitors but also legal and economic constraints effectively preclude the duplication or displacement of the single existing supplier. These constraints take several forms. State law prohibits another cooperative or investor-owned utility from initiating service to a municipality where the Company is serving unless it obtains a certificate from the Michigan Public Service Commission; the MPSC uses its certificating authority to prevent the duplication of facilities.[63] Even in the unlikely event that a certificate were granted, the MPSC's aforementioned single-phase rules and three-phase policies would prohibit a new supplier serving most new and existing customers.[64]

Further, as previously noted, the cooperatives are

62/ Finding of Fact 3.04; Adoption of Rules Governing the Extension of Single-Phase Electric Service, MPSC Case U-2291 (1966), App. I-1.

63/ Finding of Fact 2.32. MSA 22.141, 22.145, App. I-24, Huron Portland Cement Co. v. MPSC, 351 Mich. 255, 88 N.W.2d 492, 499 (1958), App.I-15; Panhandle Eastern Pipeline Co. v. MPSC, 328 Mich. 650, 44 N.W. 2d 324, 330 (1950), App. I-19, aff'd 341 U.S. 329 (1951), App. I-17, Michigan Gas & Electric Co., MPSC Case U-2468 (1966), App. I-17 (applying these statutes to bar duplicative gas service). The MPSC has informed Consumers Power Company of the Commission's conclusion that it is under a duty, pursuant to these statutes, to "restrict the activities of a utility which desires to render service in an area already served by another utility". Letter from James H. Inglis, Chairman, MPSC to Consumers Power Co., transmitting decision in MPSC Case U-1152, December 27, 1962, App. I-9.

64/ Findings of Fact 2.33, 2.34, 2.35. See pp. 102-03, supra.

legally barred from initiating service in towns exceeding 1500 in population.[65/] Although the municipal systems are not subject to these same constraints, the previously discussed newly-enacted state legislation explicitly prevents municipal systems expanding beyond areas contiguous to those they presently serve and proscribes the "pirating" of an existing system's customers.[66/]

Another legal barrier to the replacement of the existing retail electric supplier in these submarkets is the ability of the local governmental entity to refuse to issue another supplier the franchise which is a pre-requisite to service.[67/] For example, none of the neighboring municipalities which operate electric systems has offered the Company franchise rights to render general service inside their boundaries[68/] and at least one municipality has contractually committed itself not to franchise others while its electric system's debt instruments are outstanding.[69/]

Theoretically, a new municipal system could be formed which would duplicate the facilities of an existing system serv-

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65/ 7 U.S.C. §§904, 913; Finding of Fact 2.37.

66/ Finding of Fact 2.39. See pp. 101-02, supra.

67/ Mich. Const. 1963, Art. VII, §29, App. I-23.

68/ Finding of Fact 2.26.

69/ Finding of Fact 2.26.

a jury or independent commission must find that the condemnation is a "necessity".[74/] In addition, the acquisition of a "public utility" must be approved by three-fifths of a municipality's electorate.[75/] And even in the event that such a condemnation and acquisition is effected, principles of utility law require that the value of the franchise be measured for condemnation purposes by the value of the going business that operated under it.[76/] Thus, condemnation of the Company's facilities would be a very difficult and expensive process.[77/] The barriers that these economic and legal restraints impose are dramatically confirmed by the fact that there is no evidence a public utility franchise has ever been condemned in Michigan.[78/]

In view of the foregoing, it is clearly unlikely that the Company (or any other supplier) will be replaced in franchised areas during the term of its franchise or that an existing municipal system will be replaced in the foreseeable future.

74/ MSA 8.20, 8.78, 5.1858 (fourth class cities) and 5.1432 (villages), App. I-24.

75/ Mich. Const. 1963, Art. VII, §25, App. I-23.

76/ See, e.g., Judge Charles Clark's decision in United States v. Brooklyn Union Gas Co., 168 F.2d 391, 395 (2d Cir. 1948); Mississippi Power & Light Co. v. City of Clarksdale, 288 So.2d 9 (Miss. 1973); App. II-27, Monterrey Peninsula Municipal Water District v. Calif. Water and Telephone Co., 56 PUR 3d 252 (Calif. PUC 1965), App. II-29.

77/ Finding of Fact 2.28.

78/ Finding of Fact 2.28.

This is not to say that such replacement cannot possibly occur in any portion of the closed market. Although in one portion of this closed market, there is no possibility of the present supplier being replaced in the remaining areas, there is some possibility that retail power purchasers may have a choice of suppliers in the long run. These two portions of the "closed" market may be analytically viewed as a "perpetual closed" submarket and a "long-term closed" submarket respectively as shown fully below.

a. The "perpetual closed" submarket.

In much of the "closed" retail geographic market, the Company is the only supplier and serves there pursuant to so-called "Foote Act" franchises awarded prior to 1909. Under Michigan law, these franchises are irrevocable and perpetual in term; even annexation of such franchised areas by municipalities which operate their own system is insufficient to divest the Company of its franchise rights.[79/] Presently, the Company serves 45%

79/ The cases holding the state-awarded franchises to be perpetual are City of Lansing v. Michigan Power Co., 183 Mich. 400, 150 N.W. 250 (1914), App. I-7; Village of Constantine v. Michigan Gas & Elec. Co., 296 Mich. 719, 296 N.W. 847 (1941), App. I-22; City of Dowagiac v. Michigan Power Co., No. 11,106 (Mich. Ct. App. November 29, 1972), App. I-5. These franchises were awarded pursuant to 1905 Mich. PA 264, App. I-25. The effect of the municipally awarded franchises was so determined in City of Benton Harbor v. Michigan Fuel & Light Co., 250 Mich. 614, 231 N.W. 52 (1930), App. I-4.

of its retail customers under these perpetual franchises.[80/]

Thus, the only conceivable manner to oust the Company from these areas would be through condemnation and, as set out above, the possibility of such an occurrence is remote at best. Consequently, in this submarket there is no realistic likelihood that the Company will be replaced by another system.

b. The "long-run closed" submarket.

In the "long-run closed" submarket, unlike the "perpetual closed" one, voters could conceivably elect to change electric suppliers either by choosing not to renew a franchise upon its expiration or to sell a municipal system. However, we submit that the likelihood of such an eventuality occurring is so speculative that potential competition cannot be deemed to exist in these areas. Thus, these areas should be included as a portion of the "closed" market.

At the time when franchises expire, the franchised retail power supplier could be ousted, but changing electric suppliers in this manner appears to be more of a matter of theory than reality. For example, the evidence is that the Company's thirty-year franchises are almost always routinely renewed.[81/] Furthermore, less than one-third (271) of the Company's thirty-year franchises will expire during the next ten years and less than a third (79) of

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80/ Finding of Fact 2.27.

81/ Finding of Fact 2.28.

the areas served under these expiring franchises are located within ten miles of another system.[82/] Consequently, in reality the Company is likely to be replaced in few, if any, of the areas it presently services under thirty-year franchises.[83/]

Similarly, it is unlikely that municipal voters will elect to sell any of the Company's neighboring municipal systems in the foreseeable future. The rates and service offered by these systems compare favorably with those of the Company and other systems;[84/] moreover, the Company has made clear that it does not seek to purchase such systems.[85/] Within the Company's service area since 1960, only 4700 municipal customers have changed suppliers through the sale of their system.[86/] No systems have been sold since 1968, and there is no evidence that any more such changes are likely to occur in the foreseeable future.[87/]

In sum, in this "long-run" portion of the "closed" market there is some remote and speculative possibility that retail customers may have a choice of electric suppliers in the long run. However, such a choice is extremely unlikely to occur

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82/ Finding of Fact 2.29.

83/ Finding of Fact 2.30.

84/ Finding of Fact 2.17.

85/ Finding of Fact 4.76.

86/ Finding of Fact 4.73.

87/ Finding of Fact 4.76.

in the foreseeable future and therefore, under the principles set forth most recently in United States v. Marine Bancorporation,[88] it cannot be said that even potential competition exists in these areas.

These constraints on the displacement of existing suppliers are the "commercial realities"[89] defining the "patterns of trade which are followed in practice"[90] in Lower Michigan. Closely comparable legal and regulatory limitations on competition were given decisive effect by the Supreme Court in resolving market structure issues in its two most recent antitrust cases, Connecticut Bank and Marine Bancorporation. The principles expressed in those cases mandate, we submit, the recognition of distinct "open" and "closed" retail markets in this proceeding.

88/ 94 S. Ct. 2856 (June 26, 974). See pp. 138-40, infra.

89/ Brown Shoe Co. v. United States, 370 U.S. 294, 336-37 (1962).

90/ United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 303 (D. Mass. 1953) aff'd per curiam, 347 U.S. 521 (1954).

IV. The Company Does Not Possess Monopoly Power In Any Relevant Market.

As set forth in the preceding Part of this Brief,[1] the primary charge of inconsistency with the antitrust laws leveled against Consumers Power Company in this proceeding falls within the scope of the prohibition in Section 2 of the Sherman Act against "monopolization". In order to sustain this charge under established antitrust principles, it must be shown that the Company has "monopolized" one or more relevant markets.[2] Thus, a failure to show that Consumers Power Company possesses monopoly power disposes of the question whether the Company has committed the offense of monopolization.[3] This Part of the Brief will, we submit, demonstrate that the Company does not possess such power.

"Monopoly power", according to the Supreme Court, is

1/ See pp. 79-81.

2/ As the Supreme Court noted in United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966):

> "The offense of monopoly under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

3/ United States v. E.I. duPont deNemours & Co., 351 U.S. 377, 391 (1956), Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953); United States v. Columbia Steel Co., 334 U.S. 495 (1948).

"the power to control prices or exclude competition".[4/] As we demonstrate below, however, the relevant markets are defined in this proceeding, the Company cannot be deemed to possess monopoly power because governmental regulatory authorities prevent the Company, as a matter of law, from controlling prices or excluding competition in either the retail power or bulk power markets. We also propose to show that, as a matter of fact, the financial and competitive strength and the cost advantages of the Company's neighboring systems, plus their significant share of those markets in which legal and economic barriers have not foreclosed competition, belie any claim that Consumers Power possesses monopoly power.

A. Governmental Regulation.

In both the retail and bulk power supply markets, Consumers Power Company's rates and other conditions of service are regulated by governmental authorities.[5/] Under the regulatory scheme to which it is subject, the Company cannot raise prices to extract monopoly profits nor selectively lower prices in a given area to injure or destroy a competitor.[6/]

In the retail power market, the Michigan Public Service

4/ United States v. Grinnell Corp., supra at 571; United States v. E.I. duPont deNemours & Co., supra at 391.

5/ Findings of Fact 2.07, 2.71.

6/ Findings of Fact 2.08, 2.14, 2.72, 2.73.

Commission (MPSC) exercises regulatory authority, inter alia, over "all rates, fares, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation operation or direction" of Consumers Power Company.[7] The Company may change its rates or other conditions of service only pursuant to an order of the MPSC[8] and only after an elaborate review process. Notice of proposed rate changes are publicized throughout the area affected and a public hearing is held.[9] Municipal and township governments, as well as individual and corporate retail customers, are authorized to participate in these proceedings.[10]

Before a proposed rate change becomes effective,

7/ MSA 22.13(6), App. I-24.

8/ MSA 22.152, App. I-24. There are only a few very minor exceptions to this principle, involving service in Pontiac and retail sales to three municipal governments. Because they are geographically isolated from the Company's main integrated system and uses bulk power supplied by another entity, the Pontiac distribution facilities are unique and are outside of any relevant geographic market in this proceeding. All four of these minor exceptions are due to MSA 22.4, App. I-24 which denies the MPSC the power to change or alter the rates or charges fixed in, or regulated by, any franchise or agreement granted or made by a city, village or township.

9/ MSA 22.13(6a), App. I-24.

10/ Mich. Const. 1963 Art. VII, § 15, App. I-23, (governmental participation), County of Wayne v. MPSC, 343 Mich. 144, 72 N.W. 2d 109, 111 (1955), App. I-14; Finding of Fact 2.07.

"affirmative action" approving the rate must be taken by the Michigan Public Service Commission.[11] In addition, at any time after a rate is approved, the Commission may initiate an inquiry into rates or other conditions of retail service,[12] either on its own motion or in response to a complaint.[13]

Under the rate-making principles followed by the MPSC, the Company cannot extract monopoly profits. On the contrary, the MPSC establishes the lowest possible rates consistent with maintaining the Company's financial integrity.[14] More specifically, the Commission uses the embedded or historic cost of service (including capital costs) as a basis for rate-making.[15]

11/ MSA 22.152, App. I-24. The only exception to this principle arises out of the operation of a fuel adjustment clause included, pursuant to MPSC approval, in a utility's tariffs. Obviously, the operation of a fuel adjustment clause is controlled by forces in the fossil fuel markets, not by the utility whose administration of the clause is purely mechanical. See Exhibit 11,002.

12/ Prior to the late 1960's, when Consumers Power Company's wholesale rates came under Federal Power Commission regulation, the Michigan Commission exercised jurisdiction over all of the Company's rates including wholesale rates with the exception of sales to municipalities. MSA 22.13(6), App. I-24; Finding of Fact 4.02.

13/ Finding of Fact 2.07; MSA 22.157, App. I-24.

14/ MSA 22.157, App. I-23; Consumers Power Co., MPSC Case U-4174 (November 24, 1972) p. 21, App. I-11; Consumers Power Co., MPSC Case U-4576 (Sept. 16, 1974), pp. 22-23, App. I-13. Finding of Fact 2.08.

15/ Finding of Fact 2.09. Consumers Power Co., MPSC Case U-4174 supra, at pp. 28-29.

Thus, the rate charged particular customers generally reflects the average cost of serving the general class of customers requiring similar service.[16/] Incremental pricing is not permitted except for "promotional rates" (e.g., for water heating) when, because of unique circumstances, they benefit all the Company's customers.[17/]

Further, the MPSC requires that rates be uniform throughout the Company's service area[18/] and that differences in the rates charged different classes generally reflect only differences in the cost of serving the various classes. Thus, the Company cannot offer special rates or discounts to attract the customers of other electric suppliers. Consumers Power Company is also obliged to offer service to all customers in its franchised service areas.[19/] This requirement precludes the Company from serving only those customers with low costs of service -- a practice known as "cream-skimming".

16/ Finding of Fact 2.10. Consumers Power Co., MPSC Case U-4174, supra at pp. 28-29.

17/ Finding of Fact 2.09; Consumers Power Co., MPSC Case U-4174, supra at p. 28.

18/ City of Ishpeming v. MPSC, 370 Mich. 293, 121 N.W.2d 462, 468 (1963), App. I-6. Finding of Fact 2.14.

19/ City of Saginaw v. Consumers Power Company, 213 Mich. 460, 182 N.W. 146, 154 (1921), App. I-8; Michigan Consolidated Gas Co. v. Austin Twp., 373 Mich. 123, 128 N.W.2d 491, 499 (1964), App. I-16; Traverse City v. Consumers Power Company, 340 Mich. 85, 64 N.W.2d 894, 899-900 (1954), App. I-21. Finding of Fact 2.07.

In the bulk power market, the Federal Power Commission regulates the Company's rates and conditions of service in much the same manner as the MPSC. Both the terms of its wholesale power agreements[20] and coordination power exchange agreements[21] are subject to review and revision by the FPC to assure that they are just, reasonable and nondiscriminatory.[22]

When the Company proposes to change its wholesale rates or other conditions of service, it must give 30 days' public no-

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20/ 16 U.S.C. §824d.

21/ See, e.g., City of Huntingburg v. FPC, 498 F.2d 778, 783 (D.C. Cir. 1974), ("the Interconnection Agreement was 'properly filed as an interstate rate schedule' ... and was therefore subject to the regulatory authority vested in the Commission by Sections 205 and 206 of the Federal Power Act.")

22/ Section 205 of the Federal Power Act (16 U.S.C. §824d) provides that:

> "(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.
>
> "(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service."

tice[23] to the Commission and the Commission may order a hearing on the lawfulness of proposed changes. Such a hearing may be called either in response to a complaint by those affected or on the Commission's own initiative,[24] and all interested persons in the matter may intervene.[25] For example, most of the Lower Michigan systems which obtain wholesale service from the Company objected to some of the provisions of the Company's most recent wholesale proposal and intervened in the hearing process established by the FPC to review the matter.[26]

As with the MPSC, the FPC regulates Consumers Power Company's bulk power rates in a manner which precludes the Company from controlling prices or obtaining monopoly profits. The FPC requires that rates be as low as possible consistent with the Company's financial integrity and prohibits the setting of rates which will maximize profits.[27] The rates which

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23/ Section 205(d), 16 U.S.C. §824d(d).

24/ Section 205(e), 16 U.S.C. §824d(e).

25/ 18 C.F.R. §1.8(b).

26/ Consumers Power Co., FPC Dkt. E-7803; "Motions by the Cities and Cooperatives to Reject, Protest, Request Hearing and Five Months Suspension and Petition to Intervene," filed December 26, 1972. This pleading was filed on behalf of Bay City, Charlevoix, Coldwater, Harbor Springs, Hillsdale, Marshall, Petoskey, St. Louis, Union City, Chelsea, Portland, Northern Michigan Cooperative, Wolverine Cooperative and the Southeastern Michigan Cooperative.

27/ Finding of Fact 2.72. FPC v. Hope Natural Gas Co., 320 U.S. 591, 605 (1944); Bluefield Waterworks and Improvements Co. v. Public Service Commission, 262 U.S. 679 (1923).

it approves generally reflect system-wide average embedded costs.[28/] The FPC also requires that rates must be uniform within a class of service and that rate differentiations[29/] between classes be based on corresponding differences in the cost of serving those classes.[30/] Therefore, Consumers Power Company clearly lacks control over prices of wholesale or other bulk power which it sells.

Contrary to the suggestions of the Department of Justice, the FPC does not simply act as a depository to store the bulk power contracts which are filed with it. For example, in Georgia Power Co., 35 FPC 436 (1966), App. II-22, aff'd sub nom. Georgia Power Co. v. FPC, 373 F.2d 485 (5th Cir. 1967) and Mississippi Power Co., 45 FPC 269 (1971), App. II-28, the Commission eliminated "dual rates" structure under which wholesale customers were charged more for power which they resold to another wholesale purchaser than for power which they sold to an ultimate user. In addition, the FPC has on many occa-

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28/ Finding of Fact 2.73. See e.g., Duke Power Co., 48 FPC 1384, 1394 (1972), App. II-19, appeal docketed, sub nom. Electricities of North Carolina v. FPC, No. 73-1185 and No. 73-1237 (D.C. Cir. 1973) in which the Commission upheld the Examiner's decision that municipal and cooperative systems were "entitled to rates based on fully allocated costs the same as any other customer." See also Duke Power Co., 49 FPC 406, 408 (1973), App. II-19.

29/ Finding of Fact 2.71. Duke Power Co., supra.

30/ Id.

sions disapproved all or part of a proposed rate increase[31/] or even required that overall wholesale rate levels be lowered.[32/]

Control over prices is, of course, the classic means of dominance by a monopolist.[33/] Indeed, monopoly power is often viewed as synonymous with control of prices.[34/] Not only do regulatory authorities preclude Consumers Power Company from acquiring or possessing power over price, these authorities have denied it any other means to exclude competitors.

Among the laws which deny the Company the ability to exclude other systems from its area is Section 202(b) of the Federal Power Act authorizes the FPC to order the interconnection of two electric suppliers for bulk power supply

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31/ See e.g, Sierra Pacific Power Co., FPC Dkt Nos. E-7706, E-7750, E-8092, Op. No. 702 (August 15, 1974); Metropolitan Edison Co., FPC Dkt. No. E-7630, Op. No. 700 (July 15, 1974); Alabama Power Co., FPC Dkt. Nos. E-7674, E-8126, E-8143, Op. No. 679 (December 14, 1973), App. II-2, appeal docketed, sub nom. Municipal Electric Utility Ass'n v. FPC, No. 74-1531 (5th Cir. 1974).

32/ Southwestern Public Service Co., 33 FPC 343, 349-50 (1965), App. II-39.

33/ United States v. E.I. duPont deNemours & Co., 351 U.S. 377, 389 (1956) (duPont-Cellophane); Moore v. Jas. H. Matthews & Co., 473 F.2d 328, 332 (9th Cir. 1973).

34/ In the duPont-Cellophane case, 351 U.S. at 392, the Supreme Court stressed that:

> "Price and competition are so intimately entwined that any discussion of theory must treat them as one. It is inconceivable that price could be controlled without power over competition or vice versa" (emphasis added).

purposes.[35] Under Section 202(b), the FPC may require that wholesale service be provided to a retail distributor which lacks generation capacity or that coordination power arrange ments be entered into with systems having sufficient generation capacity.[36] To be sure, the Commission's power under §202(b) is subject to limitations,[37] but these do not restrict the FPC's authority to require the Company to continue bulk power arrangements with an existing customer or to provide those arrangements to a newly-created system which proposes to replace the Company

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35/ 16 U.S.C. §824a(b). In Otter Tail Power Co. v. United States, 410 U.S. 366, 371 (1973), where the defendant did refuse to provide wholesale service or coordination (and wheeling as well) and engaged in other predatory conduct and admitted a monopolistic intent, the Supreme Court expressly noted that its efforts were substantially thwarted by FPC action. Village of Elbow Lake v. Otter Tail Power Co., 40 FPC 1262 (1968), App. II-44, aff'd sub nom. Otter Tail Power Co. v. FPC, 429 F.2d 232 (8th Cir. 1970) cert. denied, 401 U.S. 947 (1971); Village of Elbow Lake v. Otter Tail Power Co., 46 FPC 675 (1971), App. II-45, aff'd as modified sub nom. Otter Tail Power Co. v. FPC, 473 F.2d 1253 (8th Cir. 1973).

36/ New England Power Co. v. FPC, 349 F.2d 258 (1st Cir. 1965) (firm wholesale power to non-generating retail distributor), Otter Tail Power Co. v. FPC, 473 F.2d 1253 (8th Cir. 1973) (coordination with small generating system), Florida Power Corp. v. FPC, 425 F.2d 1196, 1201-03 (5th Cir. 1970) rev'd on other grounds sub nom. Gainesville Utilities Dept. v. Florida Power Corp., 402 U.S. 515 (1971) (FPC has identical jurisdiction to order interconnection with generating and non-generating entities).

37/ The language of Section 202(b) itself bars the Commission from compelling a utility to enlarge its facilities or jeopardize the reliability of its system.

as a retail distributor in a particular area.[38/]

The Federal Power Commission has not had occasion to order the Consumers Power Company to render service, because as discussed below, the Company has never refused to provide whole sale power to anyone in its service area who requested it. Nevertheless the FPC clearly has such authority and has exercised it with regard to other systems on a number of occasions.[39/]

The authority of the FPC with regard to bulk power service is complemented by that of the MPSC. Under Michigan law, the MPSC may order the Company to deliver power suitable "for distribution" at an appropriate primary voltage in any "city, village or township" through which its transmission

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38/ Obviously in the later setting, the former supplier would possess the necessary generating and transmission capacity to continue service since it would merely be continuing to serve loads at wholesale it had previously supplied at retail. Thus the limitations on the FPC's authority set forth in §202(b) would not be applicable.

39/ City of Cleveland v. Cleveland Electric Illuminating Co., 49 FPC 118 (1973) App. II-9, appeal docketed sub nom. City of Cleveland v. FPC, No. 73-1282 (D.C. Cir. 1973); Village of Elbow Lake v. Otter Tail Power Co., 46 FPC 675 (1971), App. II-45, aff'd as modified sub nom. Otter Tail Power Co. v. FPC, 473 F.2d 1253 (8th Cir. 1973); Gainesville Utilities Dept. v. Florida Power Corp., 40 FPC 1227 (1968), 41 FPC 4, App. II-21, (1969) aff'd, 402 U.S. 515 (1971); Crisp County Power Commission v. Georgia Power Co., 37 FPC 1103 (1967), 42 FPC 1179 (1969); App. II-18, City of Paris v. Kentucky Utilities Co., 38 FPC 269 (1967), App. II-12, Shrewsbury Municipal Light Dept. v. New England Power Co., 32 FPC 373 (1964), App. II-38, aff'd sub nom. New England Power Co. v. FPC, 349 F.2d 258 (1st Cir. 1965).

lines run.[40/] Presumably, if the Company were displaced by a new system, the Company would have had a transmission line within the affected community and consequently could be required by the MPSC to supply power to the new system.

Further supplementing the authority of the two Commissions to prevent the exclusion of electric suppliers is the FPC's jurisdiction under Sections 202(b) and 205 of the Federal Power Act to regulate the rates and other terms and conditions of bulk power supply.[41/] Under those provisions, the FPC has invalidated anticompetitive limitations in wholesale and coordinating agreements. Thus, in Georgia Power Co., 35 FPC 436 (1966), App. II-22, aff'd sub nom. Georgia Power Co., v. FPC, 373 F.2d 485 (5th Cir. 1967), the Commission struck down limitations on the size of loads that may be served by the wholesale customer. Recently in Louisiana Power & Light Co.,[42/] the Commission on its own motion instituted an investigation of clauses in a standard, firm power contract that prohibited re-sales of bulk power to future or existing wholesale customers of either

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40/ MSA 22.156, App. I-24.

41/ 16 U.S.C. §§824a(b), 824d.

42/ FPC Docket No. E-8615, Order of April 12, 1974, p.5, App. II-25.

LP&L or the purchaser.[43]

Consumers Power Company's ability to exclude competition is restricted still further by Section 203(a) of the Federal Power Act which prohibits the Company's acquisition of the facilities of another system without the prior, express approval of the Federal Power Commission. That approval may be granted only if, after opportunity for hearing, the Commission finds the acquisition "consistent with the public interest." 16 U.S.C. §824b; Citizens for Allegan County, Inc. v. FPC, 414 F.2d 1125 (D.C. Cir. 1969).[44] Such a public interest finding may only be made after taking account of any anticompetitive effects which may flow from the acquisition. Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973); Commonwealth Edison Co., 36 FPC 927 (1966), App. II-13, aff'd sub nom. Utility Users League v. FPC, 394 F.2d 16 (7th Cir. 1968), cert. denied, 393 U.S. 953.[45]

43/ See also City of Huntingburg, v. FPC, 498 F.2d 778 (D.C. Cir. 1974) requiring the FPC to articulate its basis for refusing to conduct such an investigation with regard to a provision in an interconnection agreement prohibiting further wholesale marketing of the affected power by some of the parties.

44/ This case specifically reviewed the acquisition by Consumers Power Company of the Allegan municipal system.

45/ Similarly restraining the Company's power to exclude competition through acquisition are (1) Sections 9 and 10 of the Public Utility Holding Company Act of 1935 requiring approval by the Securities and Exchange Commission of certain acquisitions by Company of securities of other public

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Plainly then, Consumers Power Company lacks the ability to control prices or exclude competition -- because the FPC and the MPSC have, and exercise, regulatory authority over prices and conditions of bulk power supply to existing and potential suppliers. Since the Company by law is denied of any ability to control prices or exclude competition, it lacks the prerequisites of monopoly power.

B. The Strength and Cost Advantages of Neighboring Systems.

The proponents of antitrust conditions in this proceeding would have the Hearing Board believe that Consumers Power Company possesses monopoly power simply because it is considerably larger than many neighboring systems -- particularly the municipal and cooperative systems within and adjacent to its service area. This assertion not only ignores the circumstance that by law the Company lacks the prerequisites of monopoly power, as explained above, but also ignores certain relevant facts about these neighboring systems -- their financial and competitive strength and their substantial financing and tax advantages.

45/ (cont.)

utility companies (15 U.S.C. 79i and 79j); and (2) Section 204(a) of the Federal Power Act permitting the Company to issue securities only after a finding by the Federal Power Commission that the object of the issue is compatible with the public interest (16 U.S.C. &824c(a)). Both Commissions must, before issuing their approval, take account of possible anticompetitive effects. Municipal Elec. Ass'n of Mass. v. SEC, 413 F.2d 1052 (D.C. Cir. 1969); Gulf States Utilities Co. v. FPC, supra.

It also fails to take account of the Company's financial condition which vividly demonstrates that size cannot be equated with monopoly power or monopoly profits.

In United States v. Columbia Steel Co., 334 U.S. 495, 527 (1948), evaluation of the "strength" of the other firms in the marketplace was identified a necessary consideration in gauging whether a company with a high market share has acquired monopoly power.[46/] One obvious comparative measure of the financial and competitive strength among firms is the price at which they are able profitably to market their product -- in this industry the rates an electric supplier charges its customers.

Here, the average retail customer rates of the municipal and small investor-owned systems which are within or adjacent to the Company's service area are substantially below the Company's comparative rates for each customer class.[47/] Some of the cooperatives' rates are not lower than the Company's because of the low density of the areas they serve.[48/] But the

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46/ Similarly in United States v. General Dynamics Corp., 415 U.S. 486, 502 (1974), the Supreme Court pointed to the weakness of a statistically leading firm as a factor diminishing the anticompetitive impact of a merger. ("United's relative position of strength in reserves was considerably weaker than its past and current ability to produce.")

47/ Finding of Fact 2.17.

48/ Finding of Fact 2.18.

cooperative rates to commercial and small industrial customers average 12 and 19 percent less than the Company's for these categories, the class of customers which is most subject to the very limited amount of competition which the MPSC permits between the Company and neighboring cooperatives.[49/]

These rate differences are reflected in the competitive success of smaller systems in the "open" market where economic and legal barriers have not foreclosed competition.[50/] Thus, in Traverse City and Bay City the Company's average market share is only 56% of a two-firm market and that share is not increasing.[51/] Indeed, during this period Consumers Power has suffered a net loss in customers to the Bay City system; and the Traverse City municipal system has obtained more than 75% of the new customers which have located there recently -- and an even higher percentage of industrial customers.[52/]

In addition, most of the Company's smaller neighboring systems are quite successful financially, and even those which are less successful could raise their rates and earn a very favorable rate of return without any adverse competitive con-

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49/ Finding of Fact 2.18.

50/ See pp. 100-03, supra.

51/ Finding of Fact 3.07.

52/ Finding of Fact 2.47.

sequences relative to the Company.[53] This situation clearly permits the conclusion -- particularly in the absence of any evidence to the contrary -- that the total per capita costs (including generation costs) of these systems are significantly less than those of the Company's.[54]

Nor is there any evidence that the strength of these smaller systems has decreased during the past decade or that it is likely to do so in the foreseeable future. During the most recent ten year period for which data is available (1961-1971), the total retail sales of the Company's small neighboring systems increased at a faster rate than the Company's retail sales.[55] This trend is evident in commercial and industrial -- as well as residential -- sales, with the cooperatives' rate of increase in this regard more than double that of the Company's.[56]

One reason why these systems have, and are likely to maintain, such impressive financial and competitive strength is the availability to nearly all such systems of significant financing and tax advantages vis-a-vis Consumers Power Company.[57] These advantages are of particular import in view of the capi-

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53/ Finding of Fact 3.29.

54/ Finding of Fact 1.10.

55/ Finding of Fact 2.19.

56/ Id.

57/ Finding of Fact 2.20.

income tax laws. Section 103 of the Internal Revenue Code, 26 U.S.C. §103, provides that interest on obligations of local and state governments is exempt from Federal income taxation. The effect of that exemption is to permit municipal systems to market debt obligations on which the payable interest rate is significantly lower than that paid at the same time by non-exempted borrowers, including investor-owned utilities such as Consumers Power Company.[63/]

These long-standing cooperative and municipal cost advantages have had a dramatic impact on the overall cost of service of lower Michigan's electric suppliers. While Consumers Power Company's capital costs amount to 21.7% of its total cost of service, municipal systems face capital costs which amount to about half that percentage of this total cost of service and cooperative systems only about a third.[64/] Plainly, these substantial disparities in the cost of capital translate into impressive variations in the cost of new facilities to meet load growth in this capital-intensive industry.

The disparate tax treatment of Consumers Power Company compared to the cooperatives and municipal systems leads to further strengthening of the market position of these systems. Con-

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63/ See, e.g., Morris, Tax Exemption for State and Local Bonds, 42 Geo. Wash. L. Rev. 526 (1974); Finding of Fact 2.21.

64/ Finding of Fact 2.21.

sumers Power Company is subject to Federal and state income taxes, state franchise taxes and local property taxes. Cooperative systems are exempt from Federal income taxation[65/] and the Michigan franchise tax[66/] while municipalities do not pay the major Federal,[67/] state[68/] or local[69/] taxes. Some municipal electric systems make voluntary contributions to their governments, but even considering those payments, the tax-type expenses of the municipal systems are less than half, viewed as a percentage of cost of service, of those borne of Consumers Power.[70/] And the 14% of the Company's cost of service attributable to taxes stands in even sharper contrast to the cooperative systems' 5.1% tax component of their cost of

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65/ 26 U.S.C. §501(c)(12); see also Consumers Credit Rural Electric Cooperative Corp. v. Commissioner, 319 F.2d 475, 477 (6th Cir. 1963); Finding of Fact 2.22.

66/ REAs as non-profit corporations, are required to file an annual report accompanied by a $10 filing fee, MSA 21.81; App. I-24, they do not, however, pay any fee for the privilege of exercising their franchise since this statute provides that non-profit corporations shall pay this $10 filing fee in lieu of any other annual fees, the provisions of any other statute notwithstanding. Finding of Fact 2.22.

67/ 26 U.S.C. §115(a); Finding of Fact 2.22.

68/ The Michigan taxing statute exempts from Michigan income tax those persons who are exempt from federal tax, MSA 7.557 (1201), App. I-24; Finding of Fact 2.22.

69/ Finding of Fact 2.22.

70/ Id.

service.[71/]

In sum, the total annual tax and capital costs of Consumers Power Company -- 35 percent of its total cost of service -- is more than twice the percentage of its municipal and cooperative neighbors; consequently these systems obviously enjoy market strength far in excess of their size.[72/] This disparity of costs is precisely the type of evidence demonstrating the "strength" of smaller firms in the marketplace which the Supreme Court in Columbia Steel deemed sufficient to refute any inference that the Company's size or market share should be equated with market power.

One of the frequently cited indicia of a firm's monopoly power is its unusually high profits. United States v. E.I. duPont deNemours and Co., 351 U.S. 377, 404 (1956). In this regard, the Company's financial position stands in marked contrast to the financial success of the small systems described in the previous paragraphs. In fact, for the past six years Consumers Power's rate of return has been below what the Michigan Public Service Commission deems minimally adequate.[73/] This financial position has created such difficulties in raising capital that the Company recently cancelled construction

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71/ Id.

72/ Finding of Fact 2.23.

73/ Finding of Fact 3.27.

plans for its next nuclear facility.[74/]

Last month, after a thorough review of the Company's operations, the Michigan Public Service Commission concluded that the Company's financial condition is "depressed" and "in serious jeopardy". In so holding, the Commission pointed to "certain critical facts such as [the Company's] depressed earnings per share, the low price of its common stock, its downgraded bond ratings, its legal inability to sell preferred stock and the possibility of legally beir restrained from selling first mortgage bonds."[75/] This is not the record of a Company that has exploited monopoly power to reap high profits. On the contrary, this record further confirms that the Company does not possess such power.

C. Market Share.

Additional evidence of Consumers Power Company's lack of monopoly power is its relatively small share of the "open" retail market and the bulk power market which, as shown in Part III, are the only markets in which legal and economic barriers have not foreclosed competition between electric systems. In the "closed" markets where there is no present or potential

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74/ Finding of Fact 3.28. "Answer" dated August 2, 1974 in Consumers Power Co., (Quanicassee Units 1 and 2), AEC Dkt. Nos. 50-475 and 50-476 (withdrawing construction permit application).

75/ Consumers Power Co., MPSC Case U-4576 (September 16, 1974), pp. 23-24, App. I-13.

competition, the Company's market shares are higher but, for the reasons set forth below, such shares permit no inference of monopoly power.

1. The Bulk Power and "Open" Retail Markets.

Even gauged by the standards set forth in the Alcoa case and other decisions involving unregulated industries, "it is doubtful whether sixty or sixty-four percent [of the market] would be enough [to demonstrate monopoly power]; and certainly thirty-three percent is not."[76/] Here Consumers Power Company's sales of bulk power to its smaller neighboring systems account for only 17 percent of these systems' total bulk power requirements; the remainder of their needs is satisfied through self-generation, exchange of coordination power, and/or wholesale purchases from other suppliers.[77/] These statistics confirm that the Company clearly has no monopoly power in the relevant bulk power market.

Nor does the Company have a statistically dominant share of the "open" retail power market. Although it proved impossible to obtain sufficient data from the Company's neighboring systems to compute precise market shares for the market

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76/ United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945); United States v. Grinnell Corp., 384 U.S. 563, 577 (1966); America Tobacco Co. v. United States, 328 U.S. 781, 797 (1946).

77/ Findings of Fact 3.11, 3.18.

as a whole,[78] statistics are available for that part of the market consisting of Bay City and Traverse City. These areas constitute the most extensive portion of the "open" retail market, as described in Section III, and as such constitute a "fair sampling" of the "open" market as a whole.[79]

Within the Traverse City and Bay City portions of the "open" retail market, the Company's share of total sales is 56.5 percent and is not increasing.[80] In each municipality, the Company faces vigorous competition from one other supplier; thus, its share of the market reflects an almost perfectly competitive two-firm market.[81] Even in terms of unregulated industries without natural monopoly characteristics -- such as the aluminum[82] or cigarette[83] industries -- the Company's market share is so low that it cannot be deemed to possess monopoly power.

78/ Finding of Fact 3.07; Even the lack of data permits a negative conclusion; i.e., there is no statistical evidence from which it can be inferred that Consumers Power possesses monopoly power in this market.

79/ Finding of Fact 3.07. The sampling approach was endorsed in a comparable circumstance in Brown Shoe Co. v. United States, 370 U.S. 294, 339 (1962).

80/ Finding of Fact 3.07.

81/ Finding of Fact 3.07.

82/ Aluminum Co. of America, supra.

83/ American Tobacco Co., supra.

2. The "Closed" Market.

As we have defined the relevant markets in Section III, most of the retail power sold by the Company and its neighboring systems is distributed in "closed" markets in which purchasers have no choice of electric suppliers. In a portion (i.e., a submarket) of the market, a change in the identity of the electric supplier may possibly occur in the long-run but not in the foreseeable future; in this portion Consumers Power Company's share of total retail sales is 77%.[84/] In the remainder of this market the Company is the only supplier, serves pursuant to perpetual franchises, and is therefore very unlikely to be replaced.[85/] By definition, the Company possesses a 100% share in this area.[86/]

We understand that the proponents of antitrust conditions seek to define the relevant markets in such a way that the Company has similarly high shares of every relevant market in this proceeding. Section III describes why we deem such market definitions to be inconsistent with law and fact. Nevertheless, in view of these contentions and because the Company does concededly have a statistically high share of the "closed" retail market, it is necessary to consider whether such market

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84/ Finding of Fact 3.08.

85/ Finding of Fact 3.09.

86/ Finding of Fact 3.09.

share data permits an inference that the Company possesses monopoly power. We submit that it does not.

There is case law to the effect that a market share of 80 or 90 percent permits an inference of monopoly power.[87] However, the fact is that the Supreme Court has never permitted monopoly power to be inferred from a statistically predominant market share except in unregulated industries where prices and entry are controlled exclusively by competition.[88]

Thus, the Court has warned that "[o]bviously no magic inheres in numbers [reflecting market share because] the relative effect of percentage command of a market varies with the setting in which that factor is placed."[89] Recently, important

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87/ See n. 76, supra.

88/ American Tobacco Co. v. United States, supra; United States v. Grinnell Corp., supra; see also United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945).

89/ Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 612 (1953) quoting United States v. Columbia Steel Co., 334 U.S. 495, 528 (1948). While a court "gives some weight to the ... percentage ... [, it] considers other factors as well" (United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 343 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954)).

In another very recent monopolization case, the market structure was heavily influenced by Government defense procurement policies and specifications. In that setting, a district court followed this line of cases in expressly declining to premise a determination of monopoly power on market share data but rather turned to a direct and specific analysis of whether the accused monopolist had the

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cases decided by the Supreme Court and by Judge Friendly writing for the Second Circuit have adhered to that principle in explaining that economic and legal restraints upon competition may negate any inference of undue strength in the marketplace.

United States v. General Dynamics Corp., 415 U.S. 486 (1974), a Clayton Act acquisition case concerning the coal industry, involved economic barriers. On the question of whether the acquired firm possessed a "probable future ability to compete", the Supreme Court stressed that the district court in that case had found, inter alia, that the reduction in the number of competitors in the coal industry was the result of "inevitable" economic forces and that the acquired firm "was far weaker than the aggregate production statistics relied on by the Government might otherwise have indicated."[90/] The Supreme Court concluded that the district court had properly:

89/ (cont.)

power to control prices or exclude competition. Pacific Engineering & Production Co. v. Kerr-McGee Corp., 1974-1 Trade Cas. ¶75,054 (D. Utah, February 28, 1974), at ¶96,740, App. II-35.

Cf. Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, 1974-1 Trade Cas. ¶75,017 (April 11, 1974) at p. 96,496, App. II-40, in which the Ninth Circuit affirmed a finding that the defendant lacked monopoly power even though the trial court had failed to determine the relevant market and the relative market shares.

90/ 415 U.S. at 487, 492-93, 503.

> "held that United Electric [the acquired company] was a far less significant factor in the coal market than the ... production statistics seemed to indicate .... Irrespective of the company's size when viewed as a producer, its weakness as a competitor was properly analyzed by the District Court and fully substantiated that court's conclusion...." 415 U.S. at 503-04.

Missouri Portland Cement Co. v. Cargill, Inc.,[91/] was another case involving the impact on market structure of economic constraints limiting competition. There, Judge Friendly held that no potential competition was eliminated, and therefore no antitrust policy contravened, by a merger affecting an industry which was so capital intensive as to make either de novo or toe-hold entry economically infeasible. By analogy, that common sense holding would indicate that in an industry so capital intensive as to preclude more than one supplier operating in a market, the presence of only a single supplier can not be condemned.

United States v. Marine Bancorporation, 94 S. Ct. 2856 (June 26, 1974) was the first case in which the Supreme Court followed its holding in General Dynamics that market share data did not always demonstrate actual power in the marketplace. In that case, regulation was the factor the Court cited as barring an inference of market power based on market

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91/ 498 F.2d 851 (2d Cir. 1974), petition for cert. filed, 43 U.S.L.W. 3114 (July 11, 1974) stay entered by single Justice vacated, 94 S. Ct. 3210 (July 25, 1974).

share statistics.[92] The Court held a large market share to be an unreliable indication of market strength in a bank merger case where state regulation lawfully foreclosed or limited competition in the market. The Court stressed that tentative inferences about market power may be drawn only where there is "unfettered competition".[93] And in another passage, the Court expressly refused to adhere to conventional market structure analysis because governmental regulatory authorities significantly restrained competition.[94]

Marine Bancorporation and Missouri Portland Cement, cases in which private plaintiffs and the Justice Department sought to block mergers on the ground that potential competition would be eliminated, are particularly pertinent because in this

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92/ 94 S. Ct. at 2874-75, especially n. 34.

93/ 94 S. Ct. at 2875, n. 34

94/ We ... hold ... that the application of the doctrine [of potential competition] to commercial banking must take into account the unique federal and state regulatory restraints on entry into that line of commerce....

> The Government's present position has evolved over a series of eight District Court cases, all of them decided unfavorably to its views. The conceptual difficulty with the Government's approach, and an important reason why it has been uniformly unsuccessful in the District Courts, is that it fails to accord full weight to the extensive federal and regulatory barriers to entry into commercial banking. This omission is of great importance, because ease of entry on the part of the acquiring firm is a central premise of the potential competition doctrine." 94 S. Ct. at 2872-73. (footnotes omitted).

proceeding as well the Department, recognizing the absence of significant presently existing competition, relies upon potential competition as the interest to be protected, by license conditions. Indeed, in its pretrial brief in this proceeding, the entire section on competition is entitled "The Potential for Competition".[95/]

In a series of earlier cases arising under §2 of the Sherman Act, courts have also recognized that where economic and legal forces require that a single firm have a dominant market share, that position cannot support an inference of monopoly power. In United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 342 (D. Mass. 1953) aff'd per curiam, 347 U.S. 521 (1954), Judge Wyzanski made clear that there is no monopolization if the existence of a monopoly market share is due "solely to ... economic or technological efficiency ... or licenses confirmed by, and used, within the limits of the law, (including ... franchises granted directly to the enterprise by a public authority)." (Emphasis supplied). In Metro Cable Co. v. CATV of Rockford, 1974-2 Trade Cas. ¶75,160 (N.D. Ill. April 12, 1974), App. II-26, a municipally franchised public utility was recognized to be precisely that type of business.

This principle is clearly applicable to the electric

95/ Prehearing Brief of the United States Department of Justice, p. 32.

utility industry. For example, in Utility Users League v. FPC, 394 F.2d 16, 19-20 (7th Cir. 1968) cert. denied, 393 U.S. 953, the Court of Appeals gave decisive effect to its recognition that the assumptions made in some industries regarding the interrelationship between market share and market power were inapplicable to the electric utility industry because of the presence of regulation.[95/] In other regulated industry settings, as well the courts have expressly held that governmental regulation may preclude a finding of private monopoly power even where the relevant product market is completely dominated by a single supplier.[96/]

95/ The court held:

> "Petitioners have shown, in general terms, that the merger will increase Edison's economic power and contribute to economic concentration in the electric energy industry. They have not shown how such growth and concentration will aggrieve them. In a market characterized by competition a merger or other acquisition necessarily injures the consumer if it substantially lessens competition. In the electric utility industry, where restraints on competition are not only tolerated, but encouraged, see 16 U.S.C.A. §824a(a) and where rates are subject to federal or state regulation, 16 U.S.C.A. §§812, 824d, injury to the consumer cannot be inferred from a merger, but must be demonstrated." (emphasis added.)

96/ Nankin Hospital v. Michigan Hospital Service, 361 F. Supp. 1199 (E.D. Mich. 1973); Travelers Ins. Co. v. Blue Cross of Western Pa., 361 F. Supp. 774 (W.D. Pa. 1972), aff'd 481 F.2d 80 (3d Cir. 1973), cert. denied, 414 U.S. 1093. In Travelers, the district court stated:

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More generally, it is well established that in markets involving governmentally-created or other natural monopoly characteristics, unlawful monopolization does not result from mere occupation of a dominant market position.[97] And, has been discussed previously, antitrust policy has long recognized that in many regulated industry settings, competition is neither to be expected nor sought even where it is techni-

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96/ (cont.)

> "... Blue Cross is not a monopolist, for it not only lacks control over the rate-making effects normally incident to lawful competition, but is without power to establish its own rates; ...." (361 F. Supp. at 780)

See also Ovitron Corp. v. General Motors Corp., 295 F. Supp. 373, 377 (S.D.N.Y. 1969):

> "Apparently, the Army, as the only user of squad radios, has thus far limited its suppliers to one, i.e., the lowest bidder on the publicly let procurement contract who met its requirements. If, as a result, monopoly power is acquired, such power would necessarily reside in any bidder who prevailed.
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> Plainly, it cannot be said that any bidder on such a Government contract ... who was successful and has thereby acquired a natural monopoly, has therefore violated Section 2."

97/ United States v. Harte-Hanks Newspapers, Inc., 170 F. Supp. 227, 229 (N.D. Tex. 1959); Union Leader Corp. v. Newspapers of New England, Inc., 284 F.2d 582 (1st Cir. 1960), cert. denied, 365 U.S. 833 (1961); American Football League v. National Football League, 323 F.2d 124 (4th Cir. 1963); John Wright & Associates, Inc. v. Ullrich, 328 F.2d 474, 478 (8th Cir. 1964); Greenville Pub. Co. v. Daily Reflector, Inc., 496 F.2d 391, 397 (4th Cir. 1974).

cally and economically feasible.[98]

The circumstances which led the courts to eschew reliance on market share statistics in such cases as the Supreme Court decisions in General Dynamics and Marine Bancorporation are equally, or perhaps even more, applicable in this proceeding. The electric utility industry is a capital-intensive natural monopoly, characterized by powerful economic restraints upon the entry of competition and the duplication of electric distribution facilities.[99] Even more important, in lower Michigan the net effect of substantial governmental regulation and other governmental mandates has been to deny a choice of electric suppliers to most purchasers of electric power. Under these circumstances, it is "hardly surprising", in the Supreme Court's words, that one firm possesses a statistically high share of one or more relevant markets.[100]

98/ The Supreme Court's has concluded that "[p]rohibitory legislation like the Sherman Law, defining the area within which 'competition' may have full play, of course loses its effectiveness as the practical limitations increase; as such considerations severely limit the number of separate enterprises that can efficiently or conveniently, exist, the need for careful qualification of the scope of competition becomes manifest. Surely it cannot be said in these situations that competition is of itself a national policy." FCC v. RCA Communications, Inc., 346 U.S. 86, 92 (1953). See Part II, Section C, pp. 43-50, supra.

99/ Findings of Fact 2.41, 2.42.

100/ United States v. Connecticut National Bank, supra, 94 S. Ct. at 2875. Were the Department of Justice's market definition in this proceeding to be adopted, two markets would

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However, as in General Dynamics and Marine Bancorporation, the same legal and economic constraints which are responsible for the high market share statistics also negate any possible inference that Consumers Power Company possesses monopoly power. As explained in Section A of this Part of this brief, regulatory authorities prevent the Company from controlling prices or excluding competition so that the Company is deprived by law of the prerequisites of monopoly power. In addition, the factual analysis set forth in Section B demonstrates that, in fact, the Company's small neighboring systems are financially strong, are competitively successful to the extent that the law permits competition, and enjoy significant cost advantages vis-a-vis Consumers Power Company. Thus, both under law and in fact, regardless of the Company's statistical share of particular markets, the Company does not possess the market power required for a finding of monopolization.

D. The "Bottleneck" Theory.

In prior pleadings, the Company's adversaries have advanced the novel thesis that because Consumers Power Company owns most of the high-voltage transmission lines and all of the

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100/ (cont.)

have this characteristic. Even under that approach, which for the reasons previously discussed we believe to be invalid, the basic conclusion -- that a statistically preeminent firm lacks monopoly power in this industry -- remains unchanged.

nuclear generation units in the geographic market, it should be deemed to possess monopoly power under a "bottleneck" or "unique resource" theory. It is apparently their contention that Consumers Power's ownership of these facilities denies systems without such facilities "access" to certain bulk power sources such as coordination power and nuclear power.

This assertion of a "bottleneck" theory is factually inapplicable to this proceeding. In the first place, until the initiation of this proceeding none of the Company's small neighboring systems had ever expressed any interest in direct access to the Company's nuclear generation units or its transmission system, and to date only one concrete request has been forthcoming in this regard -- a recent request from the MMCPP systems for transmission (wheeling) services which the Company promptly honored.[101/]

In response to the issues of access raised for the first time in this proceeding, the Company set forth its policies which clearly provide for access to any special benefits associated with nuclear generation[102/] and to transmission (wheeling) services[103/] on reasonable terms and conditions.

101/ Findings of Fact 4.57, 4.63, 4.66, 4.71.

102/ See Part V, Section C-1, infra, pp. 182-202.

103/ The Company's wheeling policies constitute a commitment to provide neighboring systems access to its transmission

(cont.)

Thus, the first factual obstacle to application of "bottleneck" or "unique resource" hypothesis in this proceeding is that Company has never denied access to these resources.

The second factual infirmity of the theory is that the Company's nuclear generation units (or the Midland units in particular) and its transmission lines are not "unique" or "essential". This is because the records of this proceeding clearly show that the unavailability of these facilities to other systems does not deny these systems any resources necessary for their financial or competitive viability.

103/ (cont.)

system, subject only to a few reasonable terms and conditions [Findings of Fact 4.66, 4.67, 4.68]. Three of these terms provide that the Company (1) should be fully compensated for transmission services, (2) should not suffer any diminution of system reliability, and (3) should not be deprived of coordination opportunities through wheeling. The fourth condition provides that a wheeling arrangement should not promote idle facilities and social waste, e.g., "cream skimming" in which a distant supplier would seek to provide service through wheeling to the most desirable customers in Consumers Power's area while leaving Consumers Power to serve the highest cost customers [Finding of Fact 4.70].

The reasonableness of the first three terms and conditions seems self-evident. As to the fourth, since the "pirating" of customers under arrangements of this type is condemned throughout the electric industry, the Company's unwillingness to furnish transmission services for cream-skimming purposes is clearly reasonable [Finding of Fact 2.42]. Indeed, the manager of one of the generation and transmission cooperatives testified that he would not offer his system's transmission services to the Company for the purpose of taking one of his customers [Finding of Fact 4.70].

There is no evidence that neither ownership of nuclear units or of an extensive transmission system permits the Company to generate and transmit either bulk power or retail power at less cost than the Company's small neighbors. In fact, the low rates and the tax and financing advantages which most of these systems enjoy suggests that their total per capita costs of service are less than the Company's costs.[104/]

The only concrete evidence comparing the actual cost of bulk power alternatives for smaller, neighboring systems does not support the assertion that nuclear power is a unique and essential resource. This evidence is contained in an elaborate study prepared for the Lansing system by its engineering consultants [Exhibit 12,008]. According to this study, and testimony about it by Lansing's system manager, the difference between average per/kwh cost of the Lansing constructing a fossil-fired plant (Plan 3B) compared with a functionally comparable plan involving its purchasing a unit share of capacity from a nuclear plant (Plan 4) is less than 2-1/2%. Since a difference of two to three percent is well within the range of engineering error, as Lansing's manager conceded, the fossil-fired and nuclear unit purchase bulk power alternatives analyzed in the study are econ-

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104/ Finding of Fact 1.10.

omically comparable and equally attractive from a cost standpoint.[105/]

The neighboring systems which do not opt to satisfy all of their bulk power needs through self-generation enjoy the alternative of securing bulk power supply from the Company.[106/] These systems may purchase firm wholesale power at rates subject to FPC jurisdiction which are based on the Company's system average costs and therefore reflect an appropriate share of whatever benefits (or burdens) the Company derives from its transmission system and/or nuclear[107/] generation units. Another option for neighboring systems which have sufficient generation capacity is coordination power exchange with the Company under the reasonable conditions discussed in Part V, Section C-1.

Part III of this brief has previously detailed how the Company's neighboring systems have utilized the self-generation, wholesale purchase, and coordination power exchange alter-

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105/ This is the only record evidence hearing on this issue. The evidence offered by the Department's witness Helfman [Exhibits 200-203] does not purport to analyze costs of nuclear and fossil-fired base load generation on a functionally comparable basis, but rather to illustrate the relative benefits of coordination on various assumptions, including (cases III and IIIA) purchases of unit power from Consumers Power's Midland plant. More specifically, the Helfman evidence does not compare the cost of such nuclear unit purchases with the cost of producing comparable amounts of power from a fossil-fired plant that would be owned by municipal and/or cooperative systems. Finding of Fact 1.12.

106/ Finding of Fact 4.02.

107/ Findings of Fact 2.71, 2.73, 2.75.

natives in obtaining bulk power supply.[108] We have also shown how in utilizing these options -- and without special nuclear unit access and without utilization of the Company's transmission (wheeling) services -- these systems have proven increasingly viable during the past decade, both financially and competitively.[109] Under these circumstances, the thesis that direct access to the Company's nuclear units and/or to its transmission system are prerequisites to survival or success by the Company's small neighboring systems is factually ill-founded.

The Justice Department's application of a "bottleneck" or "unique resource" theory in this proceeding is also lacking in law. The Supreme Court in the duPont-Cellophane case was careful to explain that, although one firm by definition has exclusive power over the products which it makes or owns, this is "not the power that makes an illegal monopoly."[110] On the

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108/ See pp. 87-89, supra.

109/ See pp. 127-28.

110/ United States v. E.I. duPont deNemours & Co., 351 U.S. 377, 393 (1956). The duPont-Cellophane case includes a more elaborate statement of this principle: "one can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power over the price and production of his own product. [fn] However, this power that, let us say, automobile or soft drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product." 351 U.S. at 393.

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contrary, the Court continued, "there is monopoly power" only "[w]hen a product is controlled by one interest without substitutes available in the market,"[111] is there monopoly power. As the preceding paragraphs amply demonstrate, although Consumers Power Company owns two operational nuclear units and extensive transmission facilities, it does not possess monopoly power or "bottleneck" control over these resources because there are other adequate substitutes for these resources available to others in the relevant bulk power market -- self-generation, wholesale purchases, and under appropriate circumstances, coordination power.

The principal case cited in support of the proffered "bottleneck" theory, Otter Tail Power Company v. United States, 410 U.S. 366 (1973) is wholly inapplicable. To be sure, Otter Tail's facts involved the electric utility industry. But in Otter Tail the municipal distribution systems were denied access to any source of bulk power supply because (1) Otter Tail

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110/ (cont.)

See also United States v. Colgate & Co., 250 U.S. 300, 307 (1919); Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177 (1965) (even a fraudulent patent-holder with obvious total control over a particular product cannot be held to have monopoly power until the court has "[appraised] terms of the relevant market for the product involved.").

111 351 U.S. at 394 (Emphasis added).

refused to wheel (2) Otter Tail simultaneously sought to withhold wholesale service[112/] and (3) the municipal systems were too small to self-generate economically.[113/] Although a denial of access to all feasible sources of bulk power supply could be deemed a denial of an essential resource, that situation does not exist under the facts of this case.

Moreover, the court in Otter Tail was not dealing with an allegation of latent, hypothetical capacity to withhold access to a resource such as that claimed here. Rather, Otter Tail's refusal to provide transmission services was cited by the Supreme Court as part of a pattern of actual anticompetitive behavior relied on by the Court to show anticompetitive intent and willfully monopolistic conduct.[114/]

Finally, it should be noted that the facts of this

112/ As the Supreme Court noted, 410 U.S. at 371, this effort was thwarted by the Federal Power Commission. See Village of Elbow Lake v. Otter Tail Power Co., 40 FPC 1262 (1968), App. II-44, aff'd sub nom. Otter Tail Power Co. v. FPC, 429 F.2d 232 (8th Cir. 1970) cert. denied, 401 U.S. 947 (1971), Village of Elbow Lake v. Otter Tail Power Co., 46 FPC 675 (1971), App. II-45, aff'd as modified sub nom. Otter Tail Power Co. v. FPC, 473 F.2d 1253 (8th Cir. 1973).

113/ See Village of Elbow Lake, supra, 46 FPC at 877-78 where the FPC chided one of the small municipalities for "an ill-advised excursion into the power business" and warned against comparable "improvident ventures elsewhere."

114/ The Court pointed to other claims of predatory conduct as well. See 410 U.S. at 371-72 (litigation) and 378-79 (contracts with Bureau of Reclamation).

case are also crucially different from the group boycott cases[115] which have been cited in support for the "bottleneck" thesis. These cases involved combinations of two or more parties which, under Section 1 of the Sherman Act, are prohibited if trade is unreasonably restrained; no monopoly power need be found to establish a violation of Section 1.[116]

Here, Section 1 standards are inapplicable, since the Consumers Power Company's nuclear units and its transmission facilities are owned and controlled solely by the Company. And, in any event, unlike the facts of this proceeding, these group boycott cases involved denial of facilities clearly essential for another party's competitive and financial success; e.g., the only bridge over the Mississippi River,[117] the unique facilities of the New York Stock Exchange,[118] the predominant news wire service,[119] and the only viable location to sell produce.[120] Moreover, in each case, an actual rather than a

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115/ United States v. Terminal Railroad Ass'n, 227 U.S. 683 (1912); Associated Press v. United States, 326 U.S. 1 (1945); Silver v. New York Stock Exchange, 373 U.S. 341 (1963) and, in a footnote, Gamco, Inc. v. Providence Fruit and Produce Bldg., Inc., 194 F.2d 484 (1st Cir. 1952) cert. denied, 344 U.S. 817.

116/ Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

117/ Terminal Railroad Ass'n, supra.

118/ Silver v. New York Stock Exchange, supra.

119/ Associated Press, supra.

120/ Gamco, supra.

merely potential refusal to deal was present.

In the present case, the facts plainly establish that Consumers Power Company has not withheld reasonable access to its transmission network or any special benefits of its nuclear generation and that neither transmission services nor nuclear facilities are unique resources. Thus, there is simply no occasion in this case to consider the unwarranted extension of antitrust "bottleneck" notions the other parties advocate.

V. The Company's Conduct Does Not Reflect the Requisite Intent to Monopolize.

Even were Consumers Power Company deemed to possess monopoly power in any relevant market, it cannot be found to have monopolized that market unless it has engaged in the "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966). In unregulated industrial settings, the precise dimensions of the "willfulness" standard have been the subject of considerable litigation and varying verbal formulations.[1/] However, research reveals and opposing counsel have cited no case in which the required willfulness was found without a showing of predatory conduct or explicit monopolistic motivation.[2/]

Where, as here, the industry under scrutiny is marked

1/ See Judge Wyzanski's discussion in United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 342 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954). Pointing to textual inconsistencies between the various opinions, he stressed that a trial court could not "give any authoritative reconcilation of opinions rendered by appellate courts."

2/ For example, in United States v. United Shoe Machinery Corp., supra, 110 F. Supp. at 343-44, the leasing arrangements under which USMC machines were made available were themselves condemned. See Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 485-86 (1968), particularly note 3. In Case-Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449, 459 (9th Cir. 1966), rev'd on other grounds, 389 U.S. 384 (1967), a post-Grinnell case, the court carefully reviewed the purportedly predatory practices from

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by natural monopoly characteristics and extensive governmental

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2/ (cont.)

which willfulness could be inferred. In most §2 monopolization cases, of course, predatory practices held to constitute a violation of §1 of the Sherman Act have also been present. See, e.g., Grinnell, supra; United States v. Griffith, 334 U.S. 100, 106-07 (1948); American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Crescent Amusement Co., 323 U.S. 173 (1944); United States v. Reading Co., 253 U.S. 25 (1920).

In United States v. Aluminum Co. of America, 148 F.2d 416, 428 (2d Cir. 1945), while there is perhaps language suggesting that willfulness may be tentatively presumed from the presence of monopoly power at least under the circumstances of that case, substantial evidence of predatory conduct was offered at trial. Many leading commentators have indicated that predatory practices were present in the case and suggested that the district court was plainly wrong in its conclusion to the contrary. See e.g., C. Kaysen and D. Turner, ANTITRUST POLICY (1959) 107; Att'y Gen Nat'l Comm. Antitrust Rep. (1955), 58-59; Roback, Monopoly or Competition through Surplus Plants Disposal? The Aluminum Case, 31 Cornell L. Q. 302, 306-07 (1946). Thus, as United Shoe surmises, the Alcoa court was obliged to follow its ambiguous approach because of the dubious, but unreversible, district court findings:

> "In Aluminum Judge Hand, perhaps because he was cabined by the findings of the District Court, did not rest his judgment on the corporation's coercive or immoral practices." (110 F. Supp. at 341).

In the bulk of the remaining cases, a specific finding was made as to the existence of predatory practices, e.g., Otter Tail Power Co. v. United States, 410 U.S. 366, 377 (1973); United States v. Besser Manufacturing Co., 96 F. Supp. 304, 310-11 (E.D. Mich. 1951), aff'd, 343 U.S. 444 (1952).

Therefore, Judge Aldrich aptly summarized the prevailing rule in holding in Union Leader Corp. v. Newspapers of New England, Inc., 284 F.2d 582, 584 (1st Cir. 1960), cert. denied, 365 U.S. 833 (1961), that "intending the natural consequences of acts which are in all respects lawful, does not constitute the 'exclusionary intent' that is a prerequisite for finding a violation of Section 2."

> "a natural monopoly market does not of itself impose restrictions on one who actively, but fairly, competes for it, any more than it does on one who passively acquires it. [fn] In either event, there must be some affirmative showing of conduct from which a wrongful intent can be inferred."

To similar effect is the holding of the Fourth Circuit in American Football League v. National Football League, 323 F.2d 124, 131 (1963). There the court ruled that "[w]hen one has acquired a natural monopoly by means which are neither exclusionary, unfair nor predatory, he is not disempowered to defend his position fairly."[4/]

Recognition of the above-quoted principle was also plainly implicit in the Supreme Court's opinion in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). Both the statement of facts (410 U.S. at 369-72) and the only discussion of general principles of the case (410 U.S. at 377-79) stressed Otter Tail's clearly predatory methods and purpose. For example, the Court noted "that Otter Tail's refusals to sell at wholesale or to wheel were solely to prevent municipal power systems from eroding its monopolistic position." (410 U.S. at 378). Those willful anticompetitive acts were comparable, the Court suggested, to those of a theatre operator who "uses the strategic posi-

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4/ For a very recent statement of this principle, see Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391, 397 (4th Cir. 1974).

tion [ownership of the only theaters in certain towns] to acquire exclusive privileges in a city where he has competitors," United States v. Griffith, 334 U.S. 100, 107 (1948), cited at 410 U.S. at 377. Obviously, the Court would have had no need to review these practices in detail if it deemed market structure alone, without unfair and predatory conduct, sufficient to establish prohibited monopolization.

In apparent recognition of the foregoing principle, the other parties to this proceeding argue that the Company has maintained[5/] its position in Lower Michigan through conduct whose purpose and intent are predatory and unfair. Their allegations in this regard relate to three principal areas of conduct: (a) action which was compelled, approved, or supervised by regulatory authorities; (b) actions taken in the political arena; and (c) other actions relating to the Company's relationship with its small neighboring systems. As set forth below, we submit that the Company's conduct in the first two categories is protected by law from allegations that it is predatory or unfair, while conduct in the third category in no way supports a finding that the Company has engaged in predatory or unfair activity.

5/ There is no evidence in this proceeding that the Company's conduct in acquiring its present position was unlawful and we do not understand the other parties to so contend.

A. Regulated Conduct: Parker v. Brown.

Much of the evidence introduced by the other parties in this proceeding clearly relates to Company conduct which has been either commanded, approved or supervised by governmental regulatory authorities. This evidence includes documents and testimony concerning retail power rates and service, wholesale power rates and service, coordination arrangements, and acquisitions of other electric systems. We submit that the Company's conduct sanctioned by regulatory authority cannot be deemed unfair or predatory.

According to the Supreme Court, "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out."[6/] In Parker v. Brown, 317 U.S. 341 (1943), the Court made clear that this principle applies not only to conduct required by governmental authority but also activity which was either approved or supervised by such authority.

In Parker, the Supreme Court ruled the antitrust laws inapplicable to an industry-wide combination to maintain the price of California-grown raisins by maintaining mandatory production and market quotas operating under a scheme created and supervised by State officials but planned and administered each

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6/ Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961).

year by the raisin producers. This decision and others like it are based on the fundamental principle, never called into question by the Court, that in enacting the federal antitrust laws Congress did not intend to pre-empt the freedom of the governmental authorities to impose a regulatory regime on private conduct:[7/]

> "The teaching of Parker v. Brown is that the antitrust laws are directed against individual and not state action. When a state has a public policy against free competition in an industry important to it, the state may regulate that industry in order to control or, in a proper case, to eliminate competition therein. It may even permit persons subject to such control to participate in the regulation, provided their activities are adequately supervised by independent state officials." Asheville Tobacco Board of Trade v. FTC, 263 F.2d 502, 509 (4th Cir. 1959).

A central application of this principle in recent years has been to regulation of operating practices and rates of public utilities, including those engaged in electric generation and distribution, whether through regulatory commissions,[8/]

7/ Antitrust challenges have been barred by the Court at the threshold in cases involving State-created private cartels of harbor or river pilots. Olson v. Smith, 195 U.S. 332 (1904); cf. Kotch v. Bd. of River Pilot Comm'rs, 330 U.S. 552 (1947). Cf. Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 137-39 (1973).

8/ Business Aides, Inc. v. Chesapeake & Potomac Telephone Co. of Va., 480 F.2d 754 (4th Cir. 1973)(telephone utility), Gas Light Co. of Columbus v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), cert. denied, 404 U.S. 1062 (1972),

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financing agencies[9] or through direct legislation.[10]

In a very recent decision, a federal court expressly held the principle of Parker v. Brown to apply fully to retail practices of electric utilities regulated by the Michigan Public Service Commission. In Cantor v. Detroit Edison Co., Civ. Action No. 4-70026 (E.D. Mich. July 2, 1974), App. II-7, Detroit Edison was accused, under §2 of the Sherman Act, of monopolizing the market for light bulbs through its practice of distributing

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8/ (cont.)

Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.2d 248 (4th Cir. 1971), Communications Brokers of America v. Chesapeake & Potomac Telephone Co. of Va., 370 F. Supp. 967 (W.D. Va. 1974)(telephone), Region Properties, Inc. v. Appalachian Power Co., 368 F. Supp. 630 (W.D. Va. 1973), Cantor v. Detroit Edison Co., Civ. Action No. 4-70026 (E.D. Mich. July 2, 1974), App. II-7. Cf. Padgett v. Louisville and Jefferson County Air Board, 492 F.2d 1258 (6th Cir. 1974) (applying these principles to an airport taxi monopoly granted by an airport authority) and Goldfarb v. Va. State Bar, 497 F.2d 1, 4-12 (4th Cir. 1974) petition for cert. filed, 43 U.S.L.W. 3087 (May 5, 1974), extending them by analogy to fee regulation by the Virginia Supreme Court of Appeals and the Virginia State Bar.

The responsibility to consider allegations of predatory or otherwise anticompetitive utility behavior placed upon the state commissions by this doctrine has been recognized by the state courts, see, e.g., Northern Calif. Power Agency v. Calif. PUC, 486 P.2d 1218, 5 Cal.3d 370, 96 Cal. Rptr. 18 (1971), App. II-33.

9/ Alabama Power Co. v. Alabama Electric Cooperative, 394 F.2d 672 (5th Cir. 1968), cert. denied, 393 U.S. 1000 (Rural Electrification Administration).

10/ Okefenokee Rural E.M.C. v. Florida Power & Light Co., 214 F.2d 413 (5th Cir. 1954).

free replacement bulbs to its customers. Since this practice was undertaken pursuant to tariffs filed with the Michigan Public Service Commission, the court dismissed the action, citing Parker v. Brown:

> "[U]nder M.C.L.A. 460.6 [MSA 22.13 (6)] the Commission is given continuing jurisdiction to supervise the "rates", "services" and "operation" of a utility such as defendant and under M.C.L.A. 460.557 [MSA 22.157] any consumer is given the right to challenge the "service rendered" in proceedings before the Commission. The court finds, therefore, that the affirmative action of the Commission in approving the rate structure and the continuing supervision of the defendant by the Commission put this case squarely within the Parker doctrine." (slip op. at pp. 3-4; emphasis supplied.)

So clearly was the MPSC supervision of Detroit Edison at the core of the Parker doctrine, that the court was able to reach its legal conclusion on summary judgment without consideration of any evidence. Of course, Consumers Power Company is subject to precisely the same on-going MPSC scrutiny of all operations and the same requirement of MPSC approval.[11/]

The other cases involving electric utilities have reached the same conclusion. For example, Gas Light Co. of Columbus v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), cert. denied, 404 U.S. 1062 (1972), was an antitrust suit by a gas utility for allegedly discriminatory rates and other acts

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11/ MSA 22.13(6), App. I-24.

asserted to be unfair competitive practices intended to discourage the use of gas. Each of the rates and practices under attack had been approved by the State utility commission. In reliance upon the Parker doctrine of immunity for state-directed conduct, the court of appeals found that State regulation of the electric utility's practices exempted them from federal antitrust attack, whatever their legal status might otherwise be under the Sherman and Clayton Acts:

> "Our view is that the Parker exclusion applies to the rates and practices of public utilities enjoying monopoly status under state policy when their rates and practices are subjected to meaningful regulation and supervision by the state to the end that they are the result of the considered judgment of the state regulatory authority ...." 440 F.2d at 1140.

Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.2d 248 (4th Cir. 1971), is even stronger testimony to the inapplicability of the antitrust laws in fields covered by state regulation. The practice complained of there was an electric utility's program of free installation of underground lines for builders who supplied only electric appliances, to the exclusion of gas appliances, in their subdivision homes. Other builders, who refused to set up "all-electric" homes to the exclusion of the plaintiff gas utility, were required to pay substantial charges for underground installation. Underground service was an important competitive advantage to builders offering it and in some areas was required by local build-

ing codes. The electric utility's discriminatory charges[12/] were subject to regulation by the State regulatory commission, but were not actually reviewed or approved by the agency until three years after they went into effect. The Commission thereafter approved the practice, but subsequently required its modification.

The court of appeals in Washington Gas Light rejected the argument that the electric utility's utilization of this practice had violated the antitrust laws at least for the three years prior to its approval. It held that even passive tolerance of the practice subject to the regulatory jurisdiction of the State commission was dispositive of any claim that the practice was in violation of the antitrust laws.

Consequently, a regulated firm taking even clearly anti-competitive actions pursuant to a determination of a regulatory agency must be shielded from antitrust scrutiny as fully as the agency itself.[13/]

12/ In a later discussion of its decision, the Fourth Circuit baldly described the electric utility's practices in that case as "predatory promotional activities." Goldfarb v. Va. State Bar, supra, 497 F.2d at 8.

13/ Business Aides, Inc. v. Chesapeake & Potomac Telephone Co. of Va., 480 F.2d 754, 756 (4th Cir. 1973); Alabama Power Co. v. Alabama Electric Cooperative, 394 F.2d 672, 676-77 (5th Cir. 1968), cert. denied, 393 U.S. 1000; Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th Cir. 1966) cert. denied, 385 U.S. 930 and E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir. 1966), cert. denied, 385 U.S. 947. As the court in Wiggins states:

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To be sure there are limits to the Parker v. Brown principle; governmental activities when the state is acting in a proprietary capacity as a purchaser[14/] or governmental action induced by fraud.[15/] But these outer limits are irrelevant to this proceeding because the factual context in which the question arises in this proceeding is squarely within the four corners of Parker v. Brown.[16/]

In the instant case, the Company's activities in the retail market are so pervasively regulated and supervised by the MPSC and by state laws that the Company's conduct in this market is either commanded by or within the jurisdiction of

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13/ (cont.)

> "If, as we have found, the Authority's conduct was lawful here it would be an unreasonable restriction on its freedom to hold that the other [non-governmental] defendants acted illegally in having aided it." (362 F.2d at 56)

14/ Hecht v. Pro-Football, Inc. 444 F.2d 931 (D.C. Cir. 1971), cert. denied, 404 U.S. 1047 (1973), George R. Whitten Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970).

15/ Woods Exploration & Prod. Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971); Israel v. Baxter Laboratories, Inc. 466 F.2d 272 (D.C. Cir. 1972).

16/ The Sixth Circuit recently reached this conclusion in a case concerning the award of a taxi monopoly by a municipal airport authority. Padgett v. Louisville and Jefferson County Air Board, 492 F.2d 1258, 1259 (1974). See also Hecht, supra, 444 F.2d at 935; Paddock Pool Builders, supra, 424 F.2d at 30. See generally ABA ANTITRUST SECTION, ANTITRUST DEVELOPMENTS 1968 (1971 Supp.) 67.

state regulatory authority. For example, the Company cannot be said to have violated the antitrust laws by serving all customers who so request service in its service area or by expanding its generation capacity to meet their demand because the state has mandated the Company -- as a franchised public utility -- to honor all such requests.[17/] This service requirement has been repeatedly upheld in cases decided by the Michigan Supreme Court -- in some instances specifically involving the Company.[18/]

Similarly, allegations that the Company has been overly "aggressive" in soliciting retail customers or, conversely, that it has acted improperly in cooperating with other systems to reduce wasteful duplication of retail distribution facilities fall squarely within the matters actively regulated and supervised by the MPSC.[19/] Indeed, that Commission has formal and informal complaint procedures available to any party which believes the Company has acted improperly with regard to retail service and

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17/ Finding of Fact 2.07.

18/ City of Saginaw v. Consumers Power Co., 213 Mich. 460, 182 N.W. 146, 154 (1921), App. I-8, Michigan Consol. Gas Co. v. Austin Twp., 373 Mich. 123, 128 N.W.2d 491, 499 (1964), App. I-16, Traverse City v. Consumers Power Co., 340 Mich. 85, 64 N.W.2d 894, 899 (1954), App. I-21. Cf. Huron Portland Cement Co. v. MPSC, 351 Mich. 255, 88 N.W.2d 492 (1958), App. I-15.

19/ MSA 22.13(6), App. I-24.

these procedures have been utilized on several occasions.[20/]

Issues relating to the allegedly anticompetitive effect of certain provisions of the Company's wholesale and coordination agreements are also squarely within the regulatory authority of the Federal Power Commission.[21/] These include allegations which have been raised regarding the "ratchet" billing formula, the capacity reservation, and the third-party interconnection provisions of the Company's wholesale contracts as well as the reserve sharing formula contained in certain coordination agreements. These agreements are on file with the FPC and that Commission has well-established hearing procedures which, by law, must take account of allegedly anti-competitive provisions.[22/] In fact, the intervening systems here have also intervened in a recent FPC wholesale case involving the Company to raise antitrust issues with regard to many of these same provisions.[23/] Because these questions relate to agreements filed with and supervised

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20/ Finding of Fact 2.36. See e.g., Cherryland REC v. Consumers Power Co., MPSC Case U-3200 (1968), App. I-2; Cherryland REC v. Consumers Power Co., MPSC Case U-3387 (1969), App. I-3. Cf. Business Aides, Inc. v. Chesapeake & Potomac Telephone Co. of Va., supra, 480 F.2d at 757-58.

21/ City of Huntingburg v. FPC, 498 F.2d 778 (D.C. Cir. 1974). See pp. 31-34, supra.

22/ City of Huntingburg, supra; Gulf State Utilities Co. v. FPC, 411 U.S. 747 (1973).

23/ See p. 118, n. 26, supra.

and regulated by the FPC, the Company cannot be deemed, under the principles of Parker v. Brown, to have violated the antitrust laws by adhering to their provisions.[24/]

Finally, allegations have been made in this proceeding about the Company's acquisition of three small electric systems between 1961 and 1968. Although the merits of the

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24/ While the courts have had more frequent occasion to apply the Parker-Brown doctrine in cases involving state regulation, they have repeatedly held it to be applicable in the federal setting as well, Alabama Power Co. v. Alabama Electric Cooperative, Inc., 394 F.2d 672, 676-77 (5th Cir. 1968), cert. denied, 393 U.S. 1000; Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 576-77 (10th Cir. 1961), cert. dismissed, 371 U.S. 801; Tarlton v. Henderson, 467 F.2d 200, 201 (5th Cir. 1972). Cf. Ladue Local Lines, Inc. v. Bi-State Development Agency of the Missouri-Illinois Metropolitan District, 433 F.2d 131 (8th Cir. 1970) (applying Parker and Alabama Power Co. to bi-state compact approved by Congress.)

Most pertinently, in Alabama Power Co., supra, the Fifth Circuit specifically applied the Parker-Brown doctrine to federal supervision of an electric supplier in holding that neither the actions of the Rural Electrification Administration nor of a cooperative acting pursuant to REA regulation were subject to antitrust scrutiny. And in a passage specifically relying on Parker v. Brown and Alabama Power Co., the Federal Power Commission expressly held that its actions and those of utilities taken pursuant to its orders were not open to antitrust attack, Petition for Amendment of 18 C.F.R. Part 141, 49 FPC 588, 589-90 and n.8 (1973), App. II-36, appeal docketed sub nom. Alabama Power Co. v. FPC., No. 73-1436 (D.C. Cir. 1973).

See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973), underscoring the close similarity of the tasks a court faces in reconciling federal antitrust and regulatory policies and in defining the interplay between federal and state legislation.

Company's acquisition activities are examined in a later subsection,[25/] in our view, the principles of Parker v. Brown, preclude a finding that these acquisitions are evidence of monopolization by the Company.

At the time of the acquisition of Grayling in 1961, the Company was not subject to FPC jurisdiction,[26/] but the acquisitions of the Rogers City[27/] and Allegan systems in 1968 were explicitly approved by the FPC. In fact, in the case of the Allegan purchase, complaints raising antitrust and other claims against the Company were filed at the FPC.[28/] The FPC authorized the acquisition as consistent with the public interest and its decision was affirmed by the United States Court of Appeals for the District of Columbia Circuit.[29/]

Thus, all but one of the Company's acquisitions since 1960 have been reviewed and authorized by the Federal Power Commission and no future acquisition proposals by the Company can

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25/ See Section C-3, pp. 205-12.

26/ Findings of Fact 4.09, 4.72.

27/ Consumers Power Co., 38 FPC 580 (1967), App. II-16. As noted in the FPC opinion, 38 FPC at 581, the Rogers City acquisition was also approved by the Michigan Public Service Commission, Consumers Power Co. and Rogers City Power Co., MPSC Case U-2737 (1967), App. I-10.

28/ City of Allegan, Michigan and Consumers Power Co., 39 FPC 99 (1968), App. II-8.

29/ Citizens for Allegan County v. FPC, 414 F.2d 1125 (1969).

be consummated without its authorization. Significantly, this FPC review of proposed acquisitions includes consideration whether the proposal will have any adverse anticompetitive effects.[30/] In light of such extensive governmental regulatory review and explicit authorization, the Company's acquisitions of other systems cannot, under Parker v. Brown, be deemed unfair or predatory or otherwise contrary to antitrust law or policy.

In sum, we submit that the Company's conduct in such areas as retail service, its wholesale and coordination agreements, and its acquisitions of other systems are so thoroughly regulated and supervised by governmental regulatory authorities that such conduct cannot be utilized in support of a finding that the Company has monopolized any relevant market.

B. Political Conduct: Noerr-Pennington.

During the prehearing phase of this proceeding the Hearing Board ruled that the Company's political activities were irrelevant to the issues raised in this proceeding.[31/] Neverthe-

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30/ 16 U.S.C. §824b; Commonwealth Edison Co., 36 FPC 927, 936 (1966), App. II-13, aff'd sub nom. Utility Users League v. FPC, 394 F.2d 16 (7th Cir. 1968), cert. denied, 393 U.S. 953.

31/ See "Order Ruling on Applicant's Objections to Document Requests, the Department of Justice's Motion to Compel Production of Four Categories of Documents, and Applicant's Motion for Protective Orders," pp. 2-3 (November 28, 1972), where the Hearing Board held that "[w]hether or not Applicant [Consumers Power Company] has engaged in unfair practices through political maneuvers is not a matter relevant to the issues in controversy ...."

less, in the course of the hearing, some evidence of the Company's political conduct was introduced. It related primarily to (1) the Company's opposition to proposed legislation to change the aforementioned "25% rule" of Michigan law,[32/] (2) its petition to the Traverse City town council with regard to the Company's leasing the municipal electric system and (3) its discussions with the Rural Electrification Administration about wholesale service to lower Michigan cooperatives. It is our contention that under the Noerr-Pennington doctrines, where, as here, there is no suggestion that the Company's political conduct included fraud, deception or other "sham" activities, the Company's political activities cannot be utilized to support a finding of monopolization.

In Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), the Supreme Court held that attempts to influence the legislative and executive branches of government with respect to the passage and enforcement of laws were beyond the reach of the antitrust laws. This case grew out of a dispute between railroads and truckers in which the former mounted an intensive and misleading publicity campaign to obtain anti-trucker legislation and to persuade the governor of Pennsylvania to veto a pro-trucker bill. The

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32/ Mich. Const. 1963, Art. VII, §24, App. I-23, provides that this restriction shall be in effect unless modified by legislation.

Court based its decision in part on the "essential dissimilarity"[33/] between such efforts to seek legislation or law enforcement and the traditionally recognized trade restraints covered by the Sherman Act.

The Noerr decision also relied on Congress' implicit intent to exempt political activity from the antitrust laws, reasoning that Congress could not have intended in passing these laws to impair the free flow of information from the people to the government inasmuch as "the whole concept of representation" depends on this flow.[34/] It further reasoned that since interference with this flow of information would "raise important constitutional questions" regarding, inter alia, the right of petition, the Court could not "lightly impute to Congress an intent to invade these freedoms."[35/]

Finally the Court examined the legal significance of the railroads' patently anticompetitive purpose in opposing the truckers and the former's use of deceptive publicity techniques. Neither, the Court held, at all affected the legality of the railroads' conduct vis-a-vis the antitrust laws.[36/]

The Supreme Court again considered the effect of anti-

33/ 365 U.S. at 137.

34/ Id.

35/ 365 U.S. at 137-38.

36/ 365 U.S. at 138-41.

competitive purpose on the legality of political activities in United Mine Workers of America v. Pennington, 381 U.S. 657 (1965) and strongly reiterated its position in Noerr. This case involved an effort by large mine operators and union officials to influence the Secretary of Labor to prescribe minimum wages for companies selling coal to the Tennessee Valley Authority on long-term contracts, an action which would have the effect of driving smaller coal operators out of business. The Court had no difficulty finding such conduct, despite the plainly anticompetitive purpose, to be protected under Noerr:

> Nothing could be clearer from the Court's opinion [in Noerr] than that anticompetitive purpose did not illegalize the conduct there involved .... Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. 381 U.S. at 669-70.

Moreover, the fact that the attempt to influence government action in Pennington was alleged to be part of a broad plan to eliminate the small mine operators -- a factor not present in Noerr, where the railroads' political activities were the sole basis for the truckers' antitrust claim -- did not impair the immunity accorded the political activity:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone [as in Noerr] or as part of a broader scheme itself violative of the Sherman Act. 37/

37/ 381 U.S. at 670.

Thus political activity, whether addressed to the legislative branch or to the executive, regardless of its underlying purpose and regardless of its relation to other possible anticompetitive practices, cannot be an element of monopolization or any other antitrust violation.

In California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), the protection afforded advocacy with respect to the passage and enforcement of laws before legislature and the executive branch was extended to encompass advocacy in the context of adjudications before both courts and administrative agencies. In addition, the constitutional basis for such protection, never explicitly confirmed in Noerr or Pennington, was clearly announced.[38/]

Noerr, Pennington and California Motor Transport thus establish a zone of immunity from the antitrust laws encompassing the full range of advocacy before public officers and governmental instrumentalities. Only where such advocacy is in fact something different, viz. "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor," (Noerr, 365 U.S. at 144), does the immunity cease and antitrust regulation begin. All genuine attempts to obtain favorable governmental action are

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38/ 404 U.S. at 511.

protected.[39/]

Inasmuch as Noerr did not present the Court with such a "sham" situation, the Court did not elaborate further on the scope of this exception to its ruling. Subsequent decisions both of the Court and of lower courts, however, have construed this caveat to create a very narrowly circumscribed exception to the Noerr doctrine for conduct amounting to extreme abuse of governmental processes.

As the courts have repeatedly emphasized, the so-called sham exception has its principal application in the litigation context either before judicial or administrative tribunals. In California Motor Transport, the Court recognized that baseless litigation, unlike unpersuasive efforts to influence legislative or non-adjudicatory executive action, can itself have an anticompetitive effect not stemming from the ultimate government action but simply through the pendency of the litigation. An effort intended solely or principally to achieve the latter effect is a

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39/ There is a second, related basis for holding Consumers Power's political activities beyond the scope of inquiry here namely, that it is constitutionally impermissible to condition or deny a government benefit as a consequence of the exercise of First Amendment rights. See, Speiser v. Randall, 357 U.S. 513 (1958); Sherbert v. Verner, 374 U.S. 398 (1963). Administrative tribunals are bound to respect the First Amendment as firmly as courts and legislative bodies. Scientific Mfg. Co. v. FTC, 124 F.2d 640 (3d Cir. 1941). Thus it would be plainly unconstitutional for the Board to place conditions upon the Midland license premised in part on the ground that the Company had engaged in anticompetitive activities where such activity is protected by the First Amendment.

sham and is not protected. Specifically, in that case the Court found that "abuse of those [litigation] processes ... effectively [barred] respondents from access to the agencies and courts." (404 U.S. at 513). Similarly, in United States v. Otter Tail Power Co., 360 F. Supp. 451 (D. Minn. 1973) aff'd per curiam, 94 S. Ct. 2594 (1974), the intended effect of Otter Tail's lawsuits was found to prevent the sale of bonds to finance the erection of municipal electric systems in that the uncertainties of litigation made them unmarketable.[40/]

Another aspect of the "sham" exception's special applicability to litigation was stressed in California Motor Transport in noting that:

> "There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations.

40/ As the Department of Justice argued to the Supreme Court, several factors established that Otter Tail's principal purpose was to achieve this direct effect. Otter Tail frequently offered to settle its suits on terms which would not remedy the defects alleged in the suits but rather would lead to the abandonment of attempts to set up municipal systems, Motion to Affirm of the Department of Justice, Otter Tail Power Co. v. United States, 94 S. Ct. 2594 (May 28, 1974), p.14. Further the litigation was frequently brought just before bids for the municipal bonds were due, again suggesting an improper motive. Id. at pp. 14-15. Thus, the Department argued successfully in obtaining Supreme Court affirmance: "it is the pattern of litigation which emerges -- the timing of the suits, the fact that the actions were repeatedly unsuccessful, and the offers of settlement unrelated to the merits of the actions -- which demonstrate that the sole purpose of the litigation was the suppression of competition." Id. at p.18.

> Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." (404 U.S. at 513) (emphasis supplied) 41/

As recent decisions make explicit, only truly extraordinary abuses make the "sham" exception applicable to actions in the political forum.[42/] In a setting closely parallel to those present in this case, a federal district court recently rejected on the basis of the Noerr-Pennington doctrine the contention that even unethical conduct in seeking a grant of a utility franchise from a city council could support an antitrust action:

> "These so called 'predatory' acts -- meetings with and statements to committees of legislative bodies seeking to influence the decisions of those bodies, and campaign contributions -- are the essence of politics .... Such allegations with respect to political matters totally fail to state a claim under the federal antitrust laws." Metro Cable v. CATV of Rockford, 1974-2 Trade Cas. ¶75,160 (N.D. Ill., April 12, 1974), at p.

41/ Of course, most anticompetitive actions in the litigation setting remain protected. Semke v. Enid Automobile Dealers Ass'n., 456 F.2d 1361, 1366 (10th Cir. 1972).

42/ In a case involving legislative action taken by popular referendum, the Ninth Circuit cited "interference with voters at the polls or ... infirmity in the election tabulation" as its only two examples of possible sham behavior in a political setting. Rodgers v. FTC, 492 F.2d 228, 231 (1974), petition for cert. filed, 42 U.S.L.W. 3707 (May 28, 1974). The appellate court stressed that unlike California Motor Transport "the allegedly unethical conduct of the 'conspirators' herein occurred solely within the 'political arena,' not within an administrative or judicial context." 492 F.2d at 232 n.3.

97,205, App. II-26, appeal docketed, No. 74-1492 (7th Cir. 1974).

To similar effect is Lamb Enterprises, Inc. v. Toledo Blade Co., 461 F.2d 506, 516 (6th Cir. 1972), cert. denied, 409 U.S. 1001, in which the court of appeals held that evidence of a joint plan to obtain favorable action from a city council on a utility franchise application to the exclusion of one's competitors properly was inadmissible under Noerr-Pennington principles.[43/]

As these recent cases illustrate, the Noerr-Pennington doctrine has become a fundamental precept of antitrust law. And, as they demonstrate also, the "sham" exception is applicable only in narrow circumstances arising principally in litigation and quasi-judicial settings.

In view of the facts of this proceeding, these exceptions to the Noerr-Pennington doctrine are plainly inapplicable here. For example, with regard to its efforts before the Michigan legislature, the Company's spokesmen merely expressed their opposition to legislation sponsored by the municipal systems which would have removed the "25% rule" limiting municipal sales -- a provision which had been a part of Michigan law since 1908.[44/]

43/ See also Bob Layne Contractor, Inc. v. Bartel, 1973-2 Trade Cas. ¶74,646 (S.D. Ind. 1973), at p. 94,843, App. II-4, appeal docketed, No. 73-1841 (7th Cir. 1973) a case involving both litigation and political activity.

44/ Finding of Fact 4.81, Mich. Const. 1963, Art. VII, §24, App. I-23.

There is no evidence that the Company's efforts were misleading or otherwise unreasonable and one municipal spokesman conceded in testimony during the hearing that the Company's activities in this regard were in "no way" improper.[45/]

With regard to its leasing proposals, the evidence in this proceeding is simply that the Company publicly urged the Traverse City council to reconsider its position not to lease the city's electric system to the Company.[46/] Thus, there is no support for the hypothesis that its conduct in any of these instances was fraudulent, deceptive, or otherwise improper.

Finally, evidence was introduced that in 1964 the Company urged officials of the Rural Electrification Administration in Washington that the lower Michigan cooperatives had failed to satisfy REA criteria for subsidized financing because they had not demonstrated that purchasing wholesale base load power from the Company was a less economic alternative than self-generation.[47/]

45/ Finding of Fact 4.82.

46/ Finding of Fact 4.80.

47/ Finding of Fact 4.85. Although the Company presented its views to REA, an administrative agency, it could not trigger or otherwise participate in a quasi-judicial proceeding under the Administrative Procedure Act, see e.g., REA v. Central Louisiana Electric Co., 354 F.2d 859, 865 (5th Cir. 1966); REA v. Northern States Power Co., 373 F.2d 686, 692 (8th Cir. 1967), cert. denied, 387 U.S. 945. Rather, it was simply petitioning an executive agency of the Government in its policy-making function, much as it might petition the President or a Congressman.

Although the cooperatives and the Company disagreed as to whether the agency's standards had been satisfied in this regard, there is no evidence that the Company's discussions with REA officials were frivolous, misleading or otherwise improper.[48/]

In sum, there is no evidence that Consumers Power Company's political activities amounted to anything more than wholly proper conduct in the political arena. Particularly in a natural monopoly context, as here, "intending the natural consequences of acts which are in all respects lawful, does not constitute the 'exclusionary intent' that is a prerequisite for a finding" that the Company monopolized a relevant market.[49/] Since it is clear that the Company's political activities were proper and lawful, they cannot under Noerr-Pennington principles be utilized in support of a finding of antitrust violation by the Company.[50/]

48/ Finding of Fact 4.85.

49/ Union Leader Corp. v. Newspapers of New England, Inc., 284 F.2d 582, 584 (1st Cir. 1960), cert. denied, 365 U.S. 833 (1961).

50/ A footnote in the Pennington decision concludes that conduct otherwise constitutionally immune from antitrust attack, may provide evidence of the "purpose and character of the particular transactions under scrutiny." (381 U.S. at 670, n.3). Whatever the proper construction of this dictum, the record demonstrates that the Company's political activities were honest, above board expressions of opinion in the public arena. [Findings of Fact 4.78-4.86] These positions were fully justified by the Company's public utility obligation to serve electric customers with the most efficient service at the lowest possible rates. (See pp. 115, n.14 and 116, n.19, supra).

C. Other Conduct.

As explained in the introduction to this Section, to the extent that the Company's activities are not exempt from antitrust scrutiny under the Parker-Brown and Noerr-Pennington doctrines, it must be determined whether its conduct has been predatory or unfair and whether such conduct has served to maintain the Company's alleged monopoly power.[51/] The other parties' contentions in this regard appear to relate primarily to (1) the Company's policies and practice concerning coordination arrangements with neighboring systems (2) its inclusion of certain provisions of its wholesale contracts, and (3) its acquisitions, and offers to acquire, other systems. For the reasons set forth below, there is no credible evidence that any of these activities were unfair or predatory or can otherwise support a finding that the Company has monopolized any retail market.

1. Coordination Policies and Practices.

The apparent focus of the allegations by the proponents of antitrust license conditions is the Company's alleged refusal to offer coordination, nuclear unit access, and transmission (wheeling) services on reasonable terms and conditions. These contentions not only misread the applicable case law but also ignore the uncontradicted facts of this proceeding which demonstrate the Company's conduct in this regard has been fair and reasonable.

51/ See pp. 155-59, supra.

In the first place, neither the antitrust laws nor any other law[52] requires an electric utility to coordinate, grant special access to nuclear units and offer transmission services under all circumstances. Under the antitrust laws, a single firm may refuse to deal except where the purpose of the refusal is unfair or predatory.[53] In addition, even where the antitrust law requires dealings, such dealings may be conditioned upon reasonable criteria -- even if the effect of such conditions is to exclude and thus competitively injure other parties.[54] Finally, in assessing whether the conditions

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52/ Repeated unsuccessful efforts to impose such obligations under the Federal Power Act have been made. The original proposals were set forth in S. 1725 and H.R. 5423, 74th Cong., 1st Sess. while statements explaining their deletion are set forth in S. Rep. No. 621, 74th Cong., 1st Sess. (1935) 49 and H.R. Rep. No. 1318, 74th Cong., 1st Sess., (1935) 8. As illustrative of the many unsuccessful later proposals to give the FPC those powers, see H.R. 12322, 90th Cong., 1st Sess. (1967), (proposed Electric Power Reliability Act); S. 1071, H.R. 7016, H.R. 7052, H.R. 7186, H.R. 9557, all 91st Cong., 1st Sess. (1969); S. 294, H.R. 605,. H.R. 3838, H.R. 5941, 92d Cong., 1st Sess. (1971); H.R. 1486, H.R. 2374, 93rd Cong., 1st Sess (1973). An unsuccessful attempt was also made to give many of those powers to the Atomic Energy Commission, S. 2564, H.R. 13828, 90th Cong., 1st Sess. (1967), App. II-52. See Part II, Section C, pp. 45-49.

53/ Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 339 (1927).

54/ Board of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918); Deesen v. Professional Golfers Ass'n, 358 F.2d 165 (9th Cir. 1966), cert. denied, 385 U.S. 846; Florists' Nationwide Telephone Delivery Network v. Florists' Telegraph Delivery Ass'n, 371 F.2d 263 (7th Cir. 1967), cert. denied,

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are, in fact, reasonable, antitrust tribunals defer to a considerable extent to the business judgment of the party from whom a right to deal is sought[55] and do not require that the conditions for dealing offer the requesting party the most favorable possible alternative.[56]

54/ (cont.)

387 U.S. 909; Bridge Corp. of America v. American Contract Bridge League, Inc., 428 F.2d 1365, 1368-70 (9th Cir. 1970), cert. denied, 401 U.S. 940 (1971); Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484, 487 (1st Cir. 1952) cert. denied, 344 U.S. 817; Roofire Alarm Co. v. Royal Indemnity Co., 202 F. Supp. 166 (E.D. Tenn. 1962) aff'd per curiam, 313 F.2d 635 (6th Cir. 1963); Dalmo Sales v. Tyson's Corner Regional Shopping Center, 429 F.2d 206 (D.C. Cir. 1970); E.A. McQuade Tours Inc. v. Consolidated Air Tour Manual Committee, 467 F.2d 178, 188 (5th Cir. 1972), cert. denied, 409 U.S. 1109 (1973).

55/ Thus, in Zuckerman v. Yount, 362 F. Supp. 858, 863-64 (N.D. Ill. 1973), a case concerning membership in the Midwest Stock Exchange, Judge McLaren, a former head of the Antitrust Division, approved and quoted the Department of Justice's position, that: "as long as the exchange acts in good faith and follows fair procedures, antitrust liability would not turn upon whether an exchange had reached what a court subsequently determined to be the 'right' decision." To the same effect, see Florists' Telegraph Delivery Ass'n, supra, 371 F.2d at 267, Deesen, supra, 358 F.2d at 167; Bridge Corp. of America, supra, 428 F.2d at 1370; Roofire, supra; Gamco, supra, 194 F.2d at 487.

56/ In Rogers v. Douglas Tobacco Board of Trade, 244 F.2d 471 (5th Cir. 1957), the court upheld the authority of a tobacco board to allocate selling time on a basis deemed to be "not unreasonable", although other reasonable alternatives less discriminatory toward a new entrant were available. In much the same way in Deesen, supra, the PGA was allowed to favor its own members over other qualified golfers in choosing tournament participants so long as it asserted a rational basis for its preference. (358 F.2d at 170-71).

In the present case, the Company has not unreasonably refused to deal with regard to coordination, unit access, or transmission services. On the contrary, the Company has entered into coordination and wheeling arrangements with both large and small systems and has offered unit access to such systems in the Ludington project.[57/] However, the Company has insisted that systems which seek to engage in such dealings must satisfy certain appropriate conditions and criteria. Because, as we demonstrate below, neither the purposes nor the effect of these conditions is unfair or predatory, the Company's conduct in this area cannot support a finding of monopolization.

We have previously explained that, with respect to special access to nuclear units and transmission services, the Company received no expressions of interest from small, neighboring systems until after the initiation of this proceeding and (with one exception) has not to date received a request to wheel power or directly purchase specified amounts of power from a given unit.[58/] The one exception involved a recent request from the Michigan Municipal-Cooperative Power Pool systems that the Company wheel 20 megawatts of bulk power from Detroit Edison; the request has been honored and an agreement to this effect is

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57/ Findings of Fact 2.76, 2.84, 4.55, 4.56.

58/ Findings of Fact 4.57, 4.63, 4.66, 4.67.

soon to be filed with the Federal Power Commission.[59]

In response to the matters raised for the first time in this proceeding concerning transmission and direct access to the Company's nuclear facilities, the Company has formulated policies which, for the reasons set forth in Part VI, we deem to be eminently reasonable. Because in the absence of any requests, these policies have yet to be implemented, there is no evidence of the Company's conduct with regard to nuclear unit access or transmission service that can support a finding that the Company has engaged in unfair or predatory conduct.

By contrast, the Company and many of its neighboring systems have long engaged in coordination power transactions and consequently, there is considerable evidence of the Company's policies and practices in this regard. In a previous section,[60] we have urged that the Federal Power Commission is the more appropriate forum to consider the reasonableness of the Company's coordination policies and practices. However, if the Hearing Board chooses to enter this thicket, we submit that the reasonableness of the Company's conduct in this regard should be measured by three standards: first and most important, the standards of reasonableness enunciated by the Federal Power Commission; second, the standards reflected in accepted electric industry

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59/ Finding of Fact 4.71.

60/ Part II; pp. 31-34.

practice; and third, the Company's consistency in applying the standards set forth in its coordination policy to various coordination arrangements.

Under its long-established policies, the Company is willing to enter into coordination arrangements which offer the Company benefits significantly in excess of its costs, i.e., "meaningful net benefits".[61/] In the Company's view, net benefits cannot be derived from a coordination arrangement unless each of the parties thereto possesses the willingness and ability to engage in comparable coordinating transactions on a reciprocal basis. For the reasons set forth below, these policies conform to FPC standards of reasonableness, they reflect accepted industry practice, and they have been consistently and fairly applied by the Company to all coordination proposals. In addition, the importance of a "net benefit" to coordination arrangements was also acknowledged by the Department of Justice in a recent "advice letter" to the Atomic Energy Commission.[62/]

61/ Finding of Fact 4.13.

62/ In the letter, the Department of Justice concluded that the applicant's "policy commitments should provide competitors of Applicant with competitive alternative sources of bulk power supply and substantially eliminate the grounds on which complaints made to the Department by smaller systems were based." The policy commitments included the provision that "[n]o party should be obligated to enter into an [interchange] arrangement if it would realize no net benefits from the arrangements, or if the arrangement would result in net burden to the party." Attorney General's advice letter, Illinois Power Co., (Clinton Power Station, Units 1 & 2), AEC Dkt. Nos. 50-461A and 50-462A, 39 Fed. Reg. 15999 (May 6, 1974).

As the FPC itself has subsequently stated, the Gainesville case embodies that Commission's "views on the appropriate criteria to be observed in evaluating [coordination] interconnection proposals".[63] One passage of the FPC's Gainesville opinion is of "particular note", according to the Commission;[64] it reads:

> As a general proposition we note that whenever two electric systems with generating capacity undertake to interconnect operate in parallel it is necessary for them to consider the nature of their respective electrical resources and individual system utility responsibilities, both as a means of evaluating the particular services to be rendered between the connecting systems and in order to ensure that appropriate compensation is afforded, either through service exchanges or financial payments. Marked disparities between two (or more) systems in the reliance placed upon the network should be reflected in the terms and conditions of the interconnection arrangement through appropriate provisions. Each participant should bear its proportionate share of that responsibility. In our judgment, a prerequisite to viable and effective interconnected operations among all electric systems is an equitable sharing of the responsibilities of interconnected operation. Each participant should bear its proportionate share of that responsibility. In doing so, each interconnecting system will meet its utility responsibilities and there will be no economic penalties for being the last one on the interconnected network. (40 FPC at 1233). (emphasis supplied).

63/ Gainesville Utilities Dept. v. Florida Power Corp., 40 FPC 1227 (1968), App. II-21, aff'd 402 U.S. 515 (1971).

64/ Village of Elbow Lake v. Otter Tail Power Co., 46 FPC 675, 678-79 (1971), App. II-45, aff'd as modified sub nom. Otter Tail Power Co. v. FPC, 473 F.2d 1253 (8th Cir. 1973); see also City of Danville v. Appalachian Power Co., 46 FPC 664, 667 (1971), App. II-11.

The FPC's Gainesville decision goes on to explain that a utility required to enter into coordination arrangements may insist on receiving net benefits from the transaction. In addition, according to the FPC in the Gainesville decision, a utility may insist upon "sufficient assurance" that its partner will not disproportionately "lean" on the interconnection, and the reasonableness of such assurance must be measured through examination of the "specific characteristics" of the two systems.[65/] Surely, if a utility is entitled to obtain these benefits and assurances when subject to an FPC order to coordinate, it cannot be deemed predatory or unfair conduct for Consumers Power Company to insist upon such benefits and assurances in its coordination policies and practices.

Another FPC decision bearing on the Commission's construction of reasonableness in coordination terms is City of Cleveland v. Cleveland Electric Illuminating Co., 49 FPC 118 (1973), App. II-9, appeal docketed sub nom. City of Cleveland v. FPC, No. 73-1282 (D.C. Cir. 1974). In that case, the FPC determined that the parties must "keep their systems in good operating condition in accordance with accepted utility practices and ECAR standards so as to avoid imposing a burden on the

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65/ Gainesville Utilities Dept. v. Florida Power Corp., 40 FPC 1227, 1257 (Initial Decision), App. II-21.

other party" as a precondition to the interconnection being required.[66/] In this way, the Commission endorsed the common sense conclusion that interconnection can only be reasonably required with a system that maintains appropriate standards of reliability and engineering soundness. Obviously then, it is not unreasonable, and therefore not predatory, for a utility to decline to enter into a voluntary interconnection agreement with a system as to whose reliability it has well-founded doubts.

The FPC's concern that a coordination arrangement provide for net benefits, reciprocity, and adequate assurance of each system's reliability is also reflected in accepted industry practice concerning coordination. The existence of reciprocal net benefits is, according to industry principles, the crucial prerequisite to any coordination agreement and plainly these benefits must be present not only at the time the arrangement is consummated to but throughout its life.[67/]

One rationale for this principle is that coordination

66/ The quoted language is set forth in the Initial Decision, 49 FPC at 136 and adopted as one of the "conditions precedent" to the effectiveness of the Commission's order, 49 FPC at 124. Subsequently, the Commission noted with gravity that "the City ... has failed to maintain its system" and "the City is not taking the steps necessary to alleviate the unreliable and inefficient nature of its electrical system...." Order Directing Compliance with Previous Orders and Denying Motion, City of Cleveland v. Cleveland Electric Illuminating Co., FPC Dkt. Nos. E-7631 et al., April 8, 1974, p.4, App. II-9.

67/ Findings of Fact 4.14, 4.15.

arrangements often involve pricing features that are below system-average costs but that the electrically reciprocal nature of these transactions leads to the cancelling out of these payments over time. Where reciprocity is absent, these below-average cost rates cannot be justified under established rate-making principles and may well be unduly discriminatory.[68/]

In the industry's view, the need for reciprocity becomes even more acute in coordination arrangements which require substantial capital investments.[69/] These capital requirements impose a burden which can adversely affect a system's capital costs and even one's future ability to raise additional capital, unless the other participants reciprocate by providing power from units which they have financed.[70/]

These same considerations are reflected in the Company's coordination policies and practices. As previously described the Company engages in coordination transactions where there is a reasonable prospect of meaningful net benefits and where the other system is sufficiently reliable to offer the Company comparable coordination transactions on a reciprocal basis.[71/] These policies are clearly consistent with FPC

68/ Finding of Fact 4.16.

69/ Finding of Fact 4.17.

70/ Id.

71/ Findings of Fact 4.14, 4.24.

standards and industry practice and therefore reasonable.

The reasonableness of these policies is confirmed by the fact the Company has applied them to all systems consistently and without discrimination. The other parties argue to the contrary, apparently relying on three facts which are not in dispute: (a) that the Company refused on two occasions in the mid-1960's to coordinate with two Michigan cooperatives; (b) that the Company engages in the coordination development of generation and transmission facilities with Detroit Edison Company, but not with other systems; and (c) that the Company's coodination arrangements with small systems do not utilize the equal percentage formula of reserve sharing. We contend that none of these three facts supports the contention that the Company has applied its coordination policies inconsistently or that it has otherwise acted unfairly in this regard.

(a) refusals to coordinate.

Although the Company presently has coordination arrangements with the Northern Michigan and Wolverine cooperatives through its agreement with the MMCPP systems, the Company earlier declined to enter into coordination arrangements with these cooperatives.[72/] The first such occasion arose in 1964 when the two cooperatives were, in their own spokesman's words, "deficient" -- that is, their systems had insufficient dependable

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72/ Finding of Fact 4.20.

generating capacity to cover projected peak load.[73/] This concession is confirmed by the data which these cooperatives filed with the FPC in 1964 which shows a combined system peak load of about 60 MW and dependable capacity of less than 56 MW.[74/] Thus, in 1964 these cooperatives had negative reserves.

In 1967, Northern Michigan again requested a coordination arrangement with the Company but its situation had not significantly improved. At this time it had a peak load of 44 MW and installed capacity of about 45 MW; the size of its largest unit was about 23 MW.[75/] Thus, in 1967 its reserves amounted to only about 4 percent of peak load.[76/]

On each of these occasions, the Company declined to enter into coordination arrangements because it deemed the cooperatives' reserve generation capacity to be too meager to provide it net benefits or to offer it assurance that comparable reciprocal emergency power support would be forthcoming.[77/] The

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73/ Finding of Fact 4.21.

74/ Finding of Fact 4.21.

75/ Finding of Fact 4.22.

76/ Finding of Fact 4.22. Northern Michigan was interconnected with other systems in 1967 but steadfastly refused to disclose the provisions of those arrangements to Consumers Power. In light of this refusal, the Company could not assess the value of these relationships to Northern Michigan and therefore could not reasonably rely on them in evaluating Northern Michigan's 1967 coordination proposal. Finding of Fact 4.23.

77/ Finding of Fact 4.20.

Company's refusal was clearly justified in these circumstances. It is standard industry practice to maintain reserves equal to the size of the system's largest unit, or at least equal to 15 to 20 percent of its peak load;[78/] and even Wolverine's system manager conceded that an acceptable coordination partner must have reserves of at least 10 percent.[79/] Since the requesting parties had a negative reserve capacity in 1964 and only a 4 percent reserve in 1967, the Company's refusal to coordinate with them at that time was clearly consistent with its policy of requiring net benefits from coordination arrangements.

(b) coordination agreements.

Consumers Power Company engages in a variety of coordination arrangements with various systems. The fact that these arrangements differ in some respects does not support the view the Company's coordination policies have been inconsistently or discriminately applied.

Consumers Power engages in the coordinated planning of generation and transmission facilities with only one other system, the Detroit Edison Company, in an arrangement known informally as the "Michigan Pool".[80/] Although the Company's

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78/ FPC 1970 National Power Survey, Volume II, pp. 1-52, -53, 2-43.

79/ Finding of Fact 4.24.

80/ Finding of Fact 2.85.

other coordination agreements do not bar coordinated planning arrangements, no other systems have expressed an interest in such coordinated planning except in the context of this proceeding and none has applied the opportunity to become a party to the Michigan Pool arrangement.[81/]

Although no other parties have applied for membership, the Michigan Pool is not restricted to its present two members. The standards which third parties must meet to become a party to the Pool are set forth in the coordination arrangement itself.[82/] They reflect the Company's policy and the FPC's Gainesville mandate that a party seeking the arrangement must bear substantial costs and responsibilities so that all parties to the arrangement continue to derive net benefits from it.[83/] These Pool standards for third party membership were expressly approved by the Department of Justice in the course of the Department's review of a Detroit Edison AEC license application.[84/] Thus, it can be hardly claimed that the standards are unreasonable.

Each of Consumers Power's other coordination agree-

81/ Findings of Fact 2.85, 4.25, 4.27.

82/ Finding of Fact 4.26.

83/ Finding of Fact 4.13.

84/ Finding of Fact 4.26. Attorney General's advice letter, August 16, 1971, Detroit Edison Co. (Enrico Fermi Unit 2), Dkt. No. 50-341A, 36 Fed. Reg. 17883 (1971).

ments are unique in the sense that each reflects the differing needs of the particular signatories, the varying circumstances prevailing at the time of agreement and the give-and-take of arm's length negotiations.[85/] Yet, these other agreements are very similar in broad outline.

For example, all of the agreements provide for the exchange of emergency capacity and energy on similar terms[86/] and as explained below, tie that provision to reserve requirements which reflect the characteristics of each system.[87/] Similarly, the agreements with other Lower Michigan systems all provide for exchange of economy energy and short-term capacity and energy on terms that are generally comparable.[88/] Overall, the review of Consumers Power Company's coordination arrangements reveals that whatever differences there are in the arrangements reflect engineering and economic facts of life[89/] and that the Company has not refused to enter into "comprehensive" coordination agreements with its small neighboring systems.[90/] Thus there is no evidence that the Company has unfairly discriminated

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85/ Finding of Fact 2.78.

86/ Finding of Fact 4.32.

87/ Finding of Fact 4.33.

88/ Findings of Fact 4.48, 4.49.

89/ Finding of Fact 4.43.

90/ Finding of Fact 2.76.

against any system in any way in implementing its coordination policies.

(c) reserve sharing.

Perhaps the least substantial claim advanced concerning the Company's coordination policies is that by failing to utilize the equal percentage formula in all of its coordination arrangement the Company has acted unfairly and unreasonably. The Gainesville case is cited in this regard, apparently for the proposition that the equal percentage formula is required for coordination arrangements under all circumstances. We contend that this proposition is unsound as a matter of law and fact.

Because our adversaries so misread the Gainesville case, it is necessary to examine it in some detail. The Gainesville proceeding arose under Section 202(b) of the Federal Power Act, 16 U.S.C. §824a(b). Pursuant to that section, the FPC ordered Florida Power Company to interconnect with the Gainesville municipal system, under the following terms and conditions: (1) Gainesville would pay the entire cost (about $3 million) of the facilities required to construct the interconnection; (2) Gainesville would maintain reserves at a level which would, in fact, assure that Gainesville did not disproportionately rely on the interconnection; (3) until it installed its own tie line bias control equipment, Gainesville would pay its share of Florida Power's costs of frequency regulation; (4) energy exchanged across the interconnection would be priced equally

for both parties.[91/] The FPC Hearing Examiner concluded that the total savings achieved under interconnection should be evenly divided, but this allocation was rejected by the Commission, as was Florida Power's request for a "stand-by" charge to be paid by Gainesville.[92/]

In reviewing the second aspect of the arrangement -- the reserves which Gainesville would be required to maintain -- the Commission concluded that 15 percent installed and 10 percent spinning reserves to be reasonable. According to the Commission, the 15 percent installed reserve standard was justified, inter alia, in light of "studies relating to the specific characteristics of the Florida Power and Gainesville systems such as load characteristics, capacity of generation, size of individual generating units, forced outage rates and scheduled maintenance requirements."[93/] The evidence showed, according to the Hearing Examiner in a finding adopted by the Commission, that 15 percent would provide Florida Power with "sufficient assurance" that Gainesville would not disproportionately rely on the interconnection.[94/]

Although the Commission believed that the benefits to

91/ Gainesville Utilities Dept. v. Florida Power Corp., 40 FPC 1227, 1245-46 (1968), App. II-21.

92/ 40 FPC at 1236-39.

93/ 40 FPC at 1227, 1257-58 (1968) (Initial Decision).

94/ 40 FPC at 1258.

be derived from the interconnection to be irrelevant as a matter of law to the proper decision of the case, it found as a fact that both parties would receive substantial benefits from the interconnection. On appeal, however, the Fifth Circuit rejected the Commission's findings, characterized the benefits to Florida Power as "imaginary"[95/] and held the compensation prescribed by the Commission to be thereby unreasonable. Enforcement of the order was also denied insofar as it failed to require payment of a stand-by charge to Florida Power.

The Supreme Court reversed the Court of Appeals.[96/] The validity of the Fifth Circuit's conclusion, it held, "depends upon whether the court correctly read the record as showing that Florida Power 'receives no benefit' and that Gainesville incurs 'no real obligations'. The Commission's findings are squarely contrary." 402 U.S. at 526 (emphasis added). The Supreme Court thus concluded:

> "Insofar as the Court of Appeals' opinion implies that there was not substantial evidence to support a finding of some benefits, it is clearly wrong. And insofar as the court's opinion implies that the responsibilities assumed by Gainesville in combination with benefits found to accrue to Florida Power were insufficient to constitute 'compensation ... reasonably due,' the Court of Appeals overstepped the role of judiciary. Congress or-

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95/ Florida Power Corp. v. FPC, 425 F.2d 1196, 1203 (5th Cir. 1970).

96/ 402 U.S. 515 (1971).

> dained that that determination should be made, in the first instance, by the Commission, and in the record in this case, the Court of Appeals erred in not deferring to the Commission's expert judgment." 402 U.S. at 527. (emphasis in the original).

Thus, the essence of the Supreme Court's Gainesville decision is that (1) because substantial evidence supported the Commission's finding that Florida Power would receive benefits from the interconnection, and (2) because the statute explicitly entrust to the Commission the judgment as to what terms and compensation are reasonably due with respect to an interconnection ordered under Section 202(b)(3) the Commission's conclusion should in this instance be sustained.

Just as the FPC took into account each of the coordinating systems' "load characteristics, capacity of individual generating units, forced outage rates and scheduled maintenance requirements" in the Gainesville case, so Consumers Power Company considers these characteristics in establishing coordination terms which will assure it that coordinating parties will not "lean" on the interconnection and that all parties have the ability to provide comparable emergency assistance.[97/] Thus, it is hardly surprising that the Company utilizes different reserve criteria in arrangements involving systems with different characteristics.

In the electric utility industry, a variety of reserve

97/ Findings of Fact 4.45, 5.09.

criteria are used. It is well recognized that a given formula is not appropriate in all circumstances and that the use of the equal percentage reserve formula does not always offer assurance of equal reliability and may well deny one party any net benefit from the coordination arrangement.[98] There is no evidence that the reserve criteria which are found in the Company's various coordination arrangements are, in fact, inappropriate or unreasonable; indeed, there is uncontradicted testimony that the formulae used in the coordination arrangements with the small systems appear to take appropriate account of their particular generation and load characteristics.[99]

Nor is there any evidence that the use of the equal percentage formula in these circumstances would have assured the Company net benefits.[100] In fact, in 1972 had the Company agreed to enter into emergency power exchange arrangements under an equal percentage formula with systems of the size and generation capacity of the MMCPP members, and had these systems experienced the same generation outage record as the Company, the Company would have had to increase its reserves by 29 MW over its pre-agreement level.[101] Such an agreement clearly would

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98/ Id/

99/ Finding of Fact 4.43.

100/ Findings of Fact 4.45, 5.09.

101/ Finding of Fact 4.45.

not have provided the Company with reciprocal net benefits.

Thus, the Gainesville case clearly does not require that the equal percentage formula be utilized in all instances and use of other reserve criteria was reasonable and fair under the circumstances present here.

In sum, we submit that the Company's coordination policies are consistent with FPC standards and industry practice and have been applied in a fair, non-discriminatory and consistent manner.

2. Wholesale Contract Provisions.

In the course of the hearing, several witnesses sponsored by other parties criticized certain provisions of the Company's wholesale contracts. We do not believe that issues relating to these contracts should, under the principles of primary jurisdiction[102/] and the Parker v. Brown doctrine,[103/] be considered by the AEC since they are subject to the regulatory supervision of the FPC. But should the hearing Board choose to review these contracts, it is our contention that their provisions are eminently fair and reasonable.

The principal wholesale contract provisions discussed at the hearing were the "demand ratchet" included in all of the Company's wholesale firm power rates and the "capacity reserva-

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102/ See Part II, Section A-3, pp. 24-38, supra.

103/ See Section A of this Part, pp. 160-171, supra.

tion" provision of the Company's partial requirements wholesale power contract. These charges tie part of the price (i.e., rate) of wholesale electric service during a particular time period to the cost of providing the generating facilities needed to meet the highest demand placed on the system.[104/] The demand ratchet has that effect on the basis of actual usage, while the capacity reservation does so on the basis of projected requirements. In both cases, the practice is essentially similar and clearly reasonable.[105/]

The use of such charges is fully supported by established principles of rate-making and is found throughout the electric utility industry, including the Company's own industrial and commercial retail rates.[106/] The evidence is therefore uncontradicted that both provisions are fair and that neither has an anticompetitive purpose or effect.

Additionally, the Company's adversaries point to certain provisions in former wholesale contracts which have been amended since the Company's operations came under FPC supervision. One provision, now substantially modified, permitted Alpena Power Company to re-negotiate its wholesale contract with Consumers Power Company when MPSC permitted Consumers Power to

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104/ Findings of Fact 4.04, 4.06.

105/ Findings of Fact 4.04, 4.06.

106/ Finding of Fact 4.04.

change its retail rates.[107] Another provision required wholesale customers to obtain the Company's consent before interconnecting with third parties in order to avoid a situation in which a wholesale customer might prematurely bring Consumers Power Company under FPC jurisdiction.[108] Once the Company became subject to FPC's jurisdiction in the late 1960's, the re-negotiation provision became inappropriate since it tied the level of wholesale rates to MPSC-approved rates. And, of course, the rationale of the third-party interconnection provision became moot once FPC jurisdiction was established.[109] Consequently, neither provision appears in the wholesale contracts now in effect.[110]

There is no evidence that the former provisions had any adverse effect at all on any wholesale customer. For example, no wholesale customer ever requested consent to interconnect with a third party, and one wholesale customer interconnected with another system without first advising the Company.[111]

Therefore, on the basis of the limited treatment these matters received at hearing, the Company's conduct concerning its wholesale contracts must be deemed wholly reasonable and

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107/ Finding of Fact 4.07.

108/ Finding of Fact 4.09.

109/ Findings of Fact 4.07, 4.09.

110/ Findings of Fact 4.07, 4.09.

111/ Finding of Fact 4.10.

cannot support the conclusion the Company has engaged in willful acquisition or maintenance of monopoly power.

3. Acquisitions.

As with the Company's wholesale contracts, we submit that the Company's acquisitions of other systems are subject to supervision and approval of the FPC and that they therefore should not be considered here.[112/] Again, however, if the Hearing Board chooses to examine the Company's conduct on this area, there is no evidence that the Company has acted in an unfair or predatory manner.

In the fourteen years under review in this proceeding, Consumers Power Company has acquired only three small systems -- those which served the towns of Grayling, Allegan and Rogers City.[113/] Those systems served a combined total of 4,700 customers out of the more than one million other customers of Consumers Power Company.[114/] Consumers Power Company also sought to acquire two other systems between 1960 and 1968 but those offers were rejected.[115/] However, since 1965, Consumers Power has declined to consider acquisitions which lacked near-unanimous

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112/ See pp. 160-71, supra.

113/ Finding of Fact 4.72.

114/ Finding of Fact 4.73.

115/ Finding of Fact 4.72.

support in the affected community[116] and since 1968 it has not made an offer to acquire and has not acquired any system.[117]

At present, and for the foreseeable future, the Company's difficulties in financing essential facilities effectively bar any consideration of acquisitions.[118] For example, in 1970 Consumers Power Company declined a neighboring municipality's proposal that the Company consider acquiring the municipal system.[119]

Throughout its limited activities relating to acquisitions, Consumers Power Company's conduct has been fair and straightforward. There is no evidence that the Company has engaged in predatory practices or in conduct that was otherwise unethical or anticompetitive.[120] Under these circumstances, well-established antitrust principles compel the conclusion that Consumers Power Company's three small acquisitions lack any significance for this proceeding.

Cases arising under §7 of the Clayton Act, 15 U.S.C. §18, have repeatedly concluded that a larger firm's acquisition of a small horizontal competitor or of a small actual or potential customer may have such limited impact on the marketplace as to be

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116/ Finding of Fact 4.76.

117/ Id.

118/ Id. See also Findings of Fact 3.27, 3.28.

119/ Finding of Fact 4.75.

120/ Finding of Fact 4.76.

of no antitrust significance. In Brown Shoe Co. v. United States, 370 U.S. 294, 329 (1962), the Court noted that even under §7, which imposes "less stringent" tests than the Sherman Act, "foreclosure of a de minimis share of the market will not tend 'substantially to lessen competition.'" This principle was also reflected in Crown Zellerbach Corp. v. FTC, 296 F.2d 800, 818 (9th Cir. 1961) in which the court stated:

> "If the acquisition took out of the market a concern whose total sales and competitive impact was so small relative to all sales and all competition in the market that it lacked real importance, then the acquisition cannot be said to affect competition in a substantial manner."

A succession of recent §7 cases have applied that maxim to mergers between companies that were competitively or vertically related but where either the acquired company was small overall or the area of product overlap between the two companies was not extensive.[121/] When courts have found a significant impact on competition in cases involving limited additional market foreclosure, they have pointed principally to

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121/ United States v. Crowell, Collier and Macmillan, Inc., 361 F. Supp. 983, 994 (S.D.N.Y. 1973); United States v. First National Bancorporation, Inc., 329 F. Supp. 1003, 1059 (D. Colo. 1971) aff'd by an equally divided court, 410 U.S. 577 (1973); United States v. International Tel. & Tel. Corp., 324 F. Supp. 19, 39-40 (D. Conn. 1970) (sprinklers); American Smelting & Refining Co. v. Pennzoil United, Inc., 295 F. Supp. 149, 157 (D. Del. 1969); United States v. International Tel. & Tel. Corp., 306 F. Supp. 766, 794 (D. Conn. 1969), appeal dismissed, 404 U.S. 801 (1971) (insurance).

special factors which affect the market, not to market share statistics.[122]

In the present case, the parties opposing Consumers Power Company have not pointed to any such factors to overcome the obvious insubstantiability reflected by the miniscule size of the Grayling, Rogers City and Allegan electric systems. To the contrary, the evidence conclusively establishes that little, if any, retail competition occurred between the Company and these systems and that there was only a limited potential of such competition in the future.[123]

The cases in which the irrelevance of small acquisitions to antitrust issues has been recognized arose under Section 7 of the Clayton Act. Even acquisitions which would be struck down under the incipiency standard of Section 7[124] provide no sup-

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122/ For example, in United States v. Aluminum Company of America, 377 U.S. 271, 280-81 (1964) ("Alcoa-Rome"), the Court, apparently recognizing that elimination of a firm with only 1.3% of the relevant markets would typically not be objectionable, stressed the acquired firm's special record of aggressive competitive effort.

To similar effect see Stanley Works v. FTC, 469 F.2d 498 (2d Cir. 1972), cert. denied, 412 U.S. 928 (finding special circumstances creating a substantial effect on competition). See also Judge Mansfield's vigorous dissent reaching the opposite conclusion under the same principles.

123/ See pp. 101-05, supra.

124/ The Supreme Court has characterized the objective of §7 as "arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency." Brown Shoe Co. v. United States, 370 U.S. 294, 317 (1962).

port for charges of monopolization here where the standards of §2 of the Sherman Act are applicable. In the leading case of United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 566, 568 (E.D. Pa. 1960) aff'd per curiam, 365 U.S. 567 (1961), the court held that a series of acquisitions were "approaching if not beyond" a possible Section 7 violation and forebade any further acquisition in its decree. However, the court refused to infer monopolistic intent from the relatively limited acquisition program. That holding further underscores the irrelevance of Consumers Power Company's few isolated acquisitions to the allegations of monopolization put forward in this case.

Finally, the Federal Power Commission has held that even acquisitions which would plainly be condemned in conventional non-regulated industries will not have an "anticompetitive effect" in the electric utility industry. In reviewing Commonwealth Edison's acquisition of a neighboring utility whose sales amounted to 7% of those of the larger company, the FPC concluded that "it does not appear that Commonwealth's merger with its much smaller neighbor will add appreciably to its command of economic power."[125/] The Commission further

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125/ Commonwealth Edison Co., 36 FPC 927, 941 (1966), App. II-13. The importance of this decision is emphasized by the Commission's statement that the opinion by Chairman White is intended "to provide guidance to utilities contemplating merger" generally. (36 FPC at 932). The FPC also noted that merger was sometimes an appropriate means to obtain the benefits of coordination. (36 FPC at 930-31).

determined that the merger would not "choke off actual or potential areas of competition between [the two utilities]."[126/] In affirming the FPC's action, the Seventh Circuit, in holding that no injury to consumers had been shown, added:

> "In a market characterized by competition a merger or other acquisition necessarily injures the consumer if it substantially lessens competition. In the electric utility industry, where restraints on competition are not only tolerated, but encouraged, see 16 U.S.C.A. §824a(a), and where rates are subject to federal or state regulation, 16 U.S.C.A. §§812, 824d, injury to the consumer cannot be inferred from a merger, but must be demonstrated."[127/]

Perhaps in light of the de minimis effect of the three acquisitions made by Consumers Power Company, the proponents of antitrust conditions here rely heavily upon a single document written in 1965 by one of the Company's middle-level marketing department employees. Courts have occasionally drawn conclusions about a company's intent from statements by top corporate management officials when the course of conduct proposed by them has actually been implemented. See e.g., United States v. Aluminum Co. of America, 233 F. Supp. 718 (E.D. Mo. 1964), aff'd 382 U.S. 12 (1965) (executive vice president of Alcoa explaining purpose of attempted acquisition). However, in this case the document

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126/ 36 FPC at 941.

127/ Utility Users League v. FPC, 394 F.2d 16, 19-20 (7th Cir. 1968), cert. denied, 393 U.S. 953.

in question merely summarizes the contents of an informal intra-Company talk to salesmen by a middle-management employee, written nine years ago and never reviewed by any Company officer.[128] Moreover, the goal arguably espoused in the document -- to acquire neighboring municipal and cooperative systems -- was never implemented either totally or in significant part.[129]

Under these circumstances, no anticompetitive motive should be imputed to the Company from this document.

Antitrust tribunals are justifiably skeptical of allegations that monopolistic purpose can be demonstrated through the general statements of subordinate personnel unrelated to actual conduct. Thus, the Ninth Circuit recently held

> "Such a manifestation of intent to triumph in the competitive market [a threat to drive a neighbor out of business if he undertook active competition], in the absence of evidence of unfair, anticompetitive or predatory conduct, is not enough to establish a violation of §2."

Dahl, Inc. v. Roy Cooper, Co., 448 F.2d 17, 19 (1971).[130]

128/ Finding of Fact 4.75.

129/ Id.

130/ In Scott Publishing Co. v. Columbia Basin Publishing, Inc., 293 F.2d 15, 21-22 (9th Cir. 1961), the court of appeals recognized that a statement of the manager of the defendant to his financial backers that he was "driving [the plaintiffs] to the wall" did not show monopolistic intent but rather, under the facts of the case, was "in the nature of a sales pitch ...."

(cont.)

The chief executive of Consumers Power Company (who was chairman of the board at the time the aforementioned document was written) has testified in this proceeding that the document in question espouses positions which are and have been contrary to the Company's policies and that the Company has never sought to acquire all of its neighboring systems or any substantial part of them.[131/] His statement is confirmed by later events. If every salesman's private ambitions never carried into action could demonstrate that his employer's conduct or purpose were predatory, then the most superficial document discovery would almost certainly reveal that every American corporation is an actual or attempted monopolist; plainly, that is not the law.

Thus, we submit, the Company's acquisitions had such de minimis impact on the situation in lower Michigan that they cannot standing alone, or in the total context of this case, provide evidence of monopolization.

130/ (cont.)

In South End Oil Co. v. Texaco, Inc., 237 F. Supp. 650, 655 (N.D. Ill. 1965), the plaintiff sought to show an unlawful purpose by reference to incidents in which "Texaco representatives allegedly approached Eustace and inquired if he sold to certain discount houses. In one instance he was asked to speak to one of his customers and request the removal of a large sign advertising the discount price; on another he allegedly was asked and agreed not to make sales to a certain outlet...." However, noting that Texaco's actual conduct at the time did not support any inference of hostility to the plaintiff, the court held "that the only reasonable explanation of these incidents is that they were unconnected, isolated occurrences."

131/ Finding of Fact 4.75.

VI. Even were an Antitrust Inconsistency to be Found, the Remedies Suggested Would Exceed the AEC's Authority and Unreasonably Burden Consumers Power Company's Rate-Payers.

The hearing in this proceeding has fully established, we submit, that the activities of Consumers Power Company under the Midland license will not create or maintain a situation inconsistent with the antitrust laws. For that reason, Section 105c does not authorize the imposition of antitrust license conditions of the Midland license. However, because this Hearing Board is to simultaneously consider whether the Company's activities will maintain a situation inconsistent with the antitrust laws and, if so, what license conditions, if any, are necessary to remedy that situation, we address here the issues which the license conditions proposed by the other parties would make it necessary to reach in the event an inconsistency were to be found.

The license conditions proposed by the other parties in this proceeding fall into three broad categories: (a) direct access to the Midland and other nuclear units, (b) transmission (wheeling) services and (c) coordination.

With regard to coordination and wheeling of power from generating sources other than the Midland Units, Consumers Power Company contends that, even assuming arguendo that the Company's activities under the licenses would maintain a situation inconsistent with the antitrust laws, the conditions proposed in this regard are beyond the appropriate scope of the AEC's

jurisdiction under Section 105c. In addition to these crucial threshold issues, we demonstrate below that any allegedly inconsistent antitrust situation can be cured by the adoption as license conditions of the Company's policy commitment which were presented in testimony in this proceeding by Mr. Aymond, the Company's chief executive officer, and later ratified by the Board of Directors. Any other license conditions, such as those sought by the opposing parties, would grant unreasonable and discriminatory advantages to some of Consumers Power's neighboring systems to the detriment of the Company's customers and would constitute an inappropriate intrusion into the regulatory responsibilities of the Federal Power Commission.

A. The Company's Present Policies Provide Adequate Access to Any Unique Advantage of the Midland Units.

1. Access through the Wholesale Rate.

We have previously explained why the Midland Units are neither "unique" resources which will significantly affect the Company's cost of bulk power supply nor "essential" resources in which other systems must directly participate in order to remain financially and competitively viable.[1/] However, even assuming arguendo that the Midland Units are deemed a unique and essential resource, the Company's wholesale ser-

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1/ See pp. 147-50, supra.

vice provides all other systems with fair and adequate access to whatever benefits may flow from the facility.[2/]

a. In its policy statement, Consumers Power Company has bound itself to meet the future needs of its present wholesale customers.[3/] Additionally, though the Company obviously cannot now commit itself to supply the complete bulk power requirements for all who may seek to become wholesale customers in the next forty or fifty years, particularly in light of its present financial difficulties,[4/] it is presently obligated to provide such wholesale service to such new customers as either the FPC or, under many circumstances, the MPSC may find to be be in the public interest.[5/]

b. The Federal Power Commission requires that Consumers Power Company's wholesale rates, bo h fulland partial-requirements, be based on the Company's fully allocated cost of service.[6/] This cost reflects all the benefits and burdens experienced by the Company's system.[7/] Thus any appropriate

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2/ Findings of Fact 2.74, 2.75.

3/ Finding of Fact 4.02.

4/ See pp. 132-33, supra.

5/ §202(b) of the Federal Power Act, 16 U.S.C. §824a(b); MSA 22.156, App. II-24. See pp. 120-24 for a discussion of those requirements including the limitations thereon.

6/ See pp. 117-120, supra; Finding of Fact 2.73.

7/ Finding of Fact 2.74.

share of any benefits flowing to the Company from the Midland Units are "passed on" directly to other systems through the Company's wholesale service.[8/]

Since wholesale service provides such fair and adequate access to any benefits that may flow from the Midland facility, special access to the Midland Units through unit power sales or an ownership interest is unnecessary and redundant. Furthermore, as discussed in the act subsection, such special access would be inappropriate as a license condition because it would unduly burden Consumers Power Company's other customers. Indeed it would raise the cost of power to those other customers who do not have the privilege of selectively buying power only from a presumptively lower cost Midland facility.

Accordingly, in the event the Hearing Board determines that suitable access to the benefits of the Midland facility must be guaranteed to nearby systems, it can and ought to assure that result through a condition reflecting the Company's commitments and obligations regarding wholesale service.

2. Non-reciprocal Unit Power Transactions.

The Department of Justice and the other parties seeking antitrust relief in this proceeding contend that Consumers Power should be required to sell power to other systems at

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8/ Findings of Fact 2.74, 2.75.

prices based solely on the costs of the Midland Units. Application of that pricing principle would, we submit, inevitably lead to discrimination against the other customers of Consumers Power Company, and is therefore inappropriate as a license condition.

Unit power purchases are not unknown to the electric utility industry. Such a purchase, however, is "a very special kind of transaction," one which the Federal Power Commission recently held "ordinarily results from coordinated planning of bulk power expansion programs between the buying and selling utilities for the purpose of obtaining economies for both systems."[9/] The FPC also stressed that "a unit sale is not like a typical sale by a public utility -- one which the utility is obliged to make as a result of its utility status." Therefore, the FPC continued, "such sales will not occur unless there is an economic incentive." Thus, according to the FPC, unless the unit power arrangement is "mutually beneficial to both parties", the selling utility cannot be expected to engage in the transaction.[10/]

In addition, to the extent that a unit power purchase is made at a price that is below the system average cost prevail-

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9/ Connecticut Light & Power Co., Dkt. No. E-8105 et al., FPC Opinion No. 701, July 22, 1974, slip op. p.2, App. II-14.

10/ Connecticut Light & Power, supra, slip op. at pp. 2-3.

ing in the foreseeable future, it discriminates against the selling utility's other customers because a higher proportion of the costs of the utility's more expensive generation units must be borne by them.[11/] This discriminatory effect would be all the more acute with regard to the Midland Units because no request for Midland unit power was made until long after the time the units were designed and sized.[12/]

As the FPC noted in Connecticut Light & Power, supra, there is an "incentive for a utility to engage in a unit sale when by doing so it can obtain the economies that result from the installation of a larger generating unit and sell a portion thereof in excess of its immediate needs."[13/] Because the size of the Midland Units had been long established at the time unit power requests were first received, the opportunities for further economies of scale were no longer available.[14/] At this juncture, to require the Company to sell part of the Midland Units' output to other systems would increase the Company's overall costs by requiring both the additional operation of more costly units and the purchase of power at higher cost from other utilities. The Company has calculated that this increase could be as high

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11/ Finding of Fact 4.54.

12/ Finding of Fact 4.57.

13/ Slip op. at 2, n.1.

14/ Findings of Fact 4.57, 4.63.

as $141 million.[15/]

The net effect of this belated request for unit power is to accentuate the discriminatory impact of a license condition which would require such a transaction. Presumably, it was those considerations which led the Department of Justice to warn the American Public Power Association that its members who were interested in "equal access" to generation facilities must make their interest known "in a timely fashion" i.e., before "a system is designed and built."[16/] Here, since the requests were untimely, such a license condition is inappropriate and contrary to the public interest.

The adverse effects of a license condition requiring unit power access are further increased by the impact which unit power sales would have on Consumers Power Company's already difficult capital financing situation.[17/] A unit power sale not

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15/ Finding of Fact 4.58; this study from which this figure is derived assumed the amount of power required to be sold from Midland would be in addition to, and would not replace, the Company's wholesale sales. This is a reasonable assumption since none of the intervening systems seeking access are wholesale customers of the Company and only 17% of all the bulk power needs of small neighboring systems are met through the Company's wholesale sales. [Findings of Fact 2.63, 3.18].

16/ Address of Donald I. Baker, Director of Policy Planning, Antitrust Division, Department of Justice, to American Public Power Association National Conference, May 16, 1973, pp. 12-13.

17/ Findings of Fact 3.27, 3.28.

only has the effect of thrusting the responsibility for designing, constructing and operating generating capacity upon the seller, but also imposes the burden of financing the facility on him as well.[18/] As the Company's recent cancellation of the Quanicassee units underscores, the extent of borrowings not only affects the interest rate the Company must pay but also, given the Company's present financial position affects its ability to raise capital at all.[19/] Requiring Consumers Power Company to borrow not only for its own needs but for those of the systems buying incrementally priced Midland power would unfairly and significantly add to the Company's financing burdens.[20/]

Finally, it should be noted that there is no evidence of record in support of the view that comparable economies are unavailable to the Company's subsidized neighbors were they jointly to construct fossil-fueled or nuclear generating facilities themselves.[21/] Indeed, several small neighboring systems are planning to construct a multi-unit generation plant comprised of units with capacities up to 350 megawatts each. This fact suggests that economies of scale are in fact available to these

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18/ Finding of Fact 4.17.

19/ Findings of Fact 4.17, 5.04.

20/ Id.

21/ Finding of Fact 2.65

systems without access to the Company's generation facilities.[22] No compelling need for unit power transactions has been established therefore, and no basis has been shown for imposing such an untimely and discriminatory license condition.

3. Ownership Participation in the Midland Units.

A license condition permitting neighboring electric systems to purchase partial ownership interests in the Midland plant has been suggested as an alternative or a complement to a condition imposing unit power sales.[23] While ownership participation sanctions may sometimes be less inequitable than unit power sales,[24] the remaining discriminatory and unfair aspects of direct access to the units make this proposed condition similarly inappropriate. In particular, because the size of the Midland Units has long been determined, the effect of any such requirement now would be to shift costs unreasonably to Consumers Power Company's other customers.[25] Whatever might be the propriety of ordering the sale of ownership interests if ownership had been sought at a time when the size and design of the units were still capable of being altered, it is clearly

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22/ Finding of Fact 2.64.

23/ See e.g., Pretrial Brief of the AEC Staff, p. 94.

24/ For example, in a sale of an ownership interest, the purchasers would have the responsibility of financing the portion of the facility to be bougnt.

25/ Findings of Fact 4.16, 5.04.

not appropriate here.[26/]

4. Access is the Outer Boundary of the Remedies Which May Be Ordered.

The object of this proceeding is to assure that the Company's activities under the Midland license will not maintain a situation inconsistent with the antitrust laws. The limitations imposed by Section 105c apply not only to the scope of the substantive inquiry in this proceeding but to any license conditions imposed as well.[27/] Providing other electric systems the opportunity to obtain an ownership share in the Midland Units would remove any impact on a competitive situation the units might possibly have. Since any possible antitrust impact of the license would thus be neutralized by

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26/ As we understand their position, the parties seeking antitrust conditions in this proceeding acknowledge that if special access arrangements were ordered, the precise terms of those arrangements (including the appropriate rates) would be determined by the Federal Power Commission in a proceeding under §205 of the Federal Power Act. See Prehearing Brief of the United States Department of Justice, p.40. This procedure was followed with regard to the wheeling ordered by the district court in United States v. Otter Tail Power Co., 331 F. Supp. 54 (D. Minn. 1971), aff'd in part and vacated and remanded in part, 410 U.S. 366 (1973), in Otter Tail Power Co., FPC Dkt. No. E-8156. See particularly Order Accepting Filing, Denying Request for Relief, Instituting Investigation and Hearing, Providing for Notice, and Permitting Intervention, October 31, 1973, App. II-34.

27/ Louisiana Power & Light Co. (Waterford Steam Electric Generating Station, Unit 3), Dkt. No. 50-382A, Memorandum and Order, February 23, 1973, CCH Atom. Ener. Law Rptr. ¶11,710.01, §a.

such a condition,[28] Section 105c does not authorize the Commission to go further.

Congress did not intend that Section 105c should be utilized to remedy all antitrust violations that may have been committed by those who happen to become subject to the AEC's licensing jurisdiction.[29] Rather, the AEC's task is to insure that an applicant's activities under the licenses issued by the Commission do not contribute to a situation contravening the antitrust laws. From that premise, it clearly follows that the maximum relief proper in a Section 105c proceeding is a license condition providing other systems with suitable access to power from the licensed plant.

Thus, if the present arrangements regarding Midland are deemed to maintain an inconsistent antitrust situation by denying the benefits of nuclear power to other systems, license conditions which provide for access through unit ownership will assure that those benefits are suitably allocated.[30] Of course,

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28/ As noted supra, pp. 216-16, Consumers Power Company submits that such conditions need only reflect the Company's present policies regarding wholesale service. This is particularly the case, inasmuch the plant was sized in 1967, and no demand for access was received prior to the initiation of this proceeding.

29/ See pp. 5-38, supra.

30/ The unit power form of access -- in actuality merely a pricing transaction providing a discriminatory discount

(cont.)

access to the Midland Units may not resolve all of the antitrust issues involving Consumers Power Company. But issues unrelated to the Midland Units are properly the concern of the Federal courts and the FPC; they are unnecessary and inappropriate to the reactor licensing responsibilities of the AEC.

Certainly, there is nothing in the text of §105c or in its legislative history to suggest that Congress intended license conditions imposed by the AEC under §105c to reach beyond the ownership and operating arrangements of the specific licensed facility under any circumstances. Were the AEC, whose authority over electric utilities in other respects touches only a single type of generating source, intended to be empowered to order antitrust relief which relates to a utility's overall operations, and which intrudes into the established jurisdictions of other government agencies, Congress surely would not do so silently and by obscure implication. The sheer unlikelihood of that Congressional intent should prompt this Board to avoid such an anomalous result.

30/ (cont.)

from the Company's average cost wholesale rate -- should be rejected because of its severe, unfair impact on the Company's other customers, as described, supra, pp. 216-21, in the absence of true reciprocal arrangements for this form of power exchange price transaction.

B. Mandatory Transmission Services Would be Contrary to the Public Interest.

Transmission services constitute the second principal area of remedy proposed by the Department of Justice and the other parties seeking antitrust license conditions. The Department has acknowledged that "provision of transmission services, or wheeling," does not "directly involve license activities." 31/ We have reviewed previously the lack of any meaningful connection between Consumers Power Company's 5800 mile transmission network and the construction or operation of the Midland units. 32/ The present case therefore presents the circumstances contemplated by this Commission when it held explicitly:

> "Denial of access to transmission systems would be more appropriate for consideration where the systems were built in connection with a nuclear unit than where the systems solely linked non-nuclear facilities and had been constructed long before application for an AEC license." 33/

The Commission's admonition gains added significance when the close interrelation of transmission services to the overall operation of a utility's transmission grid is considered. Rather, the ability to wheel is not dependent on the capability of a single transmission line but on the total capability

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31/ Prehearing Brief of the United States Department of Justice, p. 79.

32/ See pp. 12-14, supra.

33/ LP&L Order, RAI-73-9 at 621.

of a transmission system.[34/]

In only one instance of which we are aware, the Otter Tail case, has governmental authority been successfully invoked to impose a general obligation to wheel.[35/] However, in Otter Tail, not only was a refusal to wheel, coupled with a refusal to serve at wholesale, at the heart of the predatory conduct found there, but the small scale wheeling ordered did not differ substantially from the transmission service that Otter Tail -- which "regularly engages in the business of wheeling" -- was already providing to 18 other municipal systems. 331 F. Supp. at 57-58.

In the present case, the absence of any direct connection between the licens and transmission facilities is compounded by the absence of any evidence that Consumers Power Company has ever refused to wheel.[36/] In fact, the Company has received only one specific for wheeling request from its smaller neighboring systems and that request was promptly honored.[37/] And, during the course of this proceeding, Consumers Power Company has bound itself to wheel on reasonable

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34/ Finding of Fact 4.69.

35/ United States v. Otter Tail Power Co., 331 F. Supp. 54 (D. Minn. 1971), aff'd, 410 U.S. 366 (1973).

36/ Findings of Fact 4.66, 4.67, 4.71.

37/ Finding of Fact 4.71.

and explicitly stated terms and conditions.[38/]

In view of the Company's commitment to wheel upon specified terms and conditions, no license condition relating to the rates and other terms of the Company's transmission services should be imposed. Rather, such matters should be left to the jurisdiction of the FPC.

The situation here is analogous to the facts in Boston Edison Co.,[39/] a case just decided by the Federal Power Commission. There, Boston Edison committed itself to offer wheeling services under certain conditions to the Norwood municipal system "subject to the Commission's determination whether this [wheeling] is consistent with the public interest." (Slip op. p. 3). Norwood argued to the FPC that Edison's conditional commitment constituted a refusal to wheel and thus raised antitrust issues which could only be resolved by the federal courts. The Commission disagreed and held that the question

> "whether the transmission of such power is in the public interest and the terms of that transmission is in our opinion within the ambit of the Federal Power Act, particularly sections 202(a), 205(b) and 206(a). Therefore, we shall grant Edison's request for a

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38/ Finding of Fact 4.68; see p. 146, n. 103, supra.

39/ Order Granting Hearing on Petition for a Declaratory Order and Consolidating Proceedings, FPC Dkt. Nos. E-8187, E-8700, September 25, 1974, App. II-5.

determination with respect to wheeling service." (slip op. p. 4)

Intrusion by the AEC into the FPC's authority over wheeling transactions would be particularly inappropriate in light of Section 271 of the Atomic Energy Act [42 U.S.C. §2018], which expressly provides that the Act in no way modifies or limits the operation of the Federal Power Act.[40/] Were the AEC to impose license conditions which sought to modify the Company's wheeling commitments, such action would intrude upon the authority of, and invite direct conflict with, a sister administrative agency, the Federal Power Commission.

In sum, we submit that proposed license conditions relating to transmission services and facilities have no meaningful connection to the Midland Units and are therefore inappropriate for this proceeding. Should the Board disagree, the reasonable policies of the Company concerning transmission services should serve as the basis for any license conditions imposed in this regard.

C. Mandating the Terms of Coordination Arrangements Would be Contrary to the Public Interest.

In its policy statement, the Company re-affirmed its willingness to engage in coordination transactions which offer

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40/ See pp. 31-35, supra.

net benefits to each participant.[41] The precise terms of given coordination arrangements, of course, vary according to the reserves, load, generation unit sizes, and other specific characteristics of the respective systems.[42] Typically, such arrangements contain agreements to operate in parallel, to exchange emergency capacity energy and to maintain certain reserve capacity levels.[43] Where appropriate, the arrangements may also provide for the exchange of economy energy, supplemental capacity and energy, and/or diversity capacity and energy and may include provision for coordinated utilization or planning of generation and/or transmission facilities.[44]

We have previously explained why the issue of whether the Company's coordination policies and practices are reasonable should be resolved by the Federal Power Commission and why the AEC should not, and cannot lawfully, regulate in this area.[45] At the very least, if this Board is of a contrary view and concludes that license conditions relating to coordination are necessary to remedy a situation inconsistent with the antitrust laws, the terms and the conditions of such coordination

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41/ Finding of Fact 4.13.

42/ Findings of Fact 2.78, 5.08.

43/ See pp. 194-97.

44/ Id.

45/ See pp. 31-35, 160-71, supra.

arrangements should be resolved by the FPC, not here.

We submit that any license conditions relating to coordination must take account of the principles which underlie these arrangements. The basic tenet of coordination in the electric utility industry is that coordination arrangements should offer mutual net benefits. As the evidence amply showed in this proceeding, mutual net benefits can be derived only where each system possesses the willingness and the ability to engage in comparable transactions on a reciprocal basis.[46/] Therefore, in the event that the Board imposes license conditions requiring the Company to coordinate with others, such a requirement should be limited to arrangements in which the Company receives net benefits and in which each party to the arrangements demonstrates the willingness and ability to engage in comparable reciprocal arrangements.

Inherent in these principles of mutuality and reciprocity is that the coordinating systems should be self-sufficient, that is, the capacity of their generating units and third party bulk power sources should exceed their peak load. For example, the Wolverine cooperative requires that systems with whom it coordinates have generation capacity equal to at least 110 percent of peak load.[47/] This requirement clearly reflects

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46/ Finding of Fact 4.15.

47/ Finding of Fact 4.24.

the view that systems which are not self-sufficient cannot provide reciprocal transactions to the coordinating partner.

Unless a coordinating partner has sufficient reserve capacity, that system will probably need emergency power support much more often than the other party to the arrangement and be less likely to provide emergency support when the other party needs it.[48/] Coordination arrangements are structured so as to assure that such "leaning" will not occur.[49/] Requiring the Company to coordinate with any and all systems including systems which are deficient in reserve capacity would encourage such leaning and thus deny the Company the net benefits which are fundamental and essential to successful coordination arrangements.[50/]

As we have previously explained the appropriateness of coordination terms vary according to the particular characteristics and desires of each party thereto.[51/] The Company's smaller neighboring systems vary greatly in load size, in the type and reliability of their generation and transmission facilities, and in their managements. These systems also differ

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48/ Finding of Fact 5.09.

49/ Id.

50/ Id.

51/ Findings of Fact 2.78, 5.08; Gainesville Utilities Dept. v. Florida Power Corp., 40 FPC 1227, 1233, App. II-21, aff'd, 402 U.S. 515 (1971), quoted at p. 188, supra.

greatly from the large systems located adjacent to the Company's service area. Consequently, the terms of a given arrangement between the Company and a large system may be inappropriate, and in fact unduly discriminatory, if entered into with a small system.[52/]

Thus, it would be neither reasonable nor consistent with the public interest to impose license conditions upon the Company which specify the detailed arrangements which the Company must agree to in all coordination negotiations with smaller parties. Similarly, it would be neither reasonable nor consistent with the public interest to require the Company, as a license condition, to coordinate with all systems on identical terms.[53/]

Specifically, the license conditions should not require that reserve sharing criteria of coordination arrangements be calculated on tne "equal percentage" basis or any given other formula, since under particular circumstances any given formula may be inappropriate and discriminatory.[54/] Rather if license conditions are deemed appropriate in this regard such conditions should reflect the fact that reserve sharing terms vary according to thc unique characteristics

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52/ Finding of Fact 5.08.

53/ Id. See also pp. 194-202, supra.

54/ Finding of Fact 5.09.

and the reliability of each coordinating system. For example, two systems with the same percentage of reserves may differ significantly in reliability since generation facilities of one may be poorly maintained or its capacity may be concentrated in a few large units.[55/] In sum, the record in this case is devoid of the type of information considered necessary by the FPC in Gainesville[56/] and other cases[57/] to formulate reasonable reserve sharing terms. Not only would specifying such terms involve the AEC in an area already supervised by the FPC, it would also require the Board to resolve complex issues without the factual information necessary for an equitable resolution of this complex question.

55/ Id.

56/ 40 FPC 1227, 1257-58 (1968) (Initial Decision) ("specific characteristics of the Florida Power and Gainesville systems such as load characteristics, capacity of generation, size of individual generating units, forced outages rates and scheduled maintenance requirements.")

57/ Village of Elbow Lake v. Otter Tail Power Co., 46 FPC 675, 679-82 (1971), App. II-45, aff'd as modified sub nom. Otter Tail Power Co. v. FPC, 473 F.2d 1253 (8th Cir. 1973), City of Cleveland v. Cleveland Electric Illuminating Co., 49 FPC 118, 128-133 (1973) (Initial Decision), App. II-9, appeal docketed sub nom. City of Cleveland v. FPC, No. 73-1282 (D.C. Cir. 1973).

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