UNITED STATES OF AMERICA

BEFORE THE

NUCLEAR REGULATORY COMMISSION

CONSUMERS POWER COMPANY Midland Nuclear Units 1 and 2	Docket Nos. 50-329A 50-330A

BRIEF IN SUPPORT OF THE EXCEPTIONS OF THE UNITED STATES DEPARTMENT OF JUSTICE TO INITIAL DECISION OF THE HEARING BOARD

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TABLE TWO

System of Abbreviation

The following system of abbreviations has been used:

1. ID refers to Initial Decision.
2. TR refers to transcript page number
3. PT refers to prepared testimony page number.
4. DJ # refers to the Department's exhibits.
5. App # refers to the Applicant's Exhibits.
6. NRC Staff # refers to the NRC Staff's Exhibits.
7. Int # refers to the Joint Intervenors Exhibits.

I.

INTRODUCTION

Pursuant to Section 2.762 of the Nuclear Regulatory Commission's Rules of Practice, 10 C.F.R. 2.762, the U. S. Department of Justice hereby files this Brief in Support of Exceptions to the Initial Decision of the Hearing Board.

A. History of the Proceeding

This proceeding involves the application of Consumers Power Company ("Applicant") for permits authorizing the construction of two pressurized water nuclear power reactors, designated as the Midland Plant, Units 1 and 2. The proposed facilities are to be located on a site adjacent to the Tittabawasee River in Midland County, Michigan. The units are designed to operate at 482 MW(e) and 818 MW(e) respectively.

This is the first proceeding tried under Section 105c of the Atomic Energy Act of 1954 since its 1970 amendment. */ The basic issue is whether the activities under the license for the Midland nuclear generating units will "create or maintain a situation inconsistent with the antitrust laws."

The application for the proposed facility was reviewed by the Department of Justice ("Department") pursuant to the provisions of Section 105c. The results of the Department's review are contained in a letter of advice to the Atomic Energy Commission dated June 28, 1971, in which the Department concluded that

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*/ 42 U.S.C. §2135(c), 68 Stat. 919, 84 Stat. 1473 (December 19, 1970).

the issuance of unconditioned construction permits may maintain a situation inconsistent with the antitrust laws and accordingly recommended that a hearing be held.

Thereafter, petitions to intervene were submitted to the Atomic Energy Commission by Wolverine Electric Cooperative, Inc., Northern Michigan Electric Cooperative, Inc., and several Michigan municipal utilities. (See Petitions to Intervene filed on September 30, 1971 and October 4, 1971).

On April 19, 1972, the Atomic Energy Commission's Notice of Antitrust Hearing was published in the Federal Register. (37 FR 7726). An Atomic Safety and Licensing Board ("Hearing Board") was established in accordance with the Atomic Energy Act and the Commission's regulations on April 11, 1972. The Hearing Board's notice for the first prehearing conference in this proceeding was issued on April 19, 1972. Preliminary motions and discovery extended through November 12, 1973; trial of the case lasted from November 27, 1973 to June 12, 1974.

The parties to this proceeding are the Applicant, the Department, the Nuclear Regulatory Commission Staff ("NRC Staff") and the "Joint Intervenors" (Wolverine Electric Cooperative, Inc., Northern Michigan Electric Cooperative, Inc., and the Cities of Traverse City, Grand Haven, Holland, Zeeland, Coldwater, and the Michigan Municipal Electric Association).

On October 8, 1974, each party filed its proposed findings of fact and conclusions of law and a brief in support thereof (hereinafter referred to respectively as Brief for the Department, Brief for the NRC Staff, Brief for the Intervenors, and Brief

for the Applicant), and on November 25, 1974 each party filed a brief replying contentions propounded by the other parties (hereinafter referred to respectively as Reply Brief for the Department, Reply Brief for the NRC Staff, Reply Brief for the Intervenors, and Reply Brief for the Applicant).

On July 18, 1975, the Hearing Board issued its Initial Decision ("ID"), which held that the activities under the Midland licenses "will not create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a of the Atomic Energy Act of 1954, as amended." (ID at 182) The Department the NRC Staff and the Joint Intervenors noticed an appeal from the Initial Decision on September 8, 1975, by filing Exceptions to the Initial Decision. This brief is submitted in support of the Exceptions filed by the Department on that date.

B. Scope of Appellate Review

This Appeal Board has the authority to review all of the exceptions which the Department has raised to the Initial Decision.

In Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit 2) ALAB-188, RAI-74-4, 323, 357 (April 4, 1974), an NRC Appeal Board outlined the scope of appelate review. That Appeal Board stated:

> b. Under the Commission's overall adjudicatory scheme established for licensing matters, the responsibility for the appraisal ab initio of the record normally is placed in licensing boards which, in each proceeding, render an initial decision giving that appraisal. The Licensing Board has performed that function here, and our function is to review the initial decision in the light of the exceptions which have been filed, and to assess its sufficiency and correctness. Our review is a part of the administrative decisional process. As such, we are not bound by the plentitude of decisions which concern the extent to which courts defer to rulings of an administrative body. Nevertheless, as enunciated in our Point Beach decision, we do not ordinarily make our own findings based on our independent review and assessment of the evidence:
>
> > Obviously, an essential element of [our] review in a particular case is an inquiry into whether each of the essential findings of the Licensing Board is supported by reliable, probative and substantial evidence of record. But it scarcely follows that, even though we may be clothed with legal authority to do so, it is appropriate for us as a reviewing tribunal to substitute our judgment on purely factual matters for that of the Licensing Board. Specifically, while it is our duty to reject or modify factual determinations which we conclude are not well founded and rational, we see no justification for setting aside licensing board findings simply because, had we been the trier of fact, we might have found differently.

> A broader scope of appellate review normally obtains, of course, where the question of fact is inextricably interwoven with one or more questions of law. But even though in that situation there may be greater latitude for the exercise of independent judgment by the Appeal Board, we still do not operate on a clean slate. In reaching our own conclusions on a mixed question of fact and law, due consideration will be given to the views of the Licensing Board on the question.

This is in accord with the views of the leading administrative law commentator. Professor Davis states in his treatise that an appeal board within an administrative agency has much wider discretion in its review of a hearing examiner's opinion than a court does in its consideration of an administrative agency's decision. An appeal board is given this wide latitude because it alone is ultimately responsible for the agency's determination. K. Davis, Administrative Law Text 222 (3rd ed. 1972)

In the instant proceeding, we are asking this Appeal Board to overturn findings of fact, findings of law and mixed findings of law and fact which are clearly at odds with the record, not well-founded, and not rational.

C. Summary of Argument and Organization of the Brief

The activities under the Midland licenses will maintain a situation inconsistent with the antitrust laws, and this Commission must therefore impose license conditions adequate to remedy that situation. The existence of a situation inconsistent with the antitrust laws can be established if it can be shown that Applicant is monopolizing the relevant electric power markets. [Sec. II-A-1]. A showing that Applicant has violated the antitrust laws is unnecessary in a Sec. 105c proceeding. [See II-A-2]. To prove the offense of monopolization, it is necessary to show the existence of substantial market power coupled with conduct by the company possessing that market power to preserve or enhance its market dominance. [See Sec. II-B]. Evidence and expert economic testimony demonstrates that Applicant possesses monopoly power in the wholesale and retail firm electric power markets in its service area, and that these markets are the relevant markets in which to judge the anticompetitive effects of Applicant's activities. [See Sec. II-C]. Applicant also possesses monopoly power by virtue of its strategically dominant transmission network. [See Sec. II-C-2]. Applicant has misused its dominant position in transmission and other coordination services to drive up the generation costs of smaller electric systems in Michigan who compete with it, thereby maintaining its monopoly position in the relevant markets. [See Sec. II-D].

In particular, Applicant (1) unreasonably refused to share reserves with competing smaller electric systems in Michigan, excluded these systems from the Michigan Power Pool, and continues to refuse to share reserves with these systems on reasonable and nondiscriminatory terms [Sec. II-D-1], (2) refused and refuses to grant access to its strategically-dominant transmission network to these systems, thereby denying them access to other sources of coordination services [Sec. II-D-2], (3) refused and refuses to grant access to the Midland Units to these systems [Sec. II-D-3], (4) contractually prohibited these systems from coordinating with third parties [Sec. II-D-4], (5) limited the availability to these systems of peaking power, a form of coordination power, from unutilized hydroelectric sites [Sec. II-D-5], (6) entered into territorial agreements with neighboring large utilities, thereby limiting the smaller electric system's ability to deal with alternative coordinating partners or bulk power suppliers [Sec. II-D-6], (7) agreed to coordinate with <u>several</u> of the smaller electric systems and acquired several other of these systems, with the specific intent of preventing effective coordination among <u>all</u> the smaller systems in Michigan [Sec. II-D-7]. All of this evidence of monopolization is within the relevant matters in controversy.

Since these practices and policies have maintained Applicant's monopoly position in the relevant markets, Applicant has engaged in monopolization in violation of Section 2 of the Sherman

Act. Proof of Applicant's monopolization is sufficient to establish the existence of a situation inconsistent with the antitrust laws or the policies underlying those laws [Sec. II-E].

This situation will be maintained by the activities under the Midland licenses. [Sec. III]. The denial of access to the Midland Units to the smaller electric systems in Michigan is an integral part of Applicant's monopolization. The availability of low-cost Midland power to Applicant alone competitively disadvantages smaller electric systems in their efforts to compete with Applicant. Furthermore, Applicant's monopolization disables these smaller electric systems from installing their own nuclear units. This significant rela tionship between the activities under the license and the antitrust-inconsistent situation establishes the "nexus" as required by by section 105c and the Commission's Waterford Order.

To correct the situation, the Midland Licenses should be conditioned, as provided for in Section 105c, so that access to the Midland Nuclear Units, wheeling and other coordination services are available to smaller electric systems in Michigan. [Sec. IV].

The Hearing Board rejected this argument because it erroneously found the facts of this case and incorrectly interpreted the antitrust laws and Section 105c. The legal and factual errors found in the Initial Decision to which Exceptions have been taken are discussed in detail below. The Exceptions to which a particular section of the Brief are addressed are noted in Appendix A.

D. General Principles of Power Supply Production and Coordination

The Department is alleging that Applicant has prevented competing electric systems from economically producing electric power by denying them access to the benefits of coordination. In order to better understand the issues in this case, the following brief summary of power supply and coordination principles is presented.

1. Reserve Sharing

Most users of electric power want and expect that power be available 100 percent of the time, or as close thereto as possible. "Firm power" is the term for power supply which is continuously available to meet the needs of such users. Generating units are subject to mechanical failure or "forced outage," which requires their removal from service. They are also out of service periodically for maintenance. Because generators are not available 100 percent of the time, electric utilities must maintain generation in excess of their loads, or "reserves," in order to provide the continuity of service, users expect.

Small electric systems apply "the single largest unit down" standard in determining the level of reserves which must be maintained. This means the system must set aside as reserves an amount of generating capacity equal to the capacity of its largest generating unit, so as to insure that it will be able to meet its load in the event that this unit suffers a forced outage. Thus, a small distribution system with a load of 10 megawatts (mw) could produce firm power to serve its load with two 10 mw

generating units, one supplying the load and the other held in reserve.

When a small system installs large units, the amount of reserves required increases. This increases the total cost of electric power supply because of the fixed charges on the reserve equipment which is idle except during emergency periods. Reserves can be reduced by using several smaller units, but a system which installs only small units loses the benefit of the economies of scale available from larger generating units. The electric system planner must find a compromise between using larger units to obtain scale economies and using smaller units in order to reduce the capital costs of reserves. (Mayben, TR 2552-2556)

The interconnection of two electric systems through high-voltage transmission makes possible the use of larger units while keeping reserves to a reasonable level, thus avoiding the dilemma of the "single largest unit down" standard. These interconnected systems share their reserve capacity and, by making greater use of already installed capacity which formerly had to be held in reserve, serve more loads with less total capacity than they would have been able to serve operating in isolation. (Mayben, TR 2564-2570)

The elements of such a "reserve-sharing" arrangement are an agreement between two or more utilities on the minimum amounts of reserves necessary to maintain adequate reliability on their combined systems and apportionment of these reserve requirements

among the participants. These contracts obligate each participant to supply "emergency power" on an if-and-when-available basis.

To demonstrate the practical effect of reserve sharing, let us assume two systems each having two 10 mw units. Isolated, each could sell only 10 mw of firm power, for a total of 20 mw of firm power from the total 40 mw of generating capacity. Following interconnection, the two systems would need to keep a total of only 10 mw of generation in reserve. If they share the savings equally, each would need to keep only 5 mw in reserve, or could sell 15 mw as firm power.

2. Coordinated Development

"Coordinated development" means the development of power supply resources by two or more electric utilities on a joint planning basis to meet the combined requirements of those utilities. This practice, like reserve sharing, permits electric utilities to use larger scale generating units.

Load growth is substantial in the electric industry averaging approximately 7 percent per year. Of concern for the system planner is the absolute amount of growth. For a system with a 4000 mw load, 7 percent growth would mean 280 mw of growth in a year. Under those circumstances, installation of an 800 mw unit system would leave idle 520 mw of capacity for one year; for a 2000 mw system with 140 mw of annual load growth, installing an 800 mw unit would leave 600 mw idle the first year, 510 mw the

second year, and so forth. If power supply development is isolated, the system planner again must unsatisfactorily compromise between the economies of scale available from large units and the cost of maintaining idle generating equipment.

With coordinated development of generation, two or more utilities can pool their load growth and use larger scale units more efficiently. Thus, two or more systems with a combined annual load growth of 800 mw can install an 800 mw generating unit with no idle capacity left over. Through coordinated development, the "lumpiness" of installation of blocks of generating capacity can be conformed more closely to the smoothly rising curve of load growth.

Varying arrangements or methods may be used to carry out programs of coordinated development, including joint construction or joint ventures, with equity participation by each of the participants, and sales of "unit power" by contract for the life of the unit. The purchaser under a "unit power" contract is entitled to power from a specific generating unit (or plant) when that unit (or plant) is in operation. Another method is "staggered construction," where one utility builds a unit larger than it needs and markets its temporary surplus, and then another utility takes its turn in adding a larger unit. (Mayben, TR 2649; see also DJ #167 and #234)

3. Joint Transmission Arrangements (Wheeling)

A third form of coordination is achieved by coordinating the construction and operation of transmission for power exchanges.

Where the distances between two systems seeking to coordinate are considerable, the costs of constructing transmission to interconnect these two systems may be greater than the cost savings achieved through the coordination transactions. Wheeling (i.e., the transfer of electric power over a transmission line either by direct transmission or displacement) over an intervening system's transmission lines may facilitate the transaction. (Mayben, TR 7733-37) Wheeling may also facilitate wholesale firm power transactions.

4. Other Power Exchange Transactions

a. Economy Energy

Economy energy is energy supplied by one utility to another generally on a "split-the-savings" basis. For example, the City of Lansing supplied Applicant approximately 9.7 million kwh of energy in November, 1973, for the price of $160,000. The incremental cost to Lansing of generating the power was $60,000. Applicant saved on the transaction because thie economy energy replaced energy on Applicant's system which would have cost $260,000 to generate. On a "split-the-savings" basis, Lansing profited by $100,000 and Applicant saved $100,000. (Brush, TR 2351-53; see also ID at 12)

b. Dump Energy

Dump energy is energy which must be produced by an electric system but for which it has no use. This energy is made available to other electric systems usually at a very low cost. For example, a hydroelectric plant, which must be run to control river

flow or lake level, may produce energy in excess of a system's needs at that particular time. This would be dump energy. (ID at 12)

c. Maintenance Power

Maintenance power is energy supplied by one utility to another to replace energy which is unavailable to the receiving system due to the outage of a generating unit for scheduled maintenance. (ID at 11)

d. Emergency Power

Emergency power is energy supplied by one utility to another on an if-and-when-available basis to replace energy which is unavailable to the receiving system due to a forced outage. (ID at 11; see Reserve Sharing, supra)

5. Base-load v. Peaking Units

The demand for power on a particular utility system varies from hour to hour during the day, and from month to month during the year. This variation in system load requires the utilization of essentially two types of generating units, "peaking units" and "baseload units." "Peaking units," which are used to supply loads that occur a few hours a day, have relatively low capacity (capital) costs and high energy (fuel) costs. On the other hand "baseload" units operate virtually full time and are used to supply that portion of system load which occurs continuously during the day. Base load units have relatively high capacity costs and low energy costs, both because they can utilize lower cost fuels and because they are more efficient in converting these fuels into kilowatt hours of electricity. (Mayben, TR 2256, 2257)

II. THE SITUATION INCONSISTENT WITH THE ANTITRUST LAWS

A. The Standard of Section 105(c)

1. The Situation

A fundamental error which pervades the entire Initial Decision is the Hearing Board's finding that a "situation inconsistent with the antitrust laws means anticompetitive conduct." (ID at 37) The language of the statute is clear; it is a situation which is the focus of the inquiry. A situation is, by definition, a state or condition at a given point in time -- as opposed to conduct. We would characterize the "situation inconsistent with the antitrust laws" in this case as a highly concentrated, anticompetitive market structure which is the result of exclusionary conduct engaged in by the dominant firm in the market. It is readily apparent that a focus solely upon conduct would ignore essential elements in such a situation.

The Hearing Board's error in statutory construction is much more than a semantic quibble, for, working from the false premise that "conduct" is the focus of the inquiry, it makes two crucial errors.

First, it distorts the law of monopolization to fit its interpretation of Section 105c. The law of monopolization focuses on much more than conduct; it focuses on an anticompetitive situation just as Section 105c does. Monopolization is defined as the existence of monopoly power in a relevant market coupled with

activities to create or maintain that monopoly power. (See infra at II-B-2) The offense persists as long as that firm possesses monopoly power even if the conduct which contributed to or brought about the situation ceases. Consequently, in determining whether a firm is monopolizing, past conduct, present conduct and market structure all must be analyzed. Since the Hearing Board was searching only for evidence of discrete acts of anticompetitive conduct -- i.e., the "situation" as it defined it -- it never engaged in the required antitrust analysis. Instead of determining whether there was a monopolization, it searched for individual acts which could be regarded as illegal per se. Taking no account of the Hearing Board's own finding that Applicant had the monopolistic purpose of acquiring all of its smaller competitors and thereby eliminating their competition, the Hearing Board persisted in examining each allegation of anticompetitive conduct in isolation from all others and determining its lawfulness or unlawfulness in the abstract.*/ Thus, for example, the Board engages in an abstract analysis of whether one utility has an ethical duty to engage in coordination with another, when its own findings should have led inevitably to the conclusion that Applicant's refusal to do so with its smaller competitors was an integral part of its monopolization. Moreover, no finding as to the existence of monopoly power is ever made since market structure is

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*/ The Hearing Board first divides Applicant's conduct into eight individual "situations," (See ID at 125-148, 150-167) and it then examines each "situation" sequentially. The net effect of this approach is to assume out of existence all conduct by Applicant except that which is specifically being scrutinized at a particular moment.

not conduct; and past conduct if discontinued, is found "moot" and thus irrelevant to a determination as to the existence of the situation. These legal errors follow from its initial erroneous premise since market structure and past conduct are not relevant to the question of whether certain present conduct is illegal per se. The question of whether an anticompetitive situation exists is never addressed.

Secondly, in searching for the "requisite nexus," */ the Hearing Board finds that the question of nexus is a matter "which must be resolved as to each alleged anticompetitive practice." (ID at 42) This interpretation is erroneous; however, it follows logically from the false premise that situation means conduct. An NRC Appeal Board has rejected the Hearing Board's tortured reading of the language of Section 105(c) as to the nexus requirement. That Appeal Board stated:

> The words of the statute upon which the applicant relies direct the Commission to consider not only whether granting a license would "create" an anticompetitive situation but also whether it would "maintain" one. Thus, to the extent the applicant's argument suggests that the Commission's cognizance under section 105c is limited to anticompetitive consequences directly attributable to applicant's use of the nuclear plant and its output, it makes no sense. As the staff points out, for activities under a license to "maintain" a pre-existing situation inconsistent with the antitrust laws, some conduct of the applicant apart from its license activities must have been the "cause" for bringing about those anticompetitive conditions. Nothing in section 105c suggests that Congress wanted the Commission to focus on an applicant's extra-license conduct when determining

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*/ Louisiana Power and Light Company (Waterford Steam Electric Generating Station, Unit No. 3. No. 50-382A, Memorandum and Order of the AEC, RAI 73-9, 619 (September 28, 1973).

> whether an anticompetitive situation would be "maintained," but to close its eyes to that conduct in deciding whether such a situation would be "created. Indeed, were we to accept the dichotomy inherent in the applicant's position, we would be at a loss to perceive how a licensing board should proceed when it is alleged -- as it is in this case -- that granting a construction permit would both create and maintain an anticompetitive situation. There is, of course a settled presumption against imputing to Congress an intent to achieve an irrational result. We are particularly disinclined to go against that presumption where another, more sensible reading of the provision in question is suggested by its legislative history. */ (Emphasis supplied)

As the Wolf Creek Appeal Board makes clear, the proper focus of a Section 105c inquiry is to determine (1) whether anticompetitive conditions exist, (2) whether these conditions have been brought about by anticompetitive conduct of the Applicant and (3) whether these conditions are maintained by the license activities.

2. The Standard of "Inconsistency"

Section 105(c) prohibits the licensing of nuclear power facilities where the activities under such licenses would create or maintain a situation inconsistent with the antitrust laws. While we have demonstrated in this proceeding that Applicant is monopolizing the relevant markets in violation of Section 2 of the Sherman Act, such a showing is unnecessary to meet the standards of Section 105(c). **/ The Hearing Board correctly found that the standard of inconsistency "need not amount to a statutory

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*/ Kansas Gas and Electric Company and Kansas City Power and Light Company (Wolf Creek Generating Station, Unit No. 1) No. 50-482-A, Decision of Atomic Safety and Licensing Appeal Board, 19-20 (June 30, 1975).

**/ See S. Rep. No. 91-1247, 91st Cong., 2d Sess. (1970); H.R. Rep. No. 91-1470, 91st Cong. 2d Sess., 14 (1970).

(Footnote continued)

violation if it meets appropriate criteria for determining anti-competitive conduct." (ID at 37). Specifically the Hearing Board found:

> In determining the existence of anticompetitive conduct, each of the following criteria should be considered: (a) conduct which is a violation of the antitrust laws enumerated in Section 105a of the Atomic Energy Act, including conduct heretofore determined to be unfair by the FTC pursuant to Section 5 of the FTC Act; and (b) conduct, without necessarily having been previously considered unlawful, (1) which offends public policy as it has been established by statutes, the common law, or otherwise, or, in other words, is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) which is immoral, unethical, oppressive or unscrupulous; and (3) which causes substantial injury to consumers or competitors or other businessmen. (ID at 40)

We take no exception to this standard. We wonder, however, as to its meaning when the Hearing Board can simultaneously state "that cases dealing with violation of the Sherman Act and the Clayton Act provide little guidance in the selection of appropriate criteria for determining anticompetitive conduct which does not amount to a violation of antitrust laws." (ID at 37)

On the contrary, monopolization cases provide invaluable guidance in concretely applying the somewhat nebulous standard

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(Footnote continued from previous page)

> "The concept of certainty of contravention of the antitrust laws or the policies underlying those laws is not intended to be implicit in this standard; nor is it mere possibility of inconsistency. It is intended that the finding be based on reasonable probability of contravention of the antitrust laws or the policies clearly underlying those laws."

the Hearing Board has fashioned. An analysis of anticompetitive practices found in monopolization cases which were not held per se illegal but nonetheless condemned as exclusionary provides appropriate criteria by which to judge whether conduct is "unfair," is "anticompetitive," "offends public policy," or is injurious to "competitors."

For example, in Otter Tail Power Company v. United States, 410 U.S. 366 (1973), the Court determined that a monopolization consisting of refusals by the defendant to deal in wholesale power and in transmission services, the effect of which was to maintain a monopoly, violated Section 2 of the Sherman Act. The Court did not have to reach the issue of whether a refusal to wheel in and of itself, or a refusal to sell power in and of itself, was a violation of the antitrust laws, since Otter Tail was engaging in a combination of anticompetitive acts which together constituted monopolization. Nevertheless, a fair reading of Otter Tail is that at a minimum, the Court believed that each element of the monopolization, (namely, refusals to wheel and refusals to sell power), raised artificial barriers to entering the market and was thus anticompetitive --i.e., was a policy or practice inconsistent with the antitrust laws.*/

If the Hearing Board was looking for guidance as to what conduct "causes substantial injury" to "competitors" in the electric power industry, the Otter Tail case provides "appropriate

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*/ Applicant agrees that the practices of the Otter Tail Power Co. were found to be "predatory." (Brief for Applicant at 156)

criteria." Instead, the Hearing Board refused to read the majority opinion in the Otter Tail case for guidance; rather it attempted to distinguish it away, and in fact relies on the minority opinion to bolster its reasoning. (ID at 95)

The Department in this proceeding argued that selective refusals to wheel and selective refusals to coordinate were anticompetitive conduct which seriously handicapped Applicant's competitors. The Hearing Board found that such refusals in and of themselves are not per se illegal conduct; it never considered whether the Applicant's conduct was inconsistent with the antitrust laws, nor did it consider whether Applicant's conduct in its totality was inconsistent with the antitrust laws. Essentially the Hearing Board promulgated an inconsistency standard, and then ignored it. Although it does not explicitly so state, the Hearing Board erroneously judged Applicant's conduct by the strictest violation standards, requiring that each element of Applicant's monopolization be a per se violation of the antitrust laws.

B. The Antitrust Laws and the Policies Underlying those Laws

1. Introduction

The Hearing Board leaves many of its legal assumptions unstated, and therefore it is very difficult to focus precisely on where the legal errors in its Initial Decision lie. Specifically, it is unclear by what standards it was determined that Applicant has not engaged in a monopolization. The Hearing Board's legal analysis is most often limited to a rote recitation that it can find no exclusionary conduct; how it legally reaches its conclusions is largely a mystery.

This section attempts to state the law of monopolization in considerable detail and outline the legal standards by which Applicant's conduct properly should be judged. Those explicit legal interpretations of the Hearing Board which we believe to be erroneous are referred to in footnotes to the text.

2. The Law of Monopolization

Section 2 of the Sherman Act reads as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a felony. . . . 15 U.S.C. 2

The offense of monopolization consists of monopoly power in the relevant market, defined in economic terms as the power to fix prices or to exclude competition, coupled with policies designed to preserve that market power. Thus, the U. S. Supreme Court held in American Tobacco v. United States, 328 U.S. 781,

811 (1946) "that the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so." A recent definition of the offense appears in United States v. Grinnell Co., 384 U.S. 563 (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 the growth or development of a superior product, business acumen or historic accident. 384 U.S. at 570-571.

The first element of the offense, possession of monopoly power in the relevant market, can be inferred "from [a] predominant share of the market," see Grinnell, supra at 571, or from control over a "bottleneck" facility which affords the controlling company the power to exclude competition or set prices. See United States v. Otter Tail Power Company, 331 F. Supp. 54, 59 (1971), aff'd in part, 410 U.S. 366, 377 (1973).

Once it is established that a company possesses monopoly power, that company's conduct is judged by a different, stricter standard: it cannot willfully act to maintain or expand that power without violating the antitrust laws. The willful maintenance of monopoly power can be established merely by showing that "transactions neutral on their face" have an exclusionary effect on the market -- i.e., raise barriers to entry -- without a specific showing of anticompetitive motivation. See United States v. Aluminum Company of America, 148 F.2d 416, 432 (2d Cir.

1945); also, United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 346 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954). A firm possessing monopoly power violates Section 2 even though particular acts of anticompetitive conduct which contributed to its market position may have ceased. See United States v. Aluminum Company of America, supra at 432, 437.

That a monopoly results from a defendant's conduct is sufficient for a finding of monopolistic intent. United States v. Griffith, 334 U.S. 100, 105-106 (1948).*/ Furthermore, none of the transactions engaged in by a defendant need be illegal in and of themselves if they are part of a course of conduct to maintain its monopoly. See American Tobacco v. U. S., supra. It follows, therefore, that individual elements of an anticompetitive situation may not be singled out for evaluation on a piece-by-piece basis; for a group of activities, each perhaps lawful standing alone, may comprise a monopolization in violation of the antitrust laws. See the recent opinion by Judge Edelstein in United States v. International Business Machines, CCH 1975 Trade Cas. ¶60,495 (S.D. N.Y. 1975).

That the offense of monopolization may be proved by merely showing the exclusionary effect of the policies and practices engaged in by a company possessing monopoly power (without a showing of specific intent) is confirmed by the following quotation from

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*/ The Hearing Board uses the term "scheme of monopolization" throughout the Initial Decision. This term is alien to the law of monopolization. If the use of this term means that "specific intent" must be shown to prove a monopolization, the Hearing Board has erred.

Judge Hand's opinion in Alcoa, supra, a case which was very much in the minds of the framers of the 1954 Atomic Energy Act:*/

> This increase and this continued and undisturbed control did not fall undesigned into Alcoa's lap; obviously it could not have done so. It could only have resulted, as it did result, from a persistent determination to maintain the control, with which it found itself vested in 1912. There were at least one or two abortive attempts to enter the industry, but Alcoa effectively anticipated and forestalled all competition, and succeeded in holding the field alone. . . . We need charge it with no moral dereliction after 1912; we may assume that all it claims for itself is true. The only question is whether it falls within the exception established in favor of those who do not seek, but cannot avoid, the control of a market. It seems to us that that question scarcely survives its statement. It was not inevitable that it should always anticipate increases in the demand for ingots and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret "exclusion" as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not "exclusionary." So to limit it would in our judgment emasculate the Act: would permit just such consolidations as it was designed to prevent. 148 F.2d at 430-31. (Emphasis added)

Similarly, Judge Wyzanski stated in United States v. United Shoe Machinery Corp., supra:

> So far, nothing in this opinion has been said of defendant's intent in regard to its power and practices in the shoe machinery market. This point can be readily disposed of by reference once more to

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*/ Hearings on S. 3323 and H. R. 8862 Before the Joint Committee on Atomic Energy on the Amendment of the Atomic Energy Act of 1946, 83rd Cong., 2d Sess., pt 2, at 441-443, 495-498, 629, 641-642 (1954).

> Aluminum, 148 F.2d at pages 431-432. Defendant intended to engage in the leasing practices and pricing policies which maintained its market power. That is all the intent which the law requires when both the complaint and the judgment rest on a charge of "monopolizing," not merely "attempting to monopolize." Defendant having willed the means, has willed the end. 110 F. Supp. at 346 (Emphasis added)

In addition to the offense of monopolization, Section 2 also prohibits attempts to monopolize. The principal differences between the offense of monopolization and the offense of attempt to monopolize, are these: when an attempt is alleged, a firm's market power need not amount to monopoly; in addition to a showing of exclusionary conduct, "specific intent" to monopolize and a "dangerous probability of success" must be demonstrated. Note, however, that it is unnecessary to show a "dangerous probability of success" in monopolization cases because in these cases actual success must be shown, -- i.e., having monopoly power in the relevant market.*/ Similarly, "specific intent" need not be proved since intent is inferred from the achievement of the monopoly. While there are these differences between "monopolizing" and "attempting to monopolize", exclusionary practices must be found whichever offense is alleged. Consequently, both monopolization and attempt to monopolize cases are important sources of relevant legal precedents in determining whether a company possessing monopoly power has acted to exclude competitors from the market by creating artificial barriers to entry.

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*/ The Hearing Board found that Applicant did not violate the "attempt to monopolize" clause of Section 2 because it did not have the power to carry out its purpose of destroying competition. (ID at 155) Simultaneously, the Hearing Board assumes Applicant has monopoly power in the relevant geographic market, (ID at 178) These findings are contradictory: Applicant certainly has the power to achieve a monopoly if it has already achieved it.

3. Refusals to Deal

The Department contends that the principal means by which Applicant maintains its monopoly power in the relevant market -- i.e., monopolizes -- is through selective refusals to deal. Applicant deals with the large electric utility systems (some of which have tacitly or explicitly agreed not to do business in its service area) while at the same time it refuses to deal with electric systems who compete with it. Applicant has engaged in outright refusals to share reserves, refusals to share reserves at a competitive price, refusals to provide transmission services and refusals to grant access to the Midland nuclear units. (See infra at II-D-1-D-3).

It is well established that selective refusals to deal by a single firm can be exclusionary and, therefore, violate Section 2 of the Sherman Act, if that firm possesses monopoly power or has a reasonable probability of achieving a monopoly. In Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927), Kodak originally sold at wholesale to a number of independent companies, but then decided to act as its own wholesaler and succeeded in buying out all the wholesalers in the area except the plaintiff. Kodak refused to sell to Southern at the traditional wholesaler's discount, forcing it to pay the retail price. This made it impossible for Southern to compete with the Kodak-owned distribution network. Kodak had a monopoly (75% to 80%) of the national photographic supply market and it was expanding its monopoly into a second market -- retail distribution. Although no direct evidence as to Kodak's specific intent was presented at

trial, Kodak's refusal to sell to its retail competitors at a price which would allow competition in the retail market was held to constitute illegal monopolization.

The same conclusion was reached in Packaged Programs, Inc. v. Westinghouse Broadcasting, 255 F.2d 708 (3d Cir. 1958). The key facts in this case are as follows: Westinghouse owned the only TV station in Pittsburgh, giving the company a legal monopoly in television broadcasting in parts of Pennsylvania, West Virginia and Ohio; the company also operated a related business involving the production of commercials for TV advertisers, the same business in which the plaintiff was engaged; Westinghouse refused to sell television time to advertisers whose commercials were produced by the plaintiff. Plaintiff argued that Westinghouse was refusing to deal in a market where it held a monopoly -- television broadcasting in Pittsburgh -- in order to monopolize the market for production of TV commercials. The Court sustainted plaintiff's argument and held that a company possessing monopoly power in one market cannot selectively refuse to deal in order to expand its monopoly power to another level of business operations.

A similar case is Six Twenty-Nine Productions v. Rollins Telecasting, Inc., 365 F.2d 478 (5th Cir. 1966). Plaintiff was an advertising agency which prepared commercials for television broadcasting. Defendant, the only television station in the area, had its commercials prepared both by the station personnel and by the three advertising agencies in the area, one of whom

was the plaintiff. The problem arose when a client, whose advertising had previously been handled by the station, hired plaintiff to prepare a commercial. The station advised plaintiff agency that it would pay no commission to the agency and that it would refuse to deal with this agency henceforth. The court concluded that:

> . . . the complaint is sufficient if the refusal of defendant to accept advertising from plaintiff by setting up unreasonable standards or by adopting an arbitrary course of action is for the purpose of destroying plaintiff as an agency and thereby furthering a course toward monopolization.
> 365 F.2d at 483.

Lorain Journal Co. v. United States, 342 U.S. 143 (1951), is another classic refusal to deal case. There the defendant had enjoyed a local monopoly in the mass dissemination of news and advertising until the FCC licensed a radio station to serve in Lorain and adjoining areas. To combat the competitive threat, the newspaper refused to sell advertising space to anyone who advertised on the radio. The U. S. Supreme Court recognized that the defendant's monopoly position in news and advertising had been eroded, that defendant was attempting to ruin its radio competitor through selective refusals to deal, and that if defendant continued to refuse to deal, it was likely that a monopoly of the dissemination of news and advertising would be re-established. The Court condemned the paper's conduct of selectively refusing to deal as exclusionary, and since Lorain Journal's monopoly had been eroded, it found this conduct violated the attempt to monopolize clause of Section 2.

Another case clearly in point is Otter Tail Power Co. v. United States, supra.*/ Otter Tail involved the application of both the monopolization and attempt to monopolize clause of Section 2 to an integrated electric power company which generated, transmitted and distributed electric power in adjacent parts of Minnesota, North Dakota and South Dakota. Otter Tail had the only subtransmission system in this area. It distributed electricity in some 465 towns in its service area and sold power at wholesale to 17 other municipalities, which engaged in distribution. The District Court found that Otter Tail possessed monopoly power in the relevant market and maintained this market power by refusing to deal. When municipalities Otter Tail served at retail (pursuant to limited duration franchises) desired to set up their own distribution systems, the company refused to sell power to these systems at wholesale and further refused to sell transmission services so that power could be moved across its system from other suppliers (wheeling). Since, in most instances, there was no other way for such a town to purchase power, it was left with two choices: either (1) abandon its plans and renew Otter Tail's franchise or (2) establish a high-cost, isolated

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*/ The Hearing Board found that "an entity not in business of wheeling cannot violate the antitrust laws by refusing to go into the business." (ID at 96) This statement is legally erroneous as the discussion in the text makes clear. However, it is also factually erroneous; Applicant is in the "business" of wheeling. The Hearing Board admits that Applicant transmits power for Detroit Edison and other privately-owned utilities. (ID at 138)

generation system. The U. S. District Court found that Otter Tail's refusals to deal constituted illegal monopolization and attempted monopolization under Section 2 of the Sherman Act.*/ It enjoined Otter Tail from refusing to sell or to wheel power for municipal systems in its own area. The U. S. Supreme Court affirmed this portion of the District Court decision.**/

4. "Bottleneck" Monopolization

Unilateral refusals to deal have also been found to violate Section 2 of the Sherman Act in cases where there was no demonstration of a firm's monopoly of sales in a relevant market. The central feature of these Section 2 cases is the control by a company(ies) over a facility or service which cannot practicably be duplicated and to which access is a significant factor in a firm's competitive ability -i.e., a "bottleneck" facility. The control itself over such a facility or service is deemed sufficient to establish monopoly power. In denying its competitors access to a bottleneck facility, the controlling company violates

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*/ Otter Tail also was a party to a territorial allocation agreement with the U. S. Bureau of Reclamation. The substance of this agreement was that Otter Tail would not wheel power for USBR to cities where it held a franchise to serve at retail. The agreement was another manifestation of Otter Tail's policy of refusing to deal in transmission services.

**/ Otter Tail also engaged in harassing litigation as an exclusionary practice. However, as to that issue, the case was remanded for further fact finding. The District Court finding of monopolization and attempt to monopolize was affirmed even though as to the litigation issue, the case was remanded. Eventually the District Court found Otter Tail had engaged in vexatious litigation. 360 F. Supp. 451 (D. Minn. 1973), aff'd 417 U.S. 901 (1974).

Section 2 of the Sherman Act because monopoly power is imputed to it by virtue of its control over the facility; under Section 2 principles, use of monopoly power to destroy actual or potential competition is illegal. While most of these cases involve jointly-owned facilities, they all involve violations of Section 2 of the Sherman Act, a statutory provision which is concerned solely with the evil of monopoly power. The statutory section makes no distinction between monopoly power possessed by a single firm and monopoly power held jointly by several companies pursuant to a conspiracy.

Specifically, these cases involve refusals to deal in a particular factor of production in order to create or maintain a monopoly in a final product market -- i.e., refusal to grant access to news services in order to maintain a monopoly in newspapers,*/ refusal to grant access to a unique railroad bridge in order to maintain a monopoly in transcontinental railroad service,**/ refusal to grant access to a fruit market in order to monopolize the wholesale fruit business,***/ refusal to grant access to subtransmission in order to maintain a monopoly of retail electric sales.****/ In each of these cases, the power to grant or

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*/ Associated Press v. United States, 326 U.S. 1 (1945).

**/ United States v. Terminal Railroad Ass'n., 224 U.S. 383 (1912).

***/ Gamco, Inc. v. Providence Fruit & Produce Building, Inc., 194 F.2d 484 (1st Cir., 1952), cert. denied 344 U.S. 817 (1952).

****/ Otter Tail, supra.

deny access to an important factor of production -- i.e., bottleneck facility or service -- was used to seriously handicap the competitors of the company(ies) controlling the "bottleneck" facility or service.

In the instant proceeding, the Department contends that Applicant controls a bottleneck facility -- a strategically dominant transmission network -- which it is utilizing to maintain its monopoly position by denying access to this facility to its competitors. (See infra at II-C-2).

The "bottleneck" theory had its genesis in United States v. Terminal Railroad Association, supra. A group of railroads established a jointly-owned company which controlled the principal terminal facilities in St. Louis, Missouri, and East St. Louis, Illinois. This was a key east-west traffic location because eastern railroads terminated on the eastern side of the Mississippi River and western railroads had their terminus on the western side. The terminal company owned the lines connecting the two terminal areas on each side of the river and the only two bridges and ferry available for crossing. The agreement underlying the joint terminal company provided that nonmember railroads could be admitted to ownership upon unanimous approval of the members. Thus, the sponsors of the terminal company could discriminate against outsiders in charges as well as veto entirely the use of facilities by outsiders.

The Supreme Court found that outsiders as a practical matter could not build their own facilities due to topological and

geographic limitations. The Court concluded that:

> . . . When the inherent conditions are such as to prohibit any other reasonable means of entering the city, the combination of every such facility under the exclusive ownership and control of less than all of the companies under compulsion to use them violate both the first and second sections of the act. . . . 224 U.S. at 409. (Emphasis supplied)

The bottleneck theory was reaffirmed in Associated Press v. United States, supra. The Court made clear in Associated Press that the competitive advantage afforded by the service need not be indispensably necessary to competitive survival, but it is sufficient that without it the excluded competitor is at a "competitive disadvantage" 326 U.S. at 17-18. This was stressed by Judge Learned Hand for the three-judge District Court in Associated Press, in a passage quoted with approval by the Supreme Court:

> Most monopolies, like most patents, give control over only some of the means of production for which there is a substitute; the possessor enjoys an advantage over his competitors, but he can seldom shut them out altogether; his monopoly is measured by the handicap he can impose . . . . And yet that advantage alone may make a monopoly unlawful. 326 U.S. at 17 n. 17.

Gamco, Inc. v. Providence Fruit & Produce Building, Inc., supra, also involved a "bottleneck" facility. In that case local fruit and vegetable wholesalers who desired to lease space in the Produce Building were required to purchase stock in the corporation which owned the building. Because the building had the area's best shipping facilities and attracted most of the retail buyers, practically all wholesalers had leased there for the

twenty preceding years, and no similar facilities had been developed. When plaintiff was denied a renewal of its lease because of its affiliation with an out-of-state firm, it brought suit under Sections 1 and 2 of the Sherman Act.

The District Court interpreted the Sherman Act as condoning the defendants' action since it found that "competition ruled the ultimate selling market subsequent to Gamco's ouster." Gamco, Inc., supra at 486. The Court of Appeals found that "evidence that competitive activity has not actually declined is inconclusive both as to Section 3 of the Clayton Act . . . and for our present purposes under Sections 1 and 2 of the Sherman Antitrust Act." Gamco, Inc., supra at 487. Moreover, the Court found that defendants possessed monopoly power even through other alternative selling sites were available. The Court stated:

> The short answer to this is that a monopolized resource seldom lacks substitutes; alternatives will not excuse monopolization . . . . To impose upon plaintiff the additional expenses of developing another site, attracting buyers and transhipping his fruit and produce by truck is clearly to extract a monopolist's advantage. 194 F.2d at 486.

The most recent case to apply on the "bottleneck" theory of monopolization is Otter Tail, supra. In that case, Otter Tail was found to have "a strategic dominance in the transmission of power in most of its service area" -- i.e., it controlled a subtransmission network which was a bottleneck to entering the relevant market. Otter Tail's refusal to grant access to this "bottleneck facility" was deemed a violation of Section 2 of the Sherman Act. It is important to note that Otter Tail's "bottleneck" was limited

to transmission of a certain voltage, namely, 41.6 kv lines; the United States Bureau of Reclamation owned most of the larger transmission lines in the area.*/ Otter Tail is particularly important to this proceeding since it underscores the fact that a single firm "bottleneck" is fully subject to scrutiny and sanction under Section 2 of the Sherman Act.**/ The subtransmission network to which the municipalities were denied access was owned solely by Otter Tail Power Company.

5. Other Exclusionary Practices

A variety of restraints of trade form an integral part of Applicant's monopolization, namely (1) territorial market allocations between Applicant and several of its large neighboring electric systems (infra at II-D-6), (2) a restrictive power pooling agreement -- i.e., group boycott -- which unreasonably precluded new membership (infra at II-D-1), (3) contractual restrictions on power sales agreements -- i.e., resale restrictions -- which prohibited its smaller competitiors from coordinating with third parties (infra at II-D-4). These agreements are per se violations of Section 1 of the Sherman Act and thus are anticompetitive. Clearly, a company possessing monopoly power which is a party to restraints of trade which are condemned by Section 1 is engaging in exclusionary practices in violation of Section 2.

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*/ 331 F. Supp. 54 at 59.

**/ The Hearing Board erroneously found that "all the bottleneck cases involve conspiracies." (ID at 92)

a. Territorial Market Allocations

Territorial restrictions among competitiors are per se violations of Section 1 of the Sherman Act. Otter Tail, supra at 366, 378; United States v. Topco Associates, 405 U.S. 596, 608 (1972).

b. Group Boycotts

The U.S. Supreme Court stated in Klors Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207,212 (1959), "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category."

The Hearing Board correctly applied the holding of the Klors case to the electrical industry when it stated:

> If two utilities enter into a coordination arrangement thereby reaping the benefits of such arrangement and further conspire to prevent other utilities from entering the coordination arrangement with the intent to injure such other utilities, such conspiracy falls squarely within the prohibition of Section 1 of the Sherman Act. (ID at 88)

c. Restraints on Alienation

The U.S. Supreme Court stated in United States v. Arnold, Schwinn and Co., 388 U.S. 365 (1967):

> Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with which an article may be traded after the manufacturer has parted with dominion over it.

In the context of this proceeding, Applicant contractually restricted and confined areas where purchasers of electric power could dispose of that power, thereby violating Section 1 of the Sherman Act.

C. Applicant's Monopoly Power

One element of the offense of monopolization is the possession of monopoly power. Monopoly power has been defined as "the power to control prices or exclude competition." (See supra, at II-B-2) The existence of monopoly power can be established either by inference from a large share of the sales of the relevant product in the relevant geographic market, or by demonstrating that a company has strategic control over a "bottleneck" facility. (See supra, at II-B-4) Applicant's monopoly power flows from both its overwhelmingly large share of the sales in the relevant markets, and its control over a strategically dominant transmission network.

1. Applicant Possesses Monopoly Power by Virtue of Its Dominant Share of the Relevant Markets

a. Introduction

The Hearing Board found that Applicant's conduct was not inconsistent with the antitrust laws, even if it were assumed that Applicant possessed monopoly power in the relevant markets. (ID at 178) This finding is erroneous ab initio since the Hearing Board's failure to understand the legal significance of its own assumption resulted in it judging Applicant's conduct by inappropriate legal standards. The law of monopolization is clear. The conduct of a company possessing monopoly power in a relevant market must be judged by a higher, stricter standard than the conduct of a company not possessing such power. (See supra at II-B-2)

Working from a false premise regarding the significance of a finding of monopoly power, the Hearing Board avoided making a

finding as to the existence of monopoly power -- i.e., Applicant's market share. However, it did make a finding as to the relevant market. That finding is also erroneous. It determined that the only relevant product market was "coordination services," */ and that the geographic scope of the market was roughly Applicant's service area. (ID at 30) It based this determination of the relevant market on a misunderstanding of the function of the relevant matters in controversy, which, as stipulated to by all parties, are whether:

> (a) Applicant has the power to grant or deny access to coordination; (b) Applicant has used this power in an anticompetitive fashion against the smaller utilities systems; (c) Applicant's said use of its power has produced into existence a situation inconsistent with the antitrust laws, which situation would be maintained by activities under the licenses that Applicant seeks." (ID at 25)

The Hearing Board essentially found that in stipulating to the relevant matters in controversy, the parties were, in fact, stipulating to the relevant markets. **/ A reading of the briefs of any of the parties in this proceeding should quickly disabuse the Appeal Board of any such notion. (See. e.g. Brief for Department at 61-87; Brief for Applicant at 97-112.) In agreeing to the relevant matters in controversy, the parties only intended to limit the scope of evidence concerning Applicant's efforts to

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*/ What the Hearing Board refers to as "coordination services" is apparently just a different name for what the Department calls "power exchange services." Hereafter we will use the term "coordination services."

**/ No party to the proceeding advocated the market definition adopted by the Hearing Board.

preserve its alleged monopoly position in the relevant markets. It was agreed only that the hearing would focus on whether Applicant was refusing to deal in "coordination services," or blocking access to other sources of these essential factors of production, thereby preserving its alleged monopoly position in the relevant markets. The precise boundaries of those markets and Applicant's share in those markets had to be determined at hearing since there was no agreement between the parties as to whether Applicant possessed monopoly power in any market. Consequently, the Department offered expert testimony and extensive briefs to demonstrate that Applicant possessed monopoly power in each of the relevant markets. Applicant made similar efforts to persuade the Hearing Board to reach the opposite conclusion. Yet, the Hearing Board specifically declined to reach any conclusion.

Given the legal errors committed by the Hearing Board in judging Applicant's conduct by inapplicable standards and in misinterpreting the function of the relevant matters in controversy, it is necessary that the Appeal Board make findings as to (1) the relevant markets for antitrust analysis, (2) Applicant's share of sales in those markets, and (3) whether monopoly power can be inferred from that market share. A resolution of these difficult, complex questions cannot be avoided. Therefore, we have included in this Appellate Brief a discussion of the relevant market issue which, while extensive, concentrates on those

market questions on which Applicant and the Department could not reach agreement.

b. General Principles

The Supreme Court has stated that the existence and extent of a firm's monopoly power must not be determined in a vacuum, but rather in the context of a particular market or markets, and that the determination of relevant markets involves considerations of both product and geography. See United States v. Grinnell, 384 U.S. 563, 575 (1966).

The basic rule with regard to the definition of relevant product markets is that "commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal." (See United States v. E. I. DuPont De Nemours & Co., 351 U.S. 377 (1956). For products to be deemed interchangeable, two factual questions must be answered: (1) Whether the physical characteristics of products are such that they can be used for the same purpose (functional interchangeability), and, if this is answered affirmatively, (2) whether a purchaser is willing to substitute one product for the other (reactive interchangeability):

> To determine whether acids are in competition in a particular industry it is first necessary to decide whether they can be used for the same purpose -- whether they are functionally interchangeable . . . . Having found one or more productions functionally interchangeable with citric acid in a particular use, the next question to be resolved is one of purchaser reaction -- the willingness or readiness to substitute one for the other. United States v. Chas. Pfizer & Co., Inc., 246 F. Supp. 464, 468 (E.D. N.Y., 1965).

> While a finding of functional interchangeability must precede that of reasonable (reactive) interchangeability, it is not determinative. For products to be classified in the same market they must be both functionally and reasonably interchangeable. 246 F. Supp. at 468 n. 3.

The basic rule with regard to the definition of the geographic extent of relevant product markets is that the market must "correspond to commercial realities of the industry and be economically significant." Brown Shoe Co. v. United States, 370 U.S. 294, 336-337 (1962). */ Stated differently, "The area of effective competition in the effective line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies." United States v. Philadelphia National Bank, 374 U.S. 321, 359 (1963).

Monopoly power is imputed to a seller who has a statistically predominant share of the market. (See Grinnell, supra). The U. S. Supreme Court has inferred monopoly power from a market share as low as 68 percent. See American Tobacco v. United States, 328 U.S. 781, 795 (1946) [68-80%]; also, United States v. United Shoe Machinery, 110 F. Supp. 295 (D. Mass., 1953), aff d per curiam 347 U.S. 521 (1954) [75-85%]; also, United States v. Otter Tail Power Company, 410 U.S. 366, 370, 377 (1973) [91%].

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*/ The U. S. Supreme Court has held that the market definition principles developed in Clayton Act, Section 7 cases are equally applicable to Sherman Act, Section 2 cases. See United States v. Grinnell, 384 U.S. 563, 573 (1966).

c. The Relevant Product Markets

The Department and Applicant agree as to the existence of two relevant product markets: (1) the retail distribution firm power market, in which distribution systems supply firm electric to the ultimate consumers of that power; (2) the wholesale bulk firm power market in which producers of firm electric power sell power in bulk (i.e., in large quantities usually at high voltages) to electric distribution systems.

While the Department contends that a third product -- "power coordination services" -- is germane to this proceeding, */ sales in this product have no bearing on market share percentage calculations in either the retail or the wholesale market. **/ No attempt has been made to outline the precise geographic boundaries of the market for coordination services and we have not imputed to Applicant a market share from which market power could be inferred. Rather, we demonstrated that Applicant refused to deal in "coordination services" with small electric systems in Michigan, and blocked access to other sources of these services through its control over transmission, while it agreed to deal in "coordination services" with neighboring, large, privately-owned electric utilities.

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*/ The Hearing Board correctly recognized the existence of "coordination services" as a distinct and separate product, namely, a "bundle of services" which are essential factors in producing wholesale power. (See ID at 29-30)

**/ See DJ #197.

d. The Geographic Scope of the Relevant Product Markets

The Department's economic and engineering expert witnesses set out geographic boundaries for both the retail and the wholesale product markets as that area in which it is technically and economically feasible for Applicant to sell at retail and at wholesale. (Wein, PT at 71) It was concluded that Applicant is able to sell at retail and at wholesale not only in the area in which Applicant presently serves, but also in certain adjacent areas depending on the size of the load to be served and its distance from Applicant's existing facilities. (Mayben, TR at 2743-46) This area, where Applicant sells or can reasonably extend its retail and wholesale sales, is the geographic market in which the competitive impact of licensing of the Midland units will be felt and must be assessed. It reflects both the reality of the way in which Applicant is built and conducts its business and the way in which its competitors are built and conduct their businesses.

While Applicant agrees that this geographic area was correctly plotted, it would define the relevant markets to exclude its power needs from the wholesale market, and it would divide the retail market into two markets and two submarkets, the perimeters of which are determined by the presence of differing barriers to entry.

(1) The Geographic Scope of the Wholesale Power Market

Applicant contends that the relevant wholesale market should be defined to exclude those areas where it supplies bulk power

to its own vertically integrated distribution systems or, to state the matter the other way, to include only those orders where wholesale power is purchased by independent distribution systems.

The exclusion of Applicant's bulk power needs from the relevant wholesale market seriously underestimates Applicant's market power and results in a market definition which does not reflect the commercial realities of the marketplace.

To support its market definition, Applicant makes several arguments, all of which are unsound:

First, Applicant argues that the exclusion of its power requirements from the market is justified since it "plans its system in contemplation of generating almost all of its needs." (Brief for Applicant at 93) Factually, this argument is at odds with the testimony of Applicant's own economic witness, Joseph Pace. */ He stated on cross-examination that any "rational"

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*/ Q. The question is: If you had a generating business, would you ever be interested in buying other than firm power?

A. Oh, yes.

Q. All right, sir.
Now, if you were interested in buying emergency power, would firm power be substitutable for emergency power?

A. Well, again, my interest would be in getting a firm power supply to deliver to my customers. I would have to consider these things jointly. Economy power all by itself is of no value to me whatever. I have to combine non-firm sources and get myself a firm supply of power.

Now, all these power supply studies we look at in the industry constantly do this. They look at alternatives. And the alternative is not just isolation to consider will I have economy power, because having economy power is no good to me unless its combined so that I can come up with a firm product. And if I'm a rational supplier, it seems to me that one of the things I m going to consider is buying firm. (TR at 7558)

electric supplier considers wholesale firm power purchases. Since Applicant is a "rational" supplier, it does not, in fact, always generate "almost all of its needs." In 1973, for example, of a total power cost of approximately $205 million, purchased power amounted to over $69 million. (DJ #228A at E-16) Thus, in 1973 approximately 34% of Applicant's power needs (in terms of cost) came from sources other than its its own generation.

Even if it is assumed that Applicant does not consider making wholesale purchases, the holding of a recent U. S. Supreme Court case indicates that Applicant's requirements are properly included in the relevant market. Applicant's proposition -- that the wholesale needs of a vertically integrated firm which produces a substantial part of its own requirements are excluded from the relevant wholesale market in cases where such a firm is charged with monopolizing that wholesale market -- was specifically rejected by the U. S. Supreme Court in United States v. Greater Buffalo Press, 402 U.S. 549, 552 (1971). In passing on the legality of an acquisition made by a vertically integrated firm, the Court ruled that the wholesale "comics" requirements of the Greater Buffalo Press must be included in the relevant market even though it met those "comics" requirements through its printing operations. The holding in this case clearly rejects Applicant's reasoning.

Moreover, Applicant's reliance on the cases it cites as a basis for excluding its power requirements from the relevant market is misplaced. Applicant relies principally on the opinion of

the U. S. District Court in International Telephone and Telegraph Corp. v. General Telephone and Electronics Corp., 351 F. Supp. 1153 (D. Hawaii 1972). This case has now been overruled by the Ninth Circuit Court of Appeals on the grounds that, in ruling on the legality of a merger made by General Telephone and Electronics (GT&E), the District Court improperly excluded purchases of telephone equipment by the Bell System from the product market -- precisely the proposition for which Applicant cited the District Court opinion. See International Telephone and Telegraph v. General Telephone and Electronics, 1975 Trade Cas. (75-1, at 66,136, 66,149) ¶60,291 (9th Cir. 1975). Whatever the ultimate disposition of the above case regarding inclusion of the Bell System needs in the relevant market, it is irrelevant to the market definition problem in this case. The lower court found that the requirements of the Bell System should be excluded from the relevant market in which to judge the legality of the conduct of GT&E; it did not say that the requirements of the Bell System should be excluded from the relevant market in which to judge the legality of the conduct of the Bell System. Applicant also cites Elco Corp. v. Microdot, 360 F. Supp. 741, 747-8 (D. Del. 1973), a case which is not on point for the same reasons. In that merger case, the "in-house" production of companies other than those involved in the merger were excluded from the relevant market.

Applicant makes a second, equally erroneous argument: restrictions on the ability of its competitors to make bulk power

sales in areas now served by Applicant justify the exclusion of its power requirements from the relevant market. (Brief for Applicant at 93) While it is true that Michigan Cooperatives face limited federal restrictions on their ability to compete in the wholesale bulk power market, Michigan municipalities now do not. (See Reply Brief for Department, Appendix A at 6-12). */

Even if one accepts that smaller electric systems in Michigan face restrictions on their ability to engage in wholesale sales, case law does not support Applicant's legal contention that these restrictions justify two separate markets for antitrust analysis. In National Aviation Trades Ass'n. v. CAB, 420 F.2d 209, 214-5 (D.C. Cir., 1969), the court held that the relevant market in which to test contentions of monopolization included airports

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*/ Undaunted by the recent change in Michigan law which allows municipalities to market unlimited amounts of power at wholesale, Applicant makes another equally erroneous argument: insufficient time has elapsed since the passage of the legislation to permit alteration of existing commercial realities; therefore past rather than future trading patterns should dictate market definition. (Brief for Applicant at 95) To support this approach, Applicant cites United States v. Connecticut Bank, 418 U.S.656 (1974), a case where recent state legislation had expanded the competitive capabilities of an acquired firm. In that case, the Court found that, even with the legislative change, the acquired and acquiring firms were not in the same market since the acquired firm was still prohibited by state law from competing with the acquiring firm for the the most significant share of the market -- commercial checking accounts. It further found that future changes in the law were too speculative to consider in determining relevant markets. In Connecticut Bank, the Court found that competition was still severely limited. The Court never considered the novel theory advanced by Applicant that actual changes in the law, which significantly expand competitive possibilities, should not be taken into consideration. The Michigan law was in fact enacted; it has significantly expanded competitive possibilities; its passage is not speculative. The case in no way supports Applicant's argument.

of varying degrees of landing capability, even though some airports (sellers) could not serve those buyers in the market with high-performance airplanes which could not utilize the more limited facilities. In Pacific Engineering & Production Co. v. Kerr-McGee, 1974 Trade Cas. (74-1, at 96,737-8) ¶75,054 (D. Utah, 1974), the Court held that the chemicals produced by two manufacturers (sellers) were in competition, even though one producer was incapable of selling to many major consumers of the product.

Applicant's contention also must have necessarily been rejected by the Court in Greater Buffalo Press, supra. In that case, sellers who were handicapped because they could not as a practical matter sell "comics" to Greater Buffalo, a vertically-integrated firm which printed comics for its own use, were found to be in the same market as sellers whose ability to compete was not so limited.

(2) The Geographic Scope of the Relevant Retail Power Market

Applicant proposes the division of the relevant retail power market proposed by the Department into two geographic markets one of which has two submarkets. It is Applicant's contention that "various legal and attendant economic barriers which affect the choice of suppliers available to retail power purchasers" in different geographic areas of Applicant's service area, dictate two different markets. (Brief for Applicant at 97.) Applicant would propose an "open market" where competition is on a house-to-house basis and a "closed" market where franchises to serve have been

granted to an electric supplier. */ Since the "open market" is insignificant to an assessment of the competitive situation in Lower Michigan **/, we will concentrate our discussion on what Applicant misnames the "closed market," or what we will hereafter refer to as the "retail franchise" market. It is in the "retail franchise" market, where at least 95 percent of the relevant product is sold. Applicant would divide this market into two submarkets: (1) areas where the franchises are "perpetual" and (2) areas where the franchises are "long term." Applicant admits to having a 100 percent share in "perpetual' submarket and a 77 percent share of the "long term" market.

The Department does not believe that the legal and economic barriers to entry justify the creation of these two submarkets. However, this disagreement is a wholly academic one. Whether sales in the two retail franchise submarkets are aggregated or not, Applicant admits that it has a very high percentage of the sales in two relevant retail submarkets. Moreover, it agrees that market share percentages of this magnitude have in

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*/ While perpetual, or "Foote Act," franchises are unlimited in duration, they are not exclusive -- i.e., other suppliers could build their own distribution facilities and compete with Applicant for retail electric loads. Long-term franchises are exclusive for the period of the franchise, but at the end of the franchise term, the supplier must either sell his facilities to the supplier who is granted the new franchise, or remove them from the city. (Reply Brief for Department, Appendix A, at 8-20)

**/ Not more than five percent of the power sold in the retail market is sold in these areas. (Pace, PT at 27).

leading monopolization cases resulted in the inference of monopoly power. */ (Brief for Applicant at 137.)

Applicant's argument essentially is that legal and economic barriers to competition in cities where it has a franchise to serve are so formidible as to "negate any inference from a statistically high market share of undue strength in the market place." (Brief for Applicant at 138) This argument is unsound in several respects.

First, there are no legal barriers to the entry of municipal electric systems. **/ Subject to certain procedural prerequisites, Michigan municipalities have unlimited authority to compete with Applicant in franchised areas. If the electors approve, a municipality may enter the electric utility business by refusing to renew the franchise of the serving utility in long-term

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*/ Applicant cites several cases to support the proposition that "market share alone is insufficient to support a finding of monopoly power. These cited cases do not support this proposition. In Times Picayune Pub. Co. v. United States, 345 U.S. 594, 612 (1953), the Court was confronted with a market share of 40 percent, not 77 percent as in this case. It went on to consider whether other factors existed which would demonstrate the existence of monopoly power since the market share was not significant. Similarly in United States v. Columbia Steel Co., 334 U.S. 495, 528 (1948), the market share considered was only 33 percent. United States v. United Shoe Machinery, 110 F. Supp. 295, 343 (D. Mass. 1953) is simply not relevant. We know of no case where a market share of the magnitude of 77 percent has not resulted in an automatic inference of monopoly power.

**/ Applicant does not realy quarrel with this legal analysis. (See Brief for Applicant at 109.) Rather, it clouds the issue by concentrating on the legal barriers to entry which confront competing cooperatively-owned and privately-owned electric systems while stressing the unlikeliness rather than impossibility of municipal competition.

franchise cities, by duplicating the facilities of the serving utility and entering into competition with it in perpetual franchise cities, or by condemning the franchise and the facilities of the serving utility in either area. (See Reply Brief for the Department, Appendix A at 8-16.) Unlike the factual situation in United States v. Marine Bancorporation, 418 U.S. 602 (1974), a case Applicant heavily relies on to support its argument (Brief for Applicant at 140), Michigan State Law does not limit competition from municipalities. As the U. S. Supreme Court states in the Marine Bancorporation case, "If regulatory restraints are not determinative, courts should consider the factors that are pertinent to any potential competition case . . . . " 418 U.S. at 642.

Second, while economic barriers make entry more difficult in the electric power industry than in less capital-intensive industries, municipal entry is a real and vital competitive force in the market place. The commercial realities of the competitive threat posed to Applicant by potential municipal systems were confirmed by Applicant's chief executive officer, Alphonse Aymond, who testified that it was a definite possibility that municipal systems could form their own systems. When asked whether competitive pressures could force Applicant to sell its facilities to a municipal system, Mr. Aymond replied:

> A. (By Aymond) * * *
> Now one argument against our doing that is once we do that, that's an open invitation for every other municipality that we serve at retail to form their own municipal system.
>
> Q. Are you concerned with this possibility?

A. Yes, sir (TR at 6465-6466) (Emphasis added).

* * *

Q. That this could happen, meaning that your company will be forced to sell their [sic-your] facilities to them from the competitive pressures.

A. Well, there is a lag, of course. I mean, after all, between the time that a community organizes a municipal system and the time it gets started in the business and starts taking away customers, until the point when we see that we are going to have to sell out to them, that could take a period of a few years . . . . But it is definitely a possibility, and it could happen in certainly all of the larger communities and the cities that we serve. (TR at 6467-6468) (Emphasis added)

Unlike the fact situations in United States v. General Dynamics, 415 U.S. 486 (1974), United States v. Marine Bancorporation, supra, and Missouri Portland Cement v. Cargil, 498 F.2d 851 (2d Cir. 1974), cert. denied, ___ U.S. _____, cases on which Applicant relies, potential competitors in the "retail franchise" market are present and recognized by Applicant as a significant competitive threat. The U. S. Supreme Court ruled in General Dynamics and Marine Bancorporation that only where entry is hypothetical and extremely remote, may potential competition be so insignificant as not to merit the protection of the antitrust laws.

In the retail power market in the lower peninsula of Michigan, competition is an ever present threat to Applicant's

entrenched market position. Moreover, the possibilities for competition increase as the barriers to entry decrease. */ The Department demonstrated that many of the economic barriers to entry potential municipal electric systems face are not natural barriers to entry; rather these barriers are in large measure the consequence of Applicant's anticompetitive conduct. As we will demonstrate, Applicant has engaged in conduct designed to increase (vis-a-vis Applicant) the bulk power supply costs of its competitors. In doing so, Applicant has made the probability of new entry more remote. To accept Applicant's barrier-to-entry argument is to allow Applicant to interpose its own anticompetitive conduct as as a defense to a charge of monopolization.

The most glaring defect in Applicant's argument is that it ignores the U. S. Supreme Court decision in United States v. Otter Tail Power Company, 410 U.S. 366 (1973) -- the leading antitrust case involving the electric power industry. The Court in Otter Tail clearly rejected Applicant's argument; it inferred market power from a statistically high market share in a retail electric power market where the barriers to entry -- i.e. the municipality has to wait until the current franchise expires in order to enter the market -- were nearly identical to those found in Applicant's "long-term closed" sub-market. The only difference is that franchises in the Otter Tail case were for

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*/ This elementary proposition was confirmed by Applicant's economic witness. (TR at 7366-7367)

20-year term rather than 30-year term. Thirty percent (79 municipalities) of Applicant's franchises will expire over the next 10 years. (Brief for Applicant at 109) The U. S. Supreme Court concluded that competition for retail franchises between Otter Tail and potential municipal entrants merited the protection of the antitrust laws. Otter Tail was not allowed to interpose economic barriers to entry which resulted from its monopolization as a defense to an antitrust violation.

e. Applicant's Market Shares

Applicant's share of the wholesale firm bulk power market, as defined by the Department to include its own bulk power requirements, hovers around 85 percent; its share of the retail distribution firm market, as defined by the Department to include all retail sales, is approximately 84 percent. (Wein, PT at 71) Even as defined by Applicant, its share of sales in the "long-term closed" retail submarket is 77 percent and its share of sales in the "perpetually closed" market is 100 percent. Percentages of this magnitude "leave no doubt" that Applicant possesses monopoly power. See Grinnell, 384 U.S. at 571.

Furthermore, it should be noted that Applicant's predominant shares of the relevant market as well as its strategic dominance of the high-voltage transmission (discussed infra), is in substantial part the result of acquisitions by Applicant over a 60-year period of many separate, independent utility companies, both private and public. (Wein PT at 51-52; DJ #16 and #17 (rejected)) */

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*/ DJ #16 and #17, which further illustrate Applicant's past history, were erroneously rejected by the Hearing Board. The

(Footnote continued)

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proceeding before the Board was in the nature of a Sections 1 and 2 proceeding under the Sherman Act. In Section 2 cases courts invariably consider it necessary and important to have before it, at least in outline form, some history of the particular company involved, and some indication as to the movement of the industry of which the company is a part. See F.T.C. v. Cement Institute, 333 U.S. 683, 703-4 (1948); United Mine Workers v. Pennington, 381 U.S. 657, 670 n. 3 (1965).

In United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), the court found it necessary to discuss Alcoa's growth since 1888. In American Tobacco Co. v. United States, 328 U.S. 781 (1946), the statute of limitations precluded prosecution of the defendant for more than the 3-year period proceeding the filing of the information. But the Supreme Court said that "some appreciation of the history and development of the cigarette industry is essential to an understanding of the cases" (328 U.S. at 790) and discussed the dissolution of the old tobacco trust in 1911. In United States v. United Shoe Machinery, 110 F.2d 295 (D. Mass. 1953) aff'd per curiam 347 U.S. 521 (1954) the court found it essential to discuss transactions in 1899. In United States v. E. I. DuPont De Nemours & Co., 351 U.S. 377 (1956), concerning a 1947 complaint charging monopolization of cellophane, the Court set forth the factual background as far as 1900. In United States v. Grinnell Corp., 384 U.S. 563, 567-9 (1966), a proceeding based on a 1961 charge of monopolization, the Court found it necessary to discuss 1906 and 1907 agreements. The Courts have consistently allowed historical background evidence to be introduced because a monopolization does not commence on one particular date; it ordinarily is the result of market power acquired by a series of actions over a period of time which cummulatively give the monopolist his market power.

Therefore, we submit that the Hearing Board should have considered rejected DJ #16 and #17 for the sole purpose of having a historical understanding of the development of the "situation inconsistent with the antitrust laws," even though it may have chosen to disregard the same evidence in determining whether the activities under the license will maintain said situation.

2. Applicant Possesses Monopoly Power Flowing From Its Strategic Dominance in High Voltage Transmission

Where a company controls facilities which afford it a significant competitive advantage and which cannot practicably be duplicated by its competitors, monopoly power is imputed to the controlling company, and therefore that company cannot refuse to grant access to the "bottleneck" facility on reasonable terms without violating the antitrust laws. These facilities do not have to be "unique" or "essential"; it only need be shown that, without access to the facility, competitors of the company controlling the facility are at a significant disadvantage. (See supra, at II-B-4) This section demonstrates that Applicant's strategically dominant transmission is such a "bottleneck" facility. The Hearing Board, though its findings are somewhat confused, appeared to recognize that this is so as a factual matter. We will demonstrate, however, that certain subsidiary findings of the Board as to alternatives available to some of the small systems in Applicant's area are not well founded.

The record is clear that because of the geographical location of the smaller electric systems in Michigan and the attendant economics of transmission construction, Applicant's transmission network is an indispensible facility for both major (those involving the regional power exchange) and minor coordination (those solely between the small Michigan utilities) transactions. Only through this facility can smaller electric systems in Michigan economically coordinate with each other; only through

this facility can these systems interconnect with the regional power exchange where the more significant transactions in coordination services take place. Without access to both major and minor coordination transmissions, the smaller electric systems in Michigan are at a significant competitive disadvantage.

Applicant's massive 9,000 mile transmission network blankets the entire relevant retail and wholesale markets. The network includes over 1,400 circuit miles of 345 kv, 3,300 circuit miles of 138 kv, and 4,200 circuit miles of 46 kv (DJ #1, DJ #288A, at 6-21). Through this network, Applicant's generating stations are connected to its load and to large privately-owned neighboring utilities on its southern border (DJ #1). Additionally, Applicant takes advantage of Detroit Edison's (DE) transmission system. Through DE's systems, Applicant is interconnected to the Ontario Hydroelectric System; in exchange, Applicant provides DE access through its transmission system to electric companies on the southern border of Applicant's service area (American Electric Power, Toledo Edison Company, NIPSCO, Commonwealth Edison, etc.) (See DJ #72, #77, Int. #1005, at 64-66).

This high-voltage transmission network facilitates major coordination transactions between Applicant and other electric systems in the regional power exchange. Through sales, purchases and exchange of the various kinds of "coordination services," Applicant is able to install the most efficient large-scale generating units without the costly side-effects -- i.e., the maintenance of unreasonably high levels of reserve capacity and the

waste of that part of the capacity of these large-scale units which is not immediately needed to meet its system load (Mayben, TR 2565-2566, 2580, 2649-2654, 2735-2738).

A 1962 study prepared by Applicant attempted to quantify the cost savings available from major coordination; it indicates that Applicant's reserve requirements would decrease from 25% of peak load to 12.5% as a result of its entering into coordinating transactions with Detroit Edison, Ontario Hydro and the Illinois and Indiana systems, and that coordination with Ontario Hydro and the Illinois-Indiana systems alone would save Applicant $13,600,000 annually (DJ #65). A 1961 study estimated that the annual savings to Applicant from its interconnection with Detroit Edison at $16,924,000 per year (DJ #70, at 9). Applicant's vice president, W. Jack Mosley, testified that "the bulk power supply of Consumers Power Company is made available to its customers at a lower cost and with better reliability because of these interconnections than could be done under any other alternative" (Mosley, TR 8516) and, further, that "the reason we have [interconnections] are for two reasons: to enhance the stability and reliability of our system; and, as an economic thing to do in the development of our power supply" (Mosley, TR 8652).

Of particular relevance to this proceeding is the relationship of access to the regional power exchange to Applicant's ability to install the Midland Units. In 1964, Applicant's engineers noted that it would be necessary for Applicant to enter into larger third party interconnections before nuclear units

could be installed (Int. #1005, Deposition of Harry Wall, at 36-37; Lundberg, TR 9049; PT attachment J.R.L., at 1). */

In sharp contrast, the generation and transmission systems of some of the smaller electric systems in Michigan -- Northern Michigan REC, Wolverine REC, the City of Traverse City and the City of Grand Haven -- are interconnected with each other, but not to the regional power exchange. These systems have formed a small power pool called the Michigan Municipal Cooperative Power Pool (MC Pool, (Steinbrecher, TR 1112-1113, 1117). Associated with the pool are the Cities of Hart, Lowell, Zeeland and Portland, Michigan. They are interconnected through an 1,100 mile transmission system which operates principally at 44 kv or 69 kv (Shown in red on DJ #18). Upgrading of some of this transmission capacity to 138 kv, as well as construction over new rights-of-way, is planned (Steinbrecher, TR 1135, DJ #20). Since this system is comprised principally of lower voltage (44 kv and 69 kv transmission, it is sufficient only for small-scale coordination -- i.e., the movement of small blocks of power over short distances (Wolfe, TR 1712, 1727-29). These minor coordination transactions allow the MC Pool to install larger units than its members could on an isolated basis. However, it still cannot obtain the significant economies of scale available in the generation of electric power. The MC Pool's largest unit has a capacity of

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*/ Applicant, of course, as a technical matter, could "go it alone" by increasing its reserves to 40%, but this hardly seems feasible from an economic standpoint for a system of its size.

only 23 mw in output, */ compared to the Midland Unit No. 2, which has a capacity of 818 mw.

Other small electric systems in Michigan have very limited amounts of transmission: the City of Lansing has 27 miles of 138 kv transmission which ties its system together and interconnects it with Applicant; Alpena Power has 11 miles of 138 kv transmission which serves similar purposes, and certain other municipal systems have minimal transmission of 69 kv or below within their own areas. However, these other small systems are not interconnected with the MC Pool and as a practical matter, are unable to interconnect with the MC Pool without access to Applicant's transmission network.

In sum, Applicant has 98 percent of all high voltage transmission of 138 kv and above (including 100 percent of the extra-high voltage transmission); **/ it operates the only transmission network which covers the entire relevant market area and the only transmission network which is interconnected to other major bulk power supply systems which lie only on the southern and eastern borders of its service area. This control over transmission gives Applicant the power to block large neighboring utilities from dealing with smaller electric systems in Michigan, and the power to prevent these systems from dealing with each other. By virtue of its strategically dominant transmission network, Applicant has

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*/ DJ #14.

**/ Brief for the NRC Staff, at 53-54.

the market power to control the price of "coordination services," and the market power to exclude other sellers of these services from the marketplace. This power over the price of essential factors of production allows Applicant to dictate the alternatives which a small system will be able to consider in planning for its load growth. The use of this power to foreclose competition violates Section 2 of the Sherman Act.

Arthur Steinbrecher of Northern Michigan Cooperative, testifying on behalf of the MC Pool, explained the crucial impact of Applicant's transmission upon the bulk power supply costs of his system:

> Q. Are there any impediments, or have there been any impediments to programs of coordinated operation and planning by the Municipal Cooperative Pool?
>
> A. Yes, very serious impediments. I'm sure you all are aware of the geography of northern Michigan, where the area in which northern Michigan and the pool group operate, we are isolated to the east and west by water which is a very effective barrier to relationships, power supply -- power relationships with systems to the east or west.
>
> * * *
>
> Q. Do you have any opportunities for coordination other than -- or opportunities which do not require cooperation of Consumers Power Company? Perhaps you could refer to D.J. No. 1, which has already been received into evidence. It's the very first exhibit, which is the Federal Power Commission map of transmission facilities.
>
> A. Well, our problem there is one of economic feasibility to reach the system of the affiliate of

the American Electric Power Company, which has facilities in the southwest part of the lower peninsula, and to move substantial quantities of power would require very heavy investments in transmission facilities. That's likewise true with access to the facilities of the Detroit Edison Company operating in the southeast and eastern portion of the state.

Our access to other power suppliers, our economic access to other major suppliers, must be via the facilities of the Applicant. (TR 1217-12190 (Emphasis added)

Representatives of other small systems in Michigan also testified to the tremendous importance of Applicant's transmission as a means of achieving lower power costs through coordination both among the small systems and with large neighboring systems.

John Keen, Manager of Wolverine Electric Cooperative, a member of the MC Pool, testified that his systems could not engage in major or minor coordination transactions without access to Applicant's transmission system:

Q. Now, why do you feel that access to wheeling services from the Consumers Power Company is necessary to your system -- and when I say "your system," I refer to the Wolverine Electric System, sir?

A. For several reasons: one is to eliminate wherever possible duplication of transmission facilities.

Number two, to be able to make purchase and sale arrangements, economy power, and so forth, with other utilities, other than Wolverine itself and Consumers Power, itself, perhaps.

Q. Is access to Consumers Power wheeling service an important element of either present-day or future coordination attempts by your system?

A. Very much so.

A. Well, certainly, we'd be able to, if we had -- this is the primary problem of the small group that we have Daverman doing is: if we do get together and plan load growth in Northern Michigan, how do we get the power to the ultimate consumer, not having any transmission service at this time?

So, if we did have access, we would have the alternative of going in with a group of smaller utilities or, I suppose, if we actually had true honest-to-gosh wheeling services, that we could go to Detroit Edison, I & M, anybody, and ask them for wholesale power (TR 4333-4334; emphasis added).

Similarly, Harold Munn, president of the Coldwater Board of Public Utilities, which is located in the far southern part of the relevant market area and which is not interconnected with other small systems in Michigan, */ testified to the necessity of transmission access in order to achieve coordination among the smaller electric systems of Michigan.

Q. One of the proposed license conditions submitted by the Joint Intervenors in this proceeding is wheeling or transmission services over Applicant's transmission network. Is the inclusion of this provision important to the City of Coldwater?

A. Oh, I consider transmission vital to our future operation (TR 4073).

* * *

. . . . Wheeling is important because it would enable us to deal in the marketplace for blocks of energy. For example, wheeling would permit us to go to utility systems that are interconnected with Consumers Power at this time such as -- I believe there is some means of interconnection between Indiana-Michigan and Consumers, and certainly with Detroit Edison and through Detroit Edison to Ontario Hydro. There is interconnection with the City of Lansing;

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*/ On DJ #18 Coldwater is shown by the number 24 in a black circle

there is interconnection with the City of Holland. There are certain of these plants which have excess capacity.

We would like to contract for a block of that energy.

CHAIRMAN GARFINKEL: Mr. Munn, in order to expand on your answer, how would it help you, this extra wheeling?

THE WITNESS: Because we believe we would be able to purchase in the marketplace at a lower unit cost, and even after paying a compensatory amount for the wheeling, that the energy would cost us less delivered at Coldwater (TR 4073-4074).

* * *

Q. Would it be economically feasible for the City of Coldwater to enter into such joint arrangements as construction of a joint nuclear facility or a jointly owned steam facility with any other system, other than Consumers Power Company, absent wheeling over the Consumers Power Company network?

A. Well, in my opinion, based on the data that I have seen, it would not be feasible for us. We have to get the wheeling over the transmission network that exists (TR 4075).

Earl Brush, general manager of the Lansing Board of Water and Light, which is not interconnected with the MC Pool, testified as to the importance of Applicant's transmission network to that city's bulk power expansion program:

Q. . . . Is there any form of power exchange service that might be available from this case that would be of use to the City of Lansing in connection with the bulk power supply expansion program?

A. Well, as I understand the case, there is a question of wheeling.

Q. Yes, sir.

A. If the City of Lansing is to ever participate in nuclear power we are going to have to have the benefits of wheeling.

The municipals -- We are too small, as an individual municipal system, to build a nuclear plant. Our information is that 500 mw and up, or maybe 500 mw is the smallest size that is economical to consider. With out load we could not afford to build, or justify building that large a unit.

Our effort in the nuclear field is to work with some presumably investor-owned utility to own a share; and we have so asked Consumers to consider us in their Quanicassee plant, in writing. Part of that request was wheeling, part of the request was an operating agreement covering the jointly owned facilities. So we, as well as the rest of the municipals, to ever participate in nuclear power, are going to have to have wheeling arrangements. Otherwise it's going to pass us by (TR 2292-2293).

* * *

Q. Mr. Brush, does the [Stanley Engineers] study include purchases from parties other than Consumers as an alternative?

A. No, sir, it does not, because we have no contractual arrangements with anyone else.

Q. Why didn't you have any contractual arrangements with anyone else?

A. Well, we butt up against Consumers Power in our service area --

. . . . The nearest transmission line to us of another generating utility is some 15 miles due west of us. It's the Wolverine G&T. And Detroit Edison is a considerable distance from us, and we have no wheeling capacity at the present time to interconnect with anybody else. (TR 2333-2334)

Joseph Wolfe, former manager of the Traverse City municipal utility which is located in the northwestern part of the market area and which is interconnected with the MC Pool, described the competitive disadvantages under which a system which does not have access to the regional power exchange operates:

Q. . . . Mr. Wolfe, you previously testified that one of the alternatives that you considered for

planning your load growth while you were director of power and light at Traverse City was purchasing power from sources other than Consumers Power. Is that correct, sir?

A. Yes, sir.

Q. From whom did you consider purchasing power?

A. It was considered, but not in a formal way, purchasing power from Indiana-Michigan Electric, who had wholesale rates that were less than Consumers Power Company.

It was considered purchasing power from the City of Lansing, who had power available.

It was considered to purchase power from Detroit Edison, perhaps other. But when I say considered, this was not done in any active way because of the immense hurdles that would have had to have been overcome to actually realize such a purchase.

In other words, we evaluated all the impediments and decided that they were too great to overcome.

Q. Could you explain to me what these impediments consisted of?

A. Any viable or any reasonable way of delivering this power to Traverse City from a remote source would have to come over somebody else's transmission system. The transmission system of the cooperatives might have been useful for this purpose, but only insofar as it was capable of handling these power deliveries, and its system was not designed during that period of time to handle any larger power transfers than what it probably would reasonably -- would reasonably need for itself. So that that would mean that either very large transmission facilities would be involved to upgrade the cooperative's transmission system or the transmission system of Consumers Power Company would have to be utilized. And this did not appear to be a method which could be accomplished due to the expressed attitude of Consumers Power Company during negotiations and discussions that were held with them (TR 1726-1728).

Q. When you were in Traverse City, Mr. Wolfe, and in planning your system growth, why didn't you

consider building your own high voltage transmission system so you could take advantage of the third party alternatives?

A. The third party alternatives were so far away that the cost of building transmission facilities would have been prohibitive (TR 1729).

William Mayben, an expert witness testifying on behalf of the Department, confirmed the views of these smaller electric system representatives that securing access to Applicant's transmission network is "essential." Mayben testified on the basis of many studies he had conducted in other parts of the country, that the MC Pool could not economically build facilities to interconnect with the regional power exchange:

Q. Have you ever represented a small utility bargaining for coordination with a large utility, where the latter utility had ownership of much or all of the transmission lines, the high voltage transmission lines, the high voltage transmission lines surrounding the area of the small utility?

A. Yes, I have.

Q. I see.

And did that factor have any effect on the bargaining?

A. Well, definitely the first step is to gain the ability to utilize the intervening transmission system, and that was the first item of negotiation. Prior to that, it was rather useless to go to the other utilities who might be in the regional market and seek a source, because without a way to move it to a particular utility -- and again in the instance I'm citing, it was just not economically or technically feasible to construct the kinds of facilities necessary to interconnect that system.

Q. On the map it shows Lake Michigan and Lake Huron surrounding the lower peninsula. Would these bodies of water, the presence of these bodies of

water, have any effect on opportunities for coordination?

A. Well, yes, in my judgment, it would mean that coordination of a small system who might be in the center of the lower peninsula would really have to be sought with utilities who are to the south. These bodies of water constitute a natural barrier to transmission line, except for those which cross at, I believe it is, the Mackinaw Straits, if I recall my geography.

Really, the principal coordination opportunities are to the south -- excuse me -- possible to the east with Ontario Hydro also (Mayben, TR 2769-2770).

Mr. Mayben also explained the competitive handicap under which a system unable to reach the regional power exchange operates:

Q. In your view would it be possible for the MC Pool to utilize nuclear power generating units without access to a regional power exchange?

A. Well, again, Mr. Brand, I have not studied the MC Pool's power supply progress. I only have a brief familiarity with what their load level is and what generating units are in service, but my judgment is they just are not sufficiently sized, nor do they have sufficient existing generation to expect to install the kind of nuclear capacity which is feasible and yet plan to maintain reliable service at a low cost without coordination (Mayben, TR 2771).

On cross-examination, Mr. Mayben elaborated upon this point:

Mr. Ross, maybe I can answer your question with a certain qualification. I believe your question was what forms of coordination would be required for this intervenor group [M-C Pool, Holland, Coldwater and Lansing] to be able to install a 500 [mw power plant], and I won't pass any judgments with regard to whether or not 500 is an appropriate level or not.

But again, one of the forms would have to be reserve sharing and mutual support, not only among

themselves but with the regional utilities to which they could effect interconnections.

Again, with a unit that large, coordinated maintenance scheduling and maintenance service would be important. I think when units get that large, certainly economy energy transactions would be a form of coordinated operation that I would like to see because they may have some substantial low-cost energy-producing capability.

Finally, transmission service would be essential because of the way in which this particular group is strung out. It would be depending upon interconnections to the company of the various individual utilities in order to be able to transmit the power that would be produced from this 500-megawatt unit (Mayben, TR 3700-3701).

* * *

Again, I frankly look at Consumers as a regional exchange in itself. It's got an extensive transmission system, it's got extensive power generation facilities, and it is an exchange market, so to speak, and therefore the services to be supplied under the various supplements that you quoted from [D.J. #] 105, or cited from 105, could be supplied from Consumers alone.

However, that does not constitute complete access to the regional exchange market. Complete access to the regional exchange market requires that the MC Pool be able to , in fact, schedule directly from these other utilities, not just from Consumers.

And in order to have complete access, they do have to have the right, the ability to use the Consumers transmission system to carry the power and energy that they may schedule from Indiana and Michigan Electric Company, through the Consumers system to the MC Pool. (Mayben, TR 3709)

Professor Wein, the Department's expert economist, also outlined the deleterious effects on smaller systems of their being denied access to the regional power exchange as follows:

In my opinion, access to the pool enhanced the competitive ability of both CPCO and DE to compete

> in both the retail and wholesale markets in which each company operates; conversely, the inability of other electric utility firms to gain access on the same terms governing CPCO and DE severely limited the ability of these firms to compete with CPCO and DE, and further weakened their very ability to continue to generate power to supply the markets in which they distribute electricity . . . . These results flow from the fundamental consequence of "pool" operation, which is to lower the total cost per KWH in the generation of electric power.
>
> * * *
>
> The consequences for small electric utilities are not difficult to see. If they cannot engage in the bulk energy exchange market -- if, in short, access to pools and coordination is denied them on equal and equitable terms, they will fall further behind in the competitive struggle . . . . The gap between their costs and those of the larger companies will grow. (Wein, PT, at 60, 65)

That such a "gap" exists is suggested by Applicant's own study of the wholesale firm power supply market, as it defined it. This study showed that Applicant's market share doubled from 12% to 24% in the period since 1960. (Pace, TR 7421) Also, at least two municipals (Petoskey and Charlevoix) abandoned self-generation; during this period, none entered (Westenbroek, TR 953-54, 956-57).

The dollar value of the handicap under which the smaller systems operate by being denied access to the regional power exchange was demonstrated in the Illustrative Power Cost Studies of Samuel J. Helfman. The Department's expert engineering witness (DJ #200, #201, #202), Mr. Helfman concluded that access to the full line coordination services at reasonable prices would result in "substantially lower power supply expansion costs for the MC Pool, Holland and Coldwater." (Helfman, PT, at 35).

The sum and substance of this testimony is that without access to Applicant's transmission network, smaller electric systems cannot fully coordinate among themselves, nor can they reach coordinating partners to the south or east of Applicant. Consequently, they are at a significant competitive disadvantage vis-a-vis Applicant, who can take full advantage of the benefits of coordination.

The Hearing Board found that the "bottleneck" theory of monopolization applied only to jointly owned facilities. This erroneous legal assumption may explain why the Hearing Board's findings are so confusing as to the factual question of whether Applicant's transmission network is a "bottleneck."

First, it found that Applicant's transmission network is indispensible to engaging in major coordination transactions in the regional power exchange:

> Most of the smaller utilities in the relevant geographic market are too remote from such power sources to make such purchases unless they are able to obtain wheeling services from Applicant (ID, at 164). */

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*/ The Hearing Board in this quote is specifically talking about the feasibility of smaller systems making wholesale power purchases in the regional power exchange without access to Applicant's transmission network. It never addresses itself to the question of the feasibility of smaller systems engaging in coordination services transactions in the regional power exchange without access to Applicant's transmission. The geography, however, is the same whether wholesale purchases are made or coordination transactions are made. The evidence is clear that the smaller systems in Michigan want to purchase coordination services in the regional power exchange (Steinbrecher, TR at 4511; also, Munn TR at 4073-4074; Brush, TR at 2292-2293).

Secondly, it found that while these smaller systems must engage in minor coordination transactions to compete effectively, Applicant's transmission network is not indispensible to these transactions since it would be economically feasible for these systems to build their own interconnecting transmission network and, in fact, they are building such a transmission system (ID at 138, 140).

The Hearing Board's first finding supports the proposition that Applicant's transmission netowrk is, as a factual matter, a "bottleneck" facility for major coordination transactions -- i.e., transactions in the regional power exchange from which significant cost saving in generation can be achieved.

The Hearing Board's second finding -- i.e., that it is economically feasible for the smaller systems to build their own interconnecting transmission -- is factually erroneous, but more importantly, it is of little significance. As the testimony cited above demonstrates, coordination among the smaller systems is not an alternative to participation in the regional power exchange. The cost savings achievable through minor coordination are simply not of the same magnitude as those available from major coordination transactions in the regional power exchange.

In any event, the Hearing Board's second finding is clearly contradicted by the record. The finding is based on the the following evidence: (1) the transmission network is not "deemed" by the smaller systems in Michigan to be a "unique" facility, indispensable to coordination among the smaller systems, and

(2) the construction of duplicative transmission by these systems is a realistic, possibly less costly, alternative to wheeling (ID at 140).

To support the first finding, it cites the "demeanor of the witness [Steinbrecher]," who "gave the impression of being satisfied with the plans of the MC Pool to have its own transmission" and the proposed construction by the MC Pool of 138 kv transmission (ID at 140). Although we cannot disprove the "impression" garnered by the Hearing Board from the "demeanor" of Mr. Steinbrecher, it certainly is contradicted by his actual testimony (supra, at), as well as the testimony of every other system manager.

The Hearing Board further cites the program of the MC Pool to build its own transmission as evidence that Applicant's transmission is not deemed a "unique facility." The fact that the MC Pool is constructing a 138 kv transmission network indicates only that the MC Pool, denied access to Applicant's transmission, has been forced to build duplicative, inefficient transmission or lose even the limited coordination benefits available from intrapool transactions. The MC Pool's transmission network is located principally along the western and northern portions of the lower peninsula of Michigan. It is isolated on three sides by water (Lake Michigan and Lake Huron). */ Even assuming that the

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*/ A cable, with only a 30 mw capacity, across the Straits of Mackinaw connects, electrically, the upper and lower peninsula of Michigan. Thic cable is owned by Edison Sault Electric Company (Kline, TR 4447, 4449).

MC Pool's proposed 138 kv transmission system is adequate for current intra-pool transactions, it provides the MC Pool with no access to other small electric systems in Michigan -- e.g., the Cities of Lansing, Coldwater, Holland and Alpena Power Company -- and no access to large neighboring electric systems -- i.e., the regional power exchange (See DJ #197, at 3; Mayben, TR 2743; Wein, PT, at 54-55).

Moreover, the Hearing Board's finding that the MC Pool's transmission is adequate for its needs and, therefore, Applicant's system is not a "unique facility" reflects a misunderstanding of the principle declaredy by if the U. S. Supreme Court in United States v. Terminal RR, supra. In holding that the bridge across the Mississippi River was a "unique facility," the Court did not consider whether the railroads excluded from use of the St. Louis facility owned or controlled track in other parts of the United States. In short, the adequacy or inadequacy of the MC Pool's transmission network for intra-pool transactions is immaterial. The MC Pool transmission network makes possible only limited types of coordination transaction --interconnection with other small electric systems in Michigan, and, more importantly, the regional power exchange, remains impossible.

The Hearing Board's finding as to the feasibility of the construction of duplicative transmission network is clearly contradicted by the record. The cost of constructing high-voltage transmission lines is prohibitively expensive for most municipals, cooperatives, and small investor-owned utilities (Fletcher, TR

4282, 4284; Wolfe, TR 1732; Gutman, PT, at 29). A 138 kv transmission line would cost between $25,000 and $30,000 per mile and costs increase tremendously as the voltage levels increase (Mayben, TR 2816). Assuming that the Hearing Board has correctly estimated the distances from the City of Holland and the City of Lansing to the MC Pool's proposed 138 kv line, the cost of building adequate transmission facilities to interconnect these cities with the MC Pool is about $800,000 */ not including right-of-ways, if they could be obtained. The cost of constructing a line from Coldwater to the MC Pool -- a distance of over a hundred miles -- would exceed $2 million. **/ Moreover, the environmental harm and economic waste caused by the duplication of facilities simply is not in the public interest (Brush, TR 2336; Munn, TR 4141; Wolfe, TR 1732, 1733).

In the face of this substantial evidence as to the prohibitive costs of constructing duplicative transmission, the Hearing Board somehow concludes that it [wheeling] could be more expensive" (ID at 140) and that therefore smaller electric systems in Michigan should build their own systems (ID at 140). This conclusion is based on a serious misinterpretation of a response by Mr. Brush to a question based upon a hypothetical that Applicant would have to build entirely new facilities, rather than simply

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*/ $25,000 x 32 miles.

**/ The City of Coldwater, a system which maintains a high level of reserves, is completely ignored in the Hearing Board's analysis. (DJ #14)

increasing the capacity of a line or make available existing capacity, to accommodate wheeling requests. Mr. Brush was asked:

> Q. And is it not a fact that assuming -- I'm asking you to assume that Consumers' system was so configurated that it simply did not have the excess capacity to provide the wheeling service which you or someone else might seek or the MC Pool might seek; that, given your financing advantages, it is quite conceivable that a large municipal utility could build the incremental or additional facilities cheaper than Consumers could, and therefore, it might be in your best interests to do so on that assumption?
>
> MR. BRAND: -- If I might inquire * * * as to the meaning of the incremental facilities? Would that be the facilities necessary to join to Consumers Power Company system to accommodate the transaction? Or by "incremental facilities" do you mean a completely separate set of facilities to be built by Lansing?
>
> MR. ROSS: It could be either, depending on the problem and the configuration.
>
> * * *
>
> Q. Is it not a fact that it might be cheaper, given your financing advantage, for you to build than for you to pay whatever appropriate carrying charges there would be if Consumers built?
>
> A. I would agree that our fixed charges on investments would be less than Consumers' but there might also be the possibility that Consumers can incrementally increase the capacity of a programmed line and make it larger, to provide wheeling for less total dollar cost, capital-wise, than it would cost the Board of Water and Light to build the same facility from one point to the other.
>
> MR. CLARK: Mr. Brush, I don't understand that he answered his question. He didn't ask you would it necessarily be cheaper for you to build your own line, but he said could it be cheaper?
>
> THE WITNESS: I would agree that conceivably we could build it cheaper. I tried to qualify it, your Honor that conceivably they could incrementally increase a line and build it cheaper.

MR. ROSS: Thank you, sir. (Brush, TR 2425-2427).

All that the above exchange indicates is that under some circumstances (lack of capacity on Applicant's system) construction of transmission facilities by a municipality could conceivably be less expensive than wheeling due to the cheaper cost of money to municipals. Note, however, there has been no contention in this proceeding that Applicant lacks transmission capacity or would be unable to incrementally increase its transmission capacity in in order to accommodate wheeling requests. Applicant's general policy of refusing to wheel is based on competitive considerations, not engineering considerations.

As the above discussion makes clear, Applicant's transmission network is a "bottleneck" facility access to which is essential if coordination among Michigan's small electric systems and between these systems and the regional power exchange is to occur. Without coordination, the competitive viability of Applicant's competitors is seriously endangered. Monopoly power should be imputed to Applicant by virtue of its control over a strategically dominant facility.

D. Applicant Has Exercised Its Monopoly Power

Although it is error to view each of Applicant's activities in isolation, divorced from all its other conduct (see supra at II-A-1, II-B-2), for purposes of this section of the brief we will analyze the reasonableness of each element of Applicant's monopolization spearately. Such an approach will underscore the consistently unreasonable and illegal course of conduct Applicant has pursued in its dealings with the smaller electric systems in the relevant markets. Much of this conduct is illegal, even when viewed in isolation. The aggregate of this conduct conclusively demonstrates that Applicant has pursued a course of conduct which has maintained its monopoly position in the relevant markets and that it has done so with monopolistic purpose and intent. The Hearing Board's conclusion that Applicant is not responsible for any "situation inconsistent with the antitrust laws" cannot stand.

1. Outright Refusals to Coordinate and Refusals to Coordinate Except on Unreasonable and Discriminatory Terms.

The Hearing Board found correctly that Applicant has the power to deny both voluntary operational coordination (ID at 129) and voluntary developmental coordination (ID at 148) to smaller utilities in lower Michigan. It went on to find erroneously, however, that Applicant had never refused operational coordination with a smaller utility in lower Michigan and, thus, that Applicant had never used its power in an anticompetitive fashion (ID at 133). It was able to make these latter findings only by dismissing many of the small systems' requests for coordination as inappropriately made, and thus appropriately rejected by Applicant, and by

finding the terms of the discriminatory and unreasonable interconnection agreements which Applicant has entered into with certain small systems to be reasonable and nondiscriminatory.

In this section, we will review the record evidence regarding Applicant's response to the small systems' requests for coordination. This review will show that Applicant, when confronted with a request by a small system in Michigan to coordinate and share reserves has consistently and inevitably responded in one of three ways. First, it would outrightly refuse to enter into any such coordination agreement and would instead offer the requesting system either a wholesale power agreement containing a ratchet demand provision, under which applicant, not the requesting system, would generate power and energy for the small system's requirements. Second, it would respond to a request for coordination and reserve sharing with an offer to purchase or lease the requesting system. And third, if either of the first two courses of action failed or were viewed by Applicant as likely to fail, it would offer coordination and reserve sharing on terms under which it, Applicant, would obtain the majority of the benefits flowing from such an arrangement.

a. The Net Benefit Standard Excludes Consideration of Potential Losses Due to Increased Competition in Other Markets

The basic and altogether erroneous ground of the Hearing Board's findings regarding coordination was that the coordination requested was not feasible because Applicant believed, justifiably in the Board's view, that it would not have obtained net benefits as a result (ID at 131). The Department agrees

with the Hearing Board that Applicant (even assuming its monopoly power) is not obligated to coordinate with small systems where the coordinating transactions would result in no net benefit or in a net detriment to Applicant. */

Net benefit (and no net detriment) necessarily results whenever the cost (including a reasonable return on investment, i.e., profit) is recovered from any given coordinating transaction. In determining whether a net benefit is obtainable from a proposed coordinating transaction, it is clearly inappropriate to weigh in the balance any potential loss of revenue to the Applicant that may result because the small system, once afforded coordination, would thereafter purchase less wholesale firm power, or because the small system might obtain a lower cost power supply through coordination and then compete more vigorously for wholesale and retail customers of the Applicant. Incorporating these considerations into the net benefit computation would be a gross misuse of monopoly power over transmission designed to preserve wholesale and retail market positions. Yet this is apparently what Applicant has done and would

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*/ The Hearing Board appears to use somewhat interchangeably the concepts of "net benefit" and "[absence of] net detriment" in developing its "legal concept" of coordination and applying that concept to the facts of the case. For example, it first stated: "Applicant has no obligation to enter coordination agreeemnts from which no net benefit to it results: A net benfit must result." (ID at 71-72) Next it concluded that Applicant is forbidden to enter coordination agreements which its management believes will result in a net detriment to it (ID at 72). Then, in applying its "concept," the Board found that Applicant's management had a duty to refuse the small systems' requests because "[net] benefits to both parties would not have been obtained." (ID at 131)

propose to do hereafter, absent appropriate license conditions. Its president, Mr. Aymond, testified that Applicant, even under its "new" policy announced at hearing would condition its willingness to coordinate transmission as follows:

> A. The following three [conditions] come to mind:
>
> One, that we have the physical capability on our existing or projected transmission grid to provide the desired service without impairing service to our existing and projected loads of commitments or endangering our system reliability.
>
> Two, that we be properly compensated for this service. Proper compensation means that we recover our costs, measured by proper allocation of average system transmission costs, so that our other customers do not subsidize the wheeling customer.
>
> Three, that provision of bulk power wheeling service will not result in a significant loss to Consumers Power, directly or indirectly, of existing load or service areas, with resulting idle facilities and social waste. Aymond, Tr. at 6050 (emphasis added). See also Aymond, Tr. at 6099-6100.

His testimony on deposition was in a similar vein:

> Q. Assume that Ohio Power or Buckeye Power or Ontario Hydro or some other entity were willing to sell power to a municipality within your service territory, would you sell transmission services to get the power there?
>
> A. The matter has never come up and I think I would want to know more of the details of the transaction.
>
> * * *
>
> I would want to know, for one thing, whether or not our lawyers felt we were obligated to do so. For another, I would want to know for what purpose the power was being sold and at what rate . . . what the receiving utility intended to do with it, what impact it would have in the long run on the ability of Consumers Power

Company to maintain its present markets.

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

A. I think that would be a factor.

Q. A large factor?

A. I think so.

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

A. . . . . I think whether the receiving utility actually was going to use it to invade our present market area would be a factor.

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

A. Well, start taking away our customers which we have invested a great deal of money in order to serve them. Int. No. 1004, pp. 183-184. (Emphasis added)

Thus, Mr. Aymond would insist not only upon recovery of Applicant's costs (presumably including a reasonable return) from a transmission coordination transaction but also upon the maintenance of Applicant's position in other markets. Such a standard for determining "net benefit" cannot be sanctioned by this Commission.

In a proceeding concerning the licensing of Louisiana Power & Light Company's Waterford Unit No. 3, a hearing was held before an Atomic Safety and Licensing Board wherein it was assumed arguendo that activities under the Waterford license would create or maintain a situation inconsistent with

the antitrust laws and the sole issue was whether or not commitments already accepted by Louisiana Power & Light, the Applicant, would afford adequate relief. After the hearing, the Waterford Board wrote a memorandum setting forth its views with respect to an adequate or appropriate set of license conditions based upon Louisiana Power & Light's commitments, and with explanations as to wherein the Board's conditions differed from the Applicant's commitments. */ Louisiana Power & Light had committed itself to interconnect and share reserves, purchase or sell unit power or deficiency power, offer access to Waterford Unit No. 3 and subsequent nuclear units to be installed by the Applicant, deliver nuclear power from those units, transmit power over its facilities among entities with which it is or may be interconnected, and plan and construct sufficient transmission to accommodate future such transactions -- all on terms providing for Louisiana Power & Light's recovery of its "cost" or "costs" for the transactions. The Waterford Board found it appropriate to add a license condition defining "cost" as follows:

> b. "Cost" means any operating and maintenance expenses involved together with any ownership costs which are reasonably allocable to the transaction consistent with power pooling practices (where applicable). No value shall be included for loss of revenues from sale of power at wholesale or retail by one party to a customer which another party might otherwise serve. Cost shall include a reasonable return on the Company investment. The sale of a

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*/ Louisiana Power & Light Company (Waterford Steam Electric Generating Station, Unit No. 3), Memorandum of Board (AEC) with Respect to Appropriate License Conditions Which Should be Attached to Construction Permit Assuming Arguendo a Situation Inconsistent with the Antitrust Laws (October 24, 1974).

> portion of the capacity of a generating unit shall be upon the basis of a rate that will recover to the seller the pro rata part of the fixed costs and operating and maintenance expenses of the unit, provided that, in circumstances in which the Company and one or more entities in Louisiana take an undivided interest in a unit in fee, construction costs and operation and maintenance expenses shall be paid pro rata (emphasis added).

Thus the Waterford Board expressly recognized the impropriety of permitting an applicant to escape an obligation to coordinate reasonably with small systems by weighing in the net benefit balance the possible loss of wholesale and retail market revenues that may eventuate from the coordination. That Applicant may find it more profitable to keep its wholesale and retail customers captive does not justify misuse of its monopoly power by denying access to coordination.

b. Applicant's Refusals to Coordinate Were Unreasonable: the Hearing Board's Findings of No Net Benefit Were Erroneous

Insofar as the Hearing Board's findings may be premised on a concept that Applicant's refusals to coordinate were proper simply because its management had concluded Applicant would not benefit from the coordination requested, we believe they are patently erroneous. */ Clearly a mere subjective determination of the absence of net benefit by Applicant, given its monopoly power and its policies as expressed by Mr. Aymond, cannot excuse

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*/ The Hearing Board appears to indicate that such a subjective test would be apprpriate (ID at 72).

its refusals to deal. */

At bottom, we understand the Hearing Board to rely substantially in excusing Applicant's refusals to coordinate on the Board's own findings that the small systems' proposed coordination with Applicant did not promise net benefits to the Applicant. We believe these findings to be entirely unsupported by the evidence.

(1) Applicant's Refusal to Coordinate with Northern Michigan and Wolverine Cooperatives in 1964

Efforts by the Northern Michigan and Wolverine electric cooperatives to obtain a coordination arrangement (including reserve sharing) with Applicant began in the mid-1960's. A November 13, 1963 memorandum by A. J. Hodge, an employee of Daverman Associates, the cooperatives' engineering consultant, outlined the proposed basis for negotiations with Applicant. First on the list was an interchange agreement described as a

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*/ In all of the cases cited by Applicant in its post-hearing brief for the proposition that required dealings may be conditioned on reasonable criteria (Brief for Applicant at 183-184), the tribunal made its own objective determination of the reasonableness, intent and effect on competition of challenged refusals to deal. In none of these cases did it defer to the business judgment of the refusers. Zuckerman v. Young, 362 F. Supp. 858 (N.D. Ill. 1973), the case quoted from by Applicant allegedly for this latter point, dealt with the question of possible antitrust exemption, because of regulation under the Securities Exchange Act of 1934, for a stock exchange's membership rules and their application by an exchange committee in deciding, after an evidentiary hearing, to deny a broker membership. The court denied summary judgment for the exchange and other defendants noting that it would have to determine whether the charges against the requested broker, if true, would justify anticompetitive restrictions on membership in light of the purposes of the Exchange Act, so as to warrant exemption from antitrust sanction. The Court termed the matter of whether or not procedural due process was applied in the exchange committee's hearing merely a "threshold question" in this determination. The decision does not stand for the broad point argued by the Applicant.

"typical interutility agreement designed about the circumstances of the Cooperatives and Consumers Power Company." The memorandum went on to set out basic concepts for an agreement including the key point "[t]hat the negotiations would be between utilities; the relationship would not be a 'company-customer' one." (DJ #32) Shortly thereafter, on December 27, 1963, Mr. Daverman of Daverman Associates, wrote B. G. Campbell, vice president of Applicant, requesting alternative power supply proposals for the cooperatives from Applicant. (DJ #32) A memorandum prepared by Daverman recording a January 20, 1964 meeting with representatives of Applicant states in part, "Balfour stated that CPCo [Applicant] was interested in assuming all future load growth of cooperative." (DJ #35 at 2)

In further negotiations with the cooperatives, Applicant continued to express its objective of supplying all of Northern Michigan and Wolverine's power requirements for load growth rather than coordinating with them in expanding self-generation to meet that load growth. Mr. Hodge's March 20, 1964 memorandum of a meeting with Applicant's representatives states in part:

> Mr Campbell opened the meeting with generalities to the effect that Consumers was not interested in short-term stand-by arrangements (such as the present Alba contract), that Consumers wanted to obtain all of the Cooperatives' future load growth and that Consumers would like some sort of policy expression from the Cooperatives as to their intended future relations with Consumers. (DJ #26)

On April 21, 1964 Applicant submitted a proposal to sell wholesale firm power to the cooperatives (a company-customer re-

lationship) rather than to arrange reserve sharing. (DJ #37) In connection with this offer, Applicant underscored its willingness to assume all or any part of the power requirements of the cooperatives: "We wish to emphasize, as we have on many occasions in the past, that we are willing to serve all or any part of their [the cooperatives'] power requirements." (DJ #37) In a May 8, 1964 letter to Applicant, Mr. Daverman made clear that Applicant's firm power proposal was not responsive to the cooperatives' needs:

> Northern Michigan Cooperative and Wolverine Electric Cooperative, as established power suppliers, feel strongly that an effort should be made to consider the possibility of some form of an interchange agreement based upon the general principles of power pooling, possibly along the lines of your present agreement with the Detroit Edison Company or following the patterns of pooling agreements which have been developed in recent years in other states. (DJ #38)

On May 27, 1964 Applicant met with the cooperative to discuss its April 21, 1964 proposal and the cooperatives' response thereto. At this meeting, Applicant once again rebuffed the cooperatives' efforts to negotiate a reserve-sharing arrangement. DJ #39, a memorandum of Mr. Robert Davearman which records that meeting reflects, on page 2, statements by B. G. Campbell, then Applicant's marketing vice president, that Applicant was "definitely not interested in entering into such agreements with any small companies at the present time."

In a letter of June 30, 1964, the cooperatives, through Mr. Daverman, pointed out that ". . . these systems [Northern Michigan and Wolverine] are currently being physically intercon-

nected, that they have interconnections with other systems, and that the interconnected generating capacity is much greater than the simultaneous demand of the interconnected systems;" the letter renewed their request for a coordination arrangement:

> We have, on several occasions, specifically asked you to consider some sort of interchange agreement based upon the general principles of power pooling . . . . We are hopeful that at our forthcoming meeting you can see your way clear to present such a proposal for our consideration. (DJ #40)

Finally, in a letter of November 16, 1964 to Mr. Daverman, B. G. Campbell again rejected the cooperatives' requests for coordination and urged them to accept Applicant's prior proposal for a wholesale firm power contract:

> It continues to be obvious to me that both Northern Michigan and Wolverine have a strong desire to interconnect and pool with Consumers Power Company. This desire seems to preclude realistic consideration of other power supply proposals that can and should be used by both of these G&Ts to provide them with their future growth requirements. As indicated in my letter to Mr. Lee [of the Rural Electrification Administration], any interconnection and pooling arrangement should create similar benefits for both parties. After careful and considered review, we conclude there are insufficient benefits for Consumers Power Company through such an arrangement to adequately protect the best interests of our stockholders and existing regular customers. We are still of the opinion that the revised proposed [wholesale firm power] contract offers the best short- and long-range solution to the cooperative power supply requirements. (DJ #41) (Emphasis added)

We note that Applicant itself predicated its refusal to negotiate for a coordination agreement with Northern Michigan and Wolverine cooperatives in 1964 not on any claim of absence of coordination benefits to Applicant but rather on Appli-

cant s belief that the benefits would be insufficient to Applicant and not similar for both Applicant and the cooperatives. This is a far different standard than that of net benefit/no net detriment adopted by the Hearing Board, and an inappropriate one to be applied by a system with monopoly power, as explained above.

In any event, the Hearing Board, after citing Applicant's refusal to deal with Northern and Wolverine and quoting from DJ #41, seized upon the testimony of Mr. Arthur Steinbrecher, Northern's then-manager, and the 1964 FPC Form 12's of Northern and Wolverine, to the effect that those systems in 1964 had less generating capacity than their projected peak loads. The Hearing Board then found, on the basis of that fact alone, that no net benefit would have accrued to Applicant from the proposed coordination and thus Applicant had no obligation to coordinate. (ID at 129, 131) Mr. Steinbrecher's testimony and the Form 12's support no such conclusion. Northern Michigan and Wolverine did have substantial generation to coordinate with the Applicant in 1964 -- they had approximately 56 mw of generating capacity and were considering the installation of additional capacity to meet growing loads.

At that time, Northern was serving its system partly through self-generation and partly through the purchase of firm power (which by its nature includes reserves) from Applicant. It also had a reserve arrangement with Traverse City. With its generation, firm purchases and reserve arrangement, it had the capability of selling approximately 37 mw of firm power. Its

peak load was only 30 mw. (Steinbrecher, TR 1413-1416; 1949-1954) Wolverine's generation and firm purchases exceeded its peak load by approximately 6 mw or 20 percent. (Steinbrecher, TR 1417-1421)

Northern and Wolverine wished to accomplish two principal results in negotiating with Applicant in 1964: (1) to coordinate generation reserves with Applicant, thereby reducing the number of megawatts of reserve required to back up their existing and proposed self-generation and concomitantly to increase the amount of firm power that could be sold from such self generation; and (2) to buy power from Applicant as necessary them to serve the portion of their load over and above that which could be served by self-generation. Applicant, however, insisted solely on a wholesale firm power contract with a demand ratchet provision. It agreed to sell the additional firm power needed to serve Northern's and Wolverine's loads, but it persistently refused to coordinate generating reserves with them. As the Board correctly found, pooling generation is a method of decreasing reserve requirements (ID at 16, 21) and excessive reserves are an economic waste (ID at 20). Northern's and Wolverine's generation was effectively isolated, and the increase reserve burden resulting from isolation thus rendered it less valuable than it would have been with appropriate coordination.

Applicant suggested no legitimate engineering or economic reason why it could not have entered into the reserve coordination desired and obtained a net benefit from enlargement of the

reserve pool to include the generation of Northern and Wolverine. The benefit obtained by Applicant would, of course, have been small in proportion to the reserve-reduction benefit it had already obtained through reserve coordination with Detroit Edison and the benefits it would obtain through coordination with Ontario Hydro and systems in Indiana, Illinois and Ohio. */ The normal expectation, however, is that Applicant would have obtained some benefit, and Applicant introduced no evidence to demonstrate the contrary. Applicant presented no evidence, for example, that it ever even conducted any study assessing the reliability of its system meshed with Northern's and Wolverine's generation.

The fallacy of comparing system dependable generating capacity and system peak load and simplistically concluding that a system whose peak load is greater than its self-generation cannot appropriately seek to coordinate its generation is demonstrated by Applicant's own situation. Its peak load in 1971 was 3,667 mw, while its generation was only 3,443 mw. (DJ #21; Steinbrecher, redirect, TR at 1960-62) Applying the Hearing Board's net-benefit reasoning, Detroit Edison, Ontario Hydro, and the Illinois,

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*/ DJ #65, a 1962 study prepared by Applicant, showed that while Applicant alone would require 24 percent (of peak load) reserves to support the proposed installation of 350 mw units, pooling with Detroit Edison reduced the minimum required reserve to 19 percent, pooling further with Ontario would reduce reserves still further to 15 percent, and anticimpated interconnections south to the MIIO systems would reduce reserves still further to 12.5 percent.

Indiana and Ohio systems apparently were under an affirmative duty to cease coordination with the Applicant. They didn't, of course. Applicant continued to coordinate pursuant to its various agreements with the others, including the coordination of reserves; it presumably purchased power from the others to make up its deficiency and to provide for reserves. Article II of Applicant's former Electric Power Pooling Agreement with Detroit Edison, dated December 22, 1962, (DJ #71) which was in effect both in 1964 and in 1971, dealt with the sharing of reserve responsibility between the two companies and provided specifically for purchases and sales of capacity to make up reserve deficiencies such as that with which Applicant was faced in 1971. */

Nineteen-seventy-one was not the only recent year in which Applicant was short reserve capacity based on a comparison of generating capacity and peak load. For example, in 1966, its peak load was 2,860 mw and its generation 2,923 mw, leaving an indicated reserve of only 63 mw, or 2.2 percent of peak load. (DJ #21 at 28-29) At that time, Applicant's largest unit was 265 mw; it had three units of that size on line. (See Consumers Power Company's FPC Form 1 for 1973, Applicant's Ex. No. 12,022 at 436-A and 437-A.) By 1968, it had installed a 385 mw base-load unit, yet its indicated reserves were only 93 mw, or 2.9 percent of its peak load. (DJ #21, at 28-29) By 1972, it had installed and was operating an 812 mw nuclear unit (Applicant's

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*/ See also DJ #73, #76, #78; Applicant's #11,108.

Ex. #12,022, at 432f, g, 436-A, 437-A), yet its indicated reserve was only 233 mw, or 5.5 percent of peak load. (DJ #21A, at 28) Applicant nevertheless continued to enjoy the benefits of coordination with other systems, purchasing power from others as necessary to make up its deficits. Even in 1973, notwithstanding an increase of nearly 23 percent in generating capacity from 1972, it relied considerably on the purchase of power from Detroit Edison and others to meet its requirements. Consumers Power Company's Form 1 for 1973 (Applicant's Ex. #12,022) sets out its substantial purchases and interchange (a net of 4,914,405,900 kwh) for that year at pages 422-424H.

Applicant's refusal to sell partial requirements firm power and to coordinate generating reserves with Northern Michigan and Wolverine as requested was not reasonable under the circumstances. Its insistence on a wholesale firm power contract and nothing more treated Northern's and Wolverine's generation as isolated and denied them benefits such as Applicant had already received by pooling generation reserves with Detroit Edison. It was a misuse of monopoly power designed to drive up Northern's and Wolverine's costs of providing their power supply through self-generation, with the effect of making future wholesale firm power purchases from Applicant a more attractive alternative for meeting their load growth. This strategy contributed to the preservation of Applicant's wholesale and retail monopolies.

Despite Applicant's refusal to coordinate generation with them, and its insistence on selling wholesale firm power to meet

their growing requirements, Northern Michigan and Wolverine moved forward with plans to expand their self-generation to serve distribution system loads. Applicant vigorously opposed Northern's and Wolverine's efforts to obtain Rural Electrification Administration (REA) loans for such generation by letters to REA, to Northern's and Wolverine's distribution cooperative members, and to Congress. (DJ #42, #43, and #45) Applicant thus intended to insure that Northern and Wolverine would not be able to serve their wholesale customers through self-generation, but would remain dependent on Applicant for wholesale firm power to meet the load growth of their customers.

(2) Applicant's Refusal to Coordinate with Northern Michigan in 1967

In 1967, with additional generation planned and under construction, and interconnections with Traverse City and Wolverine (which was in turn interconnected with Grand Haven), Northern Michigan renewed its efforts to obtain meaningful coordination with Applicant. In a letter of January 30, 1967 R. J. Daverman, on behalf of Northern, asked for "a new interchange agreement which would permit two-way interchange of emergency capacity [and for exploration of] the possibility of the purchase and/or sale of economy energy and dump energy, and the purchase of various forms of reserve capacity." (DJ #47) At the top of the letter appears the handwritten notation of one of Applicant's officials: "Same old story." A March 2, 1967 letter from Applicant's General Supervisor of Governmental Sales, R. L. Paul, to Mr. R. J. Daverman indicates that Applicant had been

notified by Northern Michigan that with the addition of generating units planned or in the construction stages, the interconnected systems of Northern Michigan, Wolverine, Traverse City, and Grand Haven would have a generating capacity of 160 megawatts with a load requirement of 100 megawatts and that Northern wanted an agreement with Applicant that would provide (1) emergency interchange of power, (2) purchase of spinning reserves, and (3) purchase of economy po r. (DJ #48)

By letter of July 14, 1967 from Mr. Paul to Mr. Daverman, Applicant rejected a Northern Michigan-Applicant interconnection as not being "mutually beneficial," based on a claim of the insufficiency of Northern's reserve generation, and offered instead to supply Northern Michigan under Applicant's "standard wholesale type of agreement" which could "provide for either standby, partial purchase or total purchase requirements." A contract between Applicant and Northern Michigan was entered into on December 20, 1967, providing for wholesale purchases by Northern Michigan, but not reserve sharing or other coordinating arrangement. (DJ #64)

Once again, Applicant's refusal to coordinate was unreasonable, and the Board's determination that Applicant was clearly correct in finding no prospect of mutual benefits (ID at 130) is clearly incorrect. As explained above, coordination of generation does provide net benefits, and those benefits are present whether or not one or more parties to the coordination purchases firm power to meet a portion of its load requirements, rather

than meeting its entire requirements through self-generation. Also, as Applicant was aware at the time, Northern had interconnection agreements with Traverse City and Wolverine for emergency assistance, and Wolverine in turn was interconnected with Grand Haven. (TR at 1443) These four systems together had a then-planned total generating capability of 160 mw (to meet a projected load of 100 mw) (DJ #48) which could have been brought into coordination with Applicant through Northern. Yet Applicant, notwithstanding having been provided substantial information concerning Northern Michigan and the systems with which it was interconnected (letter of May 18, 1967, from Mr. Daverman to Mr. Paul, Applicant's #12,001c), and without thereafter seeking any additional information in that regard, refused even to negotiate a possible coordination agreement with Northern and continued to insist upon its "standard wholesale type of agreement." (DJ #49) Once again, Applicant's conduct unreasonably deprived Northern, as well as Wolverine, Traverse City and Grand Haven of the benefits obtainable from coordinating a large pool of generating units -- benefits which Applicant already enjoyed -- and restricted them to the more limited benefits obtainable from coordination with one another. This directly increased the cost of their self-generation power-supply alternative.

(3) Applicant's 1973 Interconnection Agreement With the Muni-Coop Pool -- Delayed and Unreasonably Restrictive

In 1968, Northern Michigan, Wolverine, Traverse City and Grand Haven formally entered into the Michigan Municipal and Cooperative Power Pool Agreement. (DJ #104A) Then, in August, 1969, Mr. John Keen, manager of Wolverine, wrote Applicant's Mr. B. G. Campbell asking proposals for purchase of a block of power and inquiring once again into the possibility of an interchange or pooling type arrangement with Applicant as follows:

> We are a member of the Michigan Municipal and Cooperative Power Pool which also includes the Nortnern Michigan Electric Cooperative and the cities of Grand Haven and Traverse City. The four members of the pool are interconnected and operate in parallel and in accordance with a power pool agreement. The power pool agreement contains the usual provisions pertaining to the maintenance of reserve capacity, spinning reserves, power sales, purchases and exchanges, and the sales, purchases and exchanges of economy energy, emergency energy, maintenance energy, etc.
>
> Our pool agreement and pool operation provides the basic power supply arrangement for our system and the frame of reference for additions of capacity to the system. We may provide for our increasing capacity requirements through self-generation or purchases.
>
> Would Consumers Power Company enter into such an interchange or pooling type arrangement with Wolverine, which could provide power we require under terms and conditions such that it could be economically and advantageously used in our pool in conjunction with our other sources on an unrestricted basis? (DJ Ex. No. 53)

Negotiations ensued thereafter between Applicant and the four members of the Muni-Coop Pool regarding an interchange and wholesale power purchase agreement (See Steinbrecher, TR at 1182-1184;

DJ #54-63). Not until September, 1973, however, well after the initiation of this proceeding was an interconnection agreement entered into between Applicant and the Michigan Pool members (DJ #105 "Replacement"). Further as will be described below, the formula for calculating reserves of the Muni-Coop Pool under this current agreement provides more of the form than the substance of genuine reserve sharing -- the Lion's share of the benefits accrue to the Applicant. */ Thus Applicant continues to misuse its monopoly power in dealing with the Muni-Coop Pool.

(4) Applicant's Refusal to Coordinate with Allegan and Purchase of its System

Although the Muni-Coop Pool was able, through its persistence over a nearly six-year period, to obtain some degree of coordination with Applicant, not all systems have been as fortunate

In 1966, the City of Allegan requested that Applicant submit a proposal for supplying either standby or supplemental power to its electric generating facilities (DJ #178). Applicant's response, however, was not such an offer to coordinate generation, but rather a proposal vor a firm power arrangement, with an alter-

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*/ It is clear that Applicant was fully aware of the limitations of the reserve computation formula it was offering. Documents reflect discussions in Applicant's staff meetngs on the role the Federal Power Commission was taking in assisting small public systems in obtaining reserve-sharing arrangements (in Crisp County Power Commission v. Georgia Power Co., 37 FPC 1103 (1967), 42 FPC 1179a(1969). Page 2 of DJ #50 contains the comment "The FPC ruling gives Crisp County a better deal than our present Holland Contract." Nevertheless, as of June 23, 1967, Applicant determined to stick with the Holland formula and to attempt to have it applied to all other small utilities seeking reserve sharing (DJ #50, at 6)

native suggestion that Allegan sell its system to Applicant. (DJ #179). */ Allegan eventually accepted the latter proposition. Applicant's acquisition of the Allegan system was apparently the successful culmination of a long-standing plan: A March 16, 1962, document of Applicant entitled "Municipal and Rural Electrification Administration Activities" states in part:

> (12) the City of Allegan owns and operates a generation and distribution system. The company competes for retail business in a large part of its operating area. Efforts are being made now to either purchase the Allegan system or sell power wholesale. (DJ Ex. No. 15)

The Allegan system was purchased in 1968, nearly six years after DJ #15 was written (See Aymond, TR at 6063; Paul, TR at 7907; Applicant's Ex. No. 11,308). Thus, through its refusal to offer Allegan coordination, Applicant helped to swing the balance in favor of sale of the Allegan system to it, and thereby enhanced its position in the retail market for electric power in lower Michigan.

(5) Applicant's Refusal to Offer Coordination on Reasonable Terms with Traverse City

In 1968, the municipal electric system of Traverse City initiated efforts to obtain a reserve-sharing agreement with Applicant. Mr. Joseph Wolfe, former director of the Light and Power Department for Traverse City testified to this matter as follows:

> Q. . . . [D]id you have any occasion to contact the Consumers Power Company to deterime what

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*/ Applicant hoped also by its proposal to "eliminate the danger of the City [Allegan] making a connection with Wolverine Electric Cooperative." (DJ #178)

arrangements might be available through that company?

A. Yes I did.

Q. Could you describe the circumstances thereof?

A. Yes . . . .

> We had already considered some other plans, but we did hire Daverman Associates to make a comparison of the alternatives available to the city. . . . In order to arrive at a comparison, I requested a meeting with Consumers Power Company representatives. Mr. Daverman and I did meet with Bob Paul of Consumers Power . . . . This was in early 1968.
>
> We requested from them an interconnection agreement or an interconnection arrangement. We were told at that time by Consumers Power people that there were only two methods by which they could interconnect with us.
>
> One was their standard wholesale partial purpose [purchase] rate, PP-1 rate, which was strictly a purchase, a one-way arrangement.
>
> The other was an interconnection agreement similar to that being offered to the City of Holland. . . . [i]t was obvious from examining the conditions and the formula involved with the reserve requirement, that it would not have been advantageous to the city." (Wolfe, TR at 1563-64).

Denied the benefits of coordination on reasonable terms with the Applicant, Mr. Wolfe was relegated to the more limited pool of generation owned by smaller systems who were available to Traverse City as coordinating partners, and Traverse City joined the Muni-Coop Pool (Wolfe, TR 1564).

(6) Applicant's Refusal to Coordinate Reserves With Lansing on Equal-Percentage-of-Load Principles

Mr. Earl Brush, General Manager of Lansing's Board of Water & Light testified concerning Lansing's efforts to obtain a new

interchange agreement with Applicant in 1969-1970 (TR at 2095 et seq.). The first negotiating meeting was on December 29, 1969. Lansing's concept was that of equal percentage reasons; Applicant offered the "Holland" formula, as it had done with Traverse City (TR at 2102; 2104; 2110). Lansing promptly rejected the Applicant's formula by letter from Mr. Brush to Applicant's Mr. Mosley on January 30, 1970, and submitted its own proposal to the Applicant. The letter stated in relevant part as follows:

> At the conclusion of our December 29, 1969, meeting regarding the above subject matter, I stated that we would give this matter further consideration and submit to you our ideas regarding a new interchange agreement, and I apologize for the delay in getting back with you on this matter.
>
> While I understand your position in the matter of reserve requirements and how the formula you suggested at the December 29 meeting would apply, we cannot agree with this formula. First of all, it is inconsistent with the philosophy of the Federal Power Commission which is clearly stated in the recent Gainsville Decision. Secondly, the large power pool agreements throughout the country do not require members of the pool to retain this high a percentage of reserve capacity.
>
> In order that we can proceed with these negotiations, we have prepared a suggested interchange agreement and are enclosing two copies for your consideration. We have no great pride of authorship in this agreement but have attempted to set forth our position and conditions that we can agree to. In working up this agreement, we have attempted to follow the format suggested by the Commission in its Statement of Policy on rate schedules contained in Order No. 347 issued May 15, 1967 (DJ #242, at 6; Brush, TR at 2111).

Mr. Brush described generally Lansing's proposal:

> Well, it followed the Gainesville concept in that it established reserve responsibility on the part of the board of 20 percent of projected peak annual load and spinning reserve responsibility of

> 10 percent of daily projected load. It incorporated economy energy, short-term energy, maintenance energy, and emergency energy concepts.
>
> It provided for emergency on other systems to be part of an emergency on the company that was interconnected -- it followed the whole gamut or incorporated, maybe, is a better word, the provisions that are found in many interchange agreements throughout the country. (Brush, TR at 2113-2114)

During Lansing's negotiations with Applicant, the Fifth Circuit Court of Appeals set aside the Federal Power Commission's order directing interconnection between Florida Power Corporation and Gainesville on equal percentage reserve terms -- and with no additional standby charge to Gainesville. Gainesville Utilities Co. v. Federal Power Commission, 425 F.2d 1198 (5th Cir. 1970). The Supreme Court did not reverse the 5th Circuit's decision and reinstate the FPC's interconnection terms until 1971. Meanwhile, Lansing had entered into an interconnection agreement with Applicant (DJ #92). Lansing, a fair-sized system, had sufficient bargaining power to hold out for something more than a "Holland" formula arrangement, but it was unable to obtain an agreement incorporating the "Gainesville" concept which it preferred (Brush, TR at 2140). It needed a better interconnection badly at that time, and thus accepted the best arrangement it could negotiate with Applicant (Brush, TR at 2148-2149).

(7) Applicant's Refusal to Coordinate with Edison Sault Electric Company

In 1972, Edison Sault Electric Company, a small privately owned system operating in Michigan's Upper Peninsula, had discussion with Applicant's representatives about the options of ob-

taining either a wholesale contract or an interchange agreement with Applicant. On the basis of those discussions, Edison Sault believed that either option would be available. (DJ #83-85). Edison Sault expected that with an interconnection agreement it would be able to coordinate its generation reserves with Applicant by maintaining reserves equal to fifteen percent of peak load, and it could buy from Applicant the generating capacity needed to reach the load plus fifteen percent level -- just as Applicant does when it's short capacity, and as Northern Michigan and Wolverine would have liked to be able to do when they sought coordinating arrangements with Applicant. Edison Sault prepared an economic evaluation which concluded that an interconnection agreement would be preferable:

> The wholesale contract would be more expensive than the interconnection contract under which we would purchase reserve from Consumers Power Company. However, if we install the reserve there is no question that the interconnection agreement would be more economical. (DJ #84, at 1)

However, during a November 14, 1972 meeting, Applicant's Mr. R. L. Paul advised Edison Sault that its understanding was erroneous (DJ #85); and on November 17, 1972, Applicant's Mr. Hedgecock summarized the options open to Edison Sault: "The only provision . . . that has been left open is the initial term of the [wholesale purchase] contract." (DJ #86) Thus Applicant, after first leading Edison Sault to believe coordination of generation would be available to it on a deficiency-purchase basis similar to the practice of Applicant and Detroit Edison, finally refused so to coordinate with Edison Sault.

(c) Applicant Undertook to Prevent Small Systems from Obtaining Coordination through Membership in the Michigan Pool

Even apart from refusing specific requests to interconnect and share reserves, Applicant undertook to insure that the benefits of coordination would not be obtained by small electric systems in lower Michigan. Applicant has taken steps to eliminate the Michigan Pool as a potential avenue by which small systems might obtain access to coordination.

The Michigan Pool was formed in 1962 by the execution of a comprehensive power pooling agreement between Applicant and Detroit Edison (DJ #71).

The Pool agreement provided for the "sharing of reserves," with each system's reserve responsibility being established as an equalized percentage of its peak demand. A 1962 study by Applicant (DJ #65, p. 2) of the then-proposed pool showed that while Applicant alone would have required 24 percent reserves to support the proposed installation of 350 mw units, pooling with Detroit Edison would reduce the minimum required reserve to 19 percent, pooling further with Ontario Hydro would reduce reserves still further to 15 percent, and anticipated interconnections south to the MIIO systems (in Indiana, Illinois and Ohio) would reduce reserves still further to 12.5 percent. In addition to providing for reserve sharing, the Michigan Pool agreement provided for a program of "coordinated development." DJ #70 is an explanation of the agreement as presented by Applicant to the FPC staff. It notes an obligation to share the capacity from

so-called "pool units" although such units were to be engineered, constructed and owned by only one party. Article VII provided for the ownership and operation of pool-associated transmission facilities other than interconnections. The agreement indicated the expectation of the parties that:

> [A]ttainment by the parties hereto of an expanded range of mutual benefits and advantages can be obtained by (a) rendering mutual assistance during emergencies; (b) effecting maximum practicable economy and dependability in day-to-day production of electric power requirements of each system [economic dispatch or economy energy transactions]; and (c) utilization to the maximum extent of current and future opportunities for securing increased economies through coordination of planning, design, construction, and pooled operation of the electric system of the parties consistent with the requirements associated with an increase in use of electric power in Michigan. (DJ #71; bracketed material supplied.)

During the course of consideration of revisions to the Michigan Pool agreement in 1968, Applicant's Mr. R. L. Paul wrote the following to persons drafting a pool agreement supplement:

> I have reviewed the Draft No. 2 of the proposed Supplement E to the Power Pooling Agreement and wish to make the following comments and/or suggestions for your consideration.
>
> As you may or may not be aware, the group consisting of Northern Michigan and Wolvering Electric Cooperatives and Traverse City and Grand Haven municipal systems have just entered into a so-called new pooling agreement. Since your proposed Supplement E would extend pooling privileges to other pools, and since you do not attempt to define a pool, and since this so-called pool could probably meet the other limitations or criteria established in the Supplement, I feel that the Supplement would not meet our expressed goal to eliminate the possible participation of undesirable third parties. The only limitation seems to be included in Paragraph 7 which states that third parties to whom such pooling privileges are

> extended must provide facilities to permit a meaningful and mutually advantageous interchange of capacity and/or energy between itself and the pool. Since the wording meaningful and mutually advantageous is very general and subject to wide interpretation, it is believed this paragraph will not effectively limit future participation by such third parties.
>
> I realize it may be difficult to write such a Supplement to exclude forever all such third parties but should we not attempt at this time to establish some definite minimum standards or levels of mutual benefits that must be available before third parties will be considered?
>
> Perhaps it would be desirable to meet with you to discuss this matter before proceeding further. (DJ #170)

On September 11, 1968, Mr. Paul advised Applicant's Mr. E. H. Kaiser as follows:

> I believe the criteria for third parties as presented in your letter of September 5 to J. B. Falahee very adequately covers the subject and should help to prevent undesirable third parties from becoming a part of our present or any future pooling agreement. I have no other comments or suggestions to offer at this time. (DJ #171)

Applicant's final decision was not to put in anything on third parties because of difficulties in drafting language that would exclude the "undesirable persons." Apparently, it was decided to omit any stated policy on admission of third parties, leaving that to the mutual agreement of Applicant and Detroit Edison. (DJ #171-172).

The Board characterizes this evidence that conditions of entry to the Michigan Pool were designed to exclude "undesirable third parties" as "nothing sinister" (ID at 135-136). This finding is clearly erroneous. Mr. Paul's comments went specifically to exclusion of the Michigan Municipal and Cooperative

Power Pool from the Michigan Pool. He said nothing about the need to ascertain the present or prospective reserve level of the Muni-Coop Pool or any other small system -- even assuming that such considerations would be relevant in formulating a coordination policy, a contention with which we dealt above. He wanted to "effectively limit future participation by" -- indeed "to exclude forever" -- undesirable third parties. He referred specifically to the Muni-Coop Pool, which the Board itself described as "[having] the capacity to confer sufficient benefits to be able to participate in the complex Michigan Pool" (ID at 136). The draft supplement then under discussion proposed that "third parties to whom such pooling privileges are extended must provide facilities to permit a meaningful and mutually advantageous interchange of capacity and/or energy between itself and the Pool." That standard appears to call for more than the Board's "net benefit," but it was still insufficient to meet Applicant's expressed goal, according to Mr. Paul. This clear evidence of Applicant's intent to monopolize is of major importance, particularly in view of the mass of other evidence reflecting Applicant's intent to deny benefits of coordination to smaller systems and its expressed goal to acquire those systems (DJ #188).

The Board went on to find "that the requirements for membership approved by Justice and incorporated in the existing Pool agreement are fair and reasonable, and [concluded] as a matter of law that they are not anticompetitive" (ID at 136). The present pool membership requirements and their "approval"

by the Department of Justice must properly be evaluated in the context of their adoption as part of a new Michigan Pool agreement, which the Board entirely failed to do.

In 1971, the Department of Justice did undertake an examination of the opportunity for third-party participation in the Michigan Pool in connection with its antitrust review of a Detroit Edison Co. nuclear power plant application. In order to obviate a Department recommendation of antitrust hearing, Detroit Edison committed itself to exert its best efforts to modify the third-party membership provisions of the pool agreement so that third parties who met reasonable objective criteria would be allowed to participate in the Pool (TR at 1684-87).

Applicant and Detroit Edison then cancelled their 1962 Michigan Pool agreement and superseded it with a new Michigan Pool agreement, which did include provisions for admitting third parties which net specified criteria. Mr. Wolfe testified, however, that the new agreement, dated May 1, 1973, had changed two key provisions of the agreement to make Pool participation onerous for small systems who might seek to join the Pool in order to obtain the advantage of utilizing larger units (Wolfe, TR at 1684-93; 1697-1702).

Specifically, first, the provisions for coordinated development were eliminated, and provisions were substituted that changed the pricing method for capacity exchanges by Pool members. Where the result of the old agreement was the pricing of such exchanges based on new large-scale generation -- i.e., base load

units -- the new agreement pricing was based on the capacity costs of the least efficient units and high-cost energy. Mr. Wolfe explained the deleterious effect of this change on the desirability of small system participation in the Pool:

> Q. Now, if a small system wanted to enter the Michigan Pool, if there were no features that were -- other features that were onerous to small systems and one of the reasons of wanting to do so was to obtain the economies of scale available through baseload capacity, sharing in some way joint venture standard construction, what have you, would this present method be advantageous or disadvantageous to it? "This method" meaning the method adopted in the contract recently signed.
>
> A. Under the new contract?
>
> Q. Yes, sir.
>
> A. It would be particularly advantageous to a small system because it would make available to it the highest cost units. That is, the power and energy from the highest cost units on the system which will be similarly presumably to that which the small system could provide for itself anyway in a reasonably economic fashion.
>
> Q. Does a small system have to engage in coordination in order to install peaking units?
>
> A. No, it does not.
>
> Q. Why is that, sir?
>
> A. Well, the nature of peaking units, particularly gas turbines, diesel engines if they could be called peaking units, or even small steam coal-fired or oil-fired steam units, is such that the small system can easily finance and operate these units and can presumably install them at the same cost as the large utility can, due to the small sizes that are involved.
>
> But baseload, obviously the economies of scale have been discussed before here and the small system is at a great disadvantage to provide for itself low-cost baseload power and energy (TR at 1700-1701).

Second, the reserve sharing provisions of the Pool agreement were changed from the straightforward criterion of equal percent reserves as a percentage of load by adding a further condition requiring each party to maintain the equivalent of its largest single unit as a generating reserve. Mr. Wolfe explained the effect of this change on the attractiveness of Pool membership for small systems:

> The second item requires that, regardless of the percentage reserve, that it must be equal to or greater than the largest unit on the system, which would tend to make it an undesirable feature as far as small systems are concerned.
>
> In fact, it could be a penalty because it would tend to penalize the large unit (TR at 1691-92).

While the small systems may have been interested in obtaining the advantages of the Michigan Pool, the foregoing changes had the effect of taking away the advantages they could have obtained from Pool membership. The amended membership provisions thus made no practical difference (Wolfe, TR at 1701-1702). */ The Board's utter failure to consider these changed provisions

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*/ The Department of Justice, not satisfied with this result, sought and obtained further policy commitments from Detroit Edison in connection with the licensing of its Greenwood Energy Center Units 2 and 3), in March, 1974. Detroit Edison agreed to accept license conditions requiring it to deal as follows with other electric systems in Southeastern Michigan: to interconnect and coordinate reserves, to sell bulk power from new generating capacity so as to provide the opportunity for coordinated planning, to offer ownership in or unit power from, the Greenwood Units (as elected by the purchaser), to provide transmission service and plan and construct facilities as required for future transmission service transactions, and to sell power to retail distribution systems. Letter from Assistant Attorney General Thomas E. Kauper to Howard Shapar, March 22, 1974 in 39 Fed. Reg., No. 67 at 12373 (April 5, 1974).

and their anticompetitive effect, particularly in view of Applicant's specific intent to exclude "undesirable third parties" from the Pool, led to its erroneous findings on the issue of Applicant's prevention of coordination by exclusion from the Michigan Pool, and thus on the broader issue of the existence of a situation inconsistent with the antitrust laws in lower Michigan.

(d) Applicant's Present Interconnection Agreements with Small Systems are Unreasonably Restrictive

The Hearing Board also concluded erroneously that the interconnection agreements Applicant has entered into with smaller systems in lower Michigan -- the Muni-Coop Pool, Lansing, Holland -- are reasonable and thus that Applicant has not acted anticompetitively with regard to entering into said agreements (ID at 132-133).

The Board described reserve sharing as the "first step" or "cornerstone" of operational coordination (ID at 72, 133). Yet it failed to perceive the unreasonableness of the reserve requirements/emergency arrangements Applicant has offered, and, by misuse of its power over access to coordination (see ID at 128), effectively compelled the smaller systems to accept. A fundamental flaw in the Board's treatment of reserve sharing is its total dismissal of the equal-percentage-of-peak-load principles established in the Gainesville case, Gainesville Utilities Dept. v. Florida Power Corp., 402 U.S. 515 (1971), as inapplicable in this proceeding -- apparently because it was able to imagine

some circumstances where application of that formula could work a hardship on one of the participants in a coordination agreement (ID at 73-77; 80-81). Having rejected Gainesville as a guide, the Board then erred in adopting the position that differences in the terms of coordination arrangements -- e.g., as between the Michigan Pool agreement and the Applicant-Holland agreement -- merely reflect factual differences in the capabilities and needs of the parties and differences in the skills of the negotiators, rather than anticompetitive conduct or the misuse of market power (ID at 130-133). The evidence in this proceeding is to the contrary.

In noting that there are differences even in agreements among large systems, and attributing those differences to "tailoring" to different parties' capabilities and needs, the Board loses sight of the main point. Such agreements invariably do not reflect the extraction of a monopolist's share of benefits by one party or the monopolist's denial of particular coordination arrangements vital to another party.

The Board's findings ignore the fundamental point that a coordination agreement is usually more valuable to a small utility than to a large one like Applicant that has already achieved the benefits of economies of scale through internal growth (including acquisitions and mergers) and by entering into coordination arrangements with neighboring large systems. The Department's principal engineering expert witness, Mr. Mayben, testified to this effect:

Q. [Assume] There are only two utilities left, one small one and one that's 20 times as large.

Will the interconnection of the one small one with the one large one produce benefits to both the small and the large?

A. They can, yes.

Q. Now, will they be equal benefits?

A. No.

I think the benefits to the small will be substantially greater than the benefits to the large.

Q. What will be the value of the benefits to each of these utilities?

A. Well, the value of the benefits to the small utility can be expressed in, again, the savings in reserve requirements and that can be translated into annual cost of capacity, and it can be sizable.

Again, he may go from 100 percent reserve requirement to a 20 percent reserve requirement, and that does represent a sizable benefit to that municipal compared to not having coordination (TR 3741-3745). */

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*/ In the same vein was the testimony of Applicant's witness, Mr. Slemmer:

CHAIRMAN GARFINKEL: Wait. Before you go off this subject, when you say economies of scale result from changes to the small system, will you explain for the record what you mean by changes to the small system?

WITNESS SLEMMER: Well, it enables the small system to increase the unit size to a greater extent than the larger system, and also the fact that the increase -- or the decrease as unit size goes up, is not a straight line, it's a curve. So for the same increase, the benefit is more in the smaller area.

CHAIRMAN GARFINKEL: So by coordinated agreement or by coming into the pool arrangement, it would en-

(Footnote continued)

Mr. Mayben explained that such disparity in the value of benefits achievable by entities negotiating coordinating arrangements has a major effect on the bargaining position of those entities. (TR at 2631-2633) He testified further regarding the unfavorable bargaining position of small systems seeking coordinated development from a dominant large system or pool, because the coordinated development is of greater benefit to the small system (TR at 2718), and the unfavorable bargaining position of a small system seeking transmission coordination from the dominant system in the area (TR at 2733-2737). */

Applicant's economist, Dr. Pace, agreed when he testified that alternatives available to the smaller system would affect the price reached by bargaining between the large and small systems (Pace, TR at 8966-8967).

The experts' testimony was confirmed by Applicant's Chief Executive, Mr. Aymond, who expressed his view that Applicant was

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(Footnote continued from previous page)

> able the small company, the small utility, let's say to build larger units; is that correct?
>
> WITNESS SLEMMER: Yes.
>
> CHAIRMAN GARFINKEL: And that's the normal type -- what normally happens when a small unit joins a pool?
>
> WITNESS SLEMMER: That's what it's all about. (TR at 8939-40)

*/ Another engineering expert witness for the Department, Mr. Lundberg, confirmed that the small systems' bargaining power was the least when it lacked coordinating alternatives (TR at 9136-9137).

justified in using the bargaining power inherent in its present size and consolidation of control over formerly separate utilities:

> Q. With respect to the first part of your answer, are you suggesting then that Consumers Power should have the benefits of previous acquisitions over the years which now result in a very large collection of central stations under a single ownership?
>
> A. That is part of Consumers Power Company, and it's something I think we're entitled to.
>
> Q. If that results in an arrangement in which -- if Consumers Power proffered coordinating power and energy to a very much smaller utility gets much larger benefits in proportion, then you believe that you are justified in refraining from proffering coordinating power and energy to that other entity?
>
> A. Yes. (Int. 1004 at 266; see also, Aymond, TR at 6262-6268).

Applicant's bargaining power is, of course, further augmented by its interconnections with Detroit Edison, Ontario Hydro and the MIIO systems, since the pooling benefits a small utility can provide are miniscule compared with those already available to and enjoyed by the Applicant. (Mayben TR at 2656, 2690)

The Board's findings concerning the reasonableness of Applicant's interconnection agreements also ignore the testimony of Applicant's engineering expert, Mr. Slemmer, who conceded that there are no technical or scientific principles which compel the specific coordinating terms reached in a particular contract:

> DR. LEEDS: Let me go back to the line of questions where I asked you about the different methods, and I want to make sure that at this point in time I

understand your position about how you are to allocate reserves in an interconnection.

Is your testimony that you allocate reserves based on first calculating reliability of each system as an isolated system in a two-system interconnection, an isolated system and calculate their reliability, and then put the systems together and calculate their reliability, and on that basis you ratio the loads, based on-- Give me some examples. I'm not really sure I understand that.

CHAIRMAN GARFINKEL: First let's get the answer. Is that the type of position you take?

WITNESS SLEMMER: The position I take is first, that this is a matter for negotiations between the parties. This is something they should work out.

DR. LEEDS: But there is no engineering reason?

WITNESS SLEMMER: It's the incentive reason. They should work it out so they each have an incentive to do this.

And I was proposing that on the basis that that would probably halve it down the middle so you have an equal risk of everybody having a good incentive. I think it's entirely a matter of argument, of negotiation.

CHAIRMAN GARFINKEL: So it is not a technical basis? We want the record clear on that. You're not doing it because the engineering consequences would have some significance to the Board?

WITNESS SLEMMER: The only technical basis to me is providing incentive is an engineering matter and this gives you the best assurance of providing an incentive (TR at 8929-8931).

* * *

BY MR. CLARK:

Q. Where a proposed interconnection is to be studied, is it my understanding, Mr. Slemmer, that the gist of your testimony is that the totality of the benefits for all parties is computed by engineering techniques?

A. (Mr. Slemmer) Yes.

Q. And is it the further gist of your testimony that the division of these benefits between the parties is a subject for negotiations; that is, it's a business decision by the parties?

A. Yes. (TR at 8969-8970)

The truth of the matter is that Applicant can and has used -- and advocates continuing to use, according to Mr. Aymond -- its bargaining power to obtain more of the benefits from coordinating transactions with small systems than it could obtain if the small systems enjoyed competitive coordinating alternatives. A prime example is the reserve requirement formula which Applicant used first in its interconnection agreement with Holland's municipal electric system (DJ #100), which it proposed subsequently to Lansing (but was rejected), and which was included in the interconnection agreement it finally consummated with the Muni-Coop Pool systems in 1973 (DJ #105).

The agreement between Applicant and Holland is silent regarding the reserve responsibility of Applicant. The Agreement between Applicant and the Muni-Coop Pool calls for Applicant to "use all reasonable efforts to provide and maintain sufficient electric generating reserves on its system" and represents that "Consumers Power is presently obligated in an existing agreement with a third party to eliminate any reserve deficiencies by the purchase of power from that or other third parties" (DJ #105 at 5). The agreements, however, place specific reserve responsibilities on Holland and the Muni-Coop Pool, respectively, based on a formula which takes into account the sizes of the two largest units on each system as well as their peak loads.

By insisting upon these formulas in the exercise of its superior bargaining power, Applicant requires Holland and the Muni-Coop Pool to maintain greater reserves (and thus market less firm power from their generation) than they would need to maintain under the equal-percentage-of-peak-load reserve-sharing formula which generally prevails in nonmonopolistic bargaining situations. This was specifically demonstrated when Mr. Slemmer compared Holland's reserve requirement under its contract with Applicant with what its requirements would be under an equal-percentage arrangement. Under the reserve responsibility formula, according to Mr. Slemmer's own calculations */ Holland could sell 1.5 mw more firm power than it could if operating isolated and maintaining the equivalent of its single largest unit as reserve (TR at 8979-82). If Holland were interconnected with Applicant on an equal-percentage basis, **/ however, it could sell 21 mw additional firm power (Slemmer, TR at 8983).

I was against a similar background of control by major utilities over access to coordination that the Supreme Court in Gainesville, supra, rejected Florida Power Corporation's contentions that Federal Power Commission imposition of equal-percentage-reserve terms in ordering Florida Power to interconnect with the Gainesville municipal system was improper.

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*/ Mr. Slemmer assumed the following data for Holland: a 40 mw load, 67 mw of generating capacity, a largest unit of 27 mw and a second largest unit of 13 mw.

**/ Mr. Slemmer assumes Applicant maintained a 15 percent reserve.

(Contrary to the impression of the Hearing Board, ID at 77 et seq., the propriety of equal percentage reserves was before the Court. The issue was whether the FPC could order an interconnection on equal percentage reserve terms, without imposing a requirement that Gainesville pay Florida Power a standby charge -- i.e., that Gainesville turn over to Florida Power some of the benefits it would otherwise obtain from the interconnection.)

The Department does not cite Gainesville for a principle that the Supreme Court has mandated equal-percentage reserve sharing as the law of the land in all instances of electric utility coordination. Rather, we believe Gainesville reflects the Court's disapproval of Florida Power's contention that it should be permitted to obtain the advantage of its market power in the allocation of coordination benefits between itself and Gainesville. The Court made this point as follows:

> Florida Power's emphasis on Gainesville's small size occurs only when discussing Gainesville's ability to provide Florida Power with energy. But Gainesville's small size has relevance in terms of the amount of power it may, even in emergencies, require from Florida Power. What Florida Power chooses to emphasize is that the availability of a certain amount of power flowing from it to Gainesville is relatively more valuable to Gainesville's small system than the availability of the same amount of power flowing from Gainesville to Florida Power. It is certainly true that the same service or commodity may be more valuable to some customers than to others in terms of the price they are willing to pay for it . . . . But focus on the willingness or ability of the purchaser to pay for a service is the concern of the monopolist, not of a governmental agency charged both with assuring the industry a fair return and with assuring the public reliable and efficient service, at a reasonable price (402 U.S. at 527-28; emphasis added).

We believe further that the equal-percentage reserve sharing terms found appropriate by the Federal Power Commission to control coordination between a relatively large system, Florida Power Corp., and a relatively small one, Gainesville, and reinstated by the Supreme Court, may properly serve as a benchmark in evaluating the reasonableness of the terms of Applicant's interconnection agreements with small systems like Holland and the Muni-Coop Pool. The FPC derived its terms from the principle that sharing of interconnection responsibilities must be based upon the proportionate burdens each system places upon the interconnected system networks, and not the benefits each expects to receive. It found that both parties would receive benefits from interconnection on the terms ordered and declined to consider the relative benefits in determining appropriate terms. The FPC's Florida Power-Gainesville terms would thus appear to reflect the type of reserve coordination arrangements that result when the superior market power of one party is not employed to extract the lion's share of coordinating benefits from another party.

Applicant's interconnection agreements with Holland and the MC Pool, which require those smaller systems to maintain disproportionately high reserves, cannot on their face pass this test, and Applicant has offered no legitimate justification for the more onerous terms it has imposed.

(e) The Board Erroneously Abdicated its Duty to Judge Applicant's Interconnection Policies by Antitrust Standards

Finally, it would appear that a major factor contributing to the Hearing Board's error in failing to perceive the anticompetitiveness and misuse of monopoly power embodied in Applicant's coordination policies toward small systems in lower Michigan was the Board's mistaken notion that both the compulsion of coordination agreements and the terms of such agreements are strictly matters for the Federal Power Commission to consider and deal with (ID at 65-66, 81, 85, 128, 132, 133, 166). Contentions to this effect were emphatically rejected by the Supreme Court in Otter Tail Power Co. v. United States, 410 U.S. 366, 372 (1973). The Court said:

> Otter Tail contends that by reason of the Federal Power Act it is not subject to antitrust regulation with respect to its refusal to deal. We disagree with that position.
>
> * * *
>
> Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws.
>
> * * *
>
> Otter Tail maintains here that its refusals to deal should be immune from antitrust prosecution because the Federal Power Commission has the authority to compel involuntary interconnections of power pursuant to §202(b) of the Federal Power Act. The essential thrust of §202, however, is to encourage voluntary interconnections of power. Only if a power company refuses to interconnect voluntarily may the Federal Power Commission, subject to limitations unrelated to antitrust considerations, order the interconnection. The standard which governs its decision is whether such action is "necessary or appropriate in the public interest." Although

antitrust considerations may be relevant, they are not determinative. There is nothing in the legislative history which reveals a purpose to insulate electric power companies from the operation of the antitrust laws.

* * *

It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships. When these relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws.

* * *

Thus, there is no basis for concluding that the limited authority of the Federal Power Commission to order interconnections was intended to be a substitute for or immunize Otter Tail from antitrust regulation for refusing to deal with municipal corporations. 410 U.S. at 372-375.

The Board had the specific responsibility under Section 105c of the Atomic Energy Act to determine whether Applicant's activities under the Midland licenses would create or maintain a situation inconsistent with the antitrust laws. It thus had the duty to examine both Applicant's agreements with other systems and its refusals to deal with other systems to determine whether or not they were unreasonable by antitrust standards, not Federal Power Act standards. It was irrelevant to the Board's consideration of Applicant's voluntary agreements and voluntary refusals to deal that the FPC has the authority to compel interconnections and that a small system can force involuntary interconnection if it convinces the FPC that such interconnection is in the public interest. It was irrelevant that

the FPC cannot, under Section 202(b) of the Federal Power Act, order coordination that would compel a public utility to enlarge its generating facilities (which would include coordinated development) and has disclaimed the authority to compel a public utility to wheel electric power. It was irrelevant that Section 202(a) of the Federal Power Act makes it the FPC's duty to promote and encourage voluntary interconnection and coordination -- and does not impose voluntary coordination as a duty. It was irrelevant that Applicant's contracts with other utilities are filed with the FPC (except retail sales contracts) and that the FPC itself has a duty to consider antitrust policy in the course of its regulation. (The Board apparently thought, incorrectly, that each of Applicant's agreements which it discussed had been approved by the FPC. Such is not the case. Rate schedules and agreements voluntarily entered into are required to be filed with the FPC. The FPC normally accepts them for filing and does not approve, disapprove, or modify them unless they are contested. In fact, the FPC has neither approved nor disapproved any of Applicant's agreements that were discussed by the Board.) That the FPC may direct coordination or approve, disapprove, or modify voluntary coordination agreements filed with it, pursuant to its regulatory jurisdiction in no wise relieved the Board of its own duty to consider independently the antitrust implication of Applicant's voluntary interconnection agreements and its voluntary refusals to enter into such agreements in the context of the Department's allegations that they were part and parcel of a situation inconsistent with the antitrust laws.

2. Refusals by Applicant to Provide Transmission Services Either to Facilitate Coordination Arrangements Between and Among the Small Electric Systems in Michigan's Lower Peninsula or To Wheel Wholesale for Resale Electric Power

In light of the Hearing Board's finding "that Applicant's conduct amounted to a general refusal to wheel," (ID at 142) we will not herein reiterate the substantial evidence supporting this conclusion. However, we direct the Appeal Board's attention to Brief for the Department (at 144-147), and of the Brief for the NRC Staff at 92-96.

Despite finding that Applicant has a policy of refusing to wheel electric power between, among or for the small electric utility systems in Michigan, the Hearing Board nevertheless concludes that such refusal is neither unreasonable nor part of a scheme or conspiracy the purpose or effect of which is to monopolize, i.e., a situation inconsistent with the antitrust laws (as defined by the Hearing Board). This conclusion is essentially based upon three erroneous premises:

(1) The bottleneck theory of monopolization is applicable only to jointly owned facilities. (ID at 95);

(2) a refusal to wheel is not per se illegal (ID at 92); and

(3) Applicant's transmission is not a "bottleneck" for members of the MC Pool, Lansing, and Holland since they can coordinate among themselves using their own transmission network and it is not a bottleneck for the remaining small systems since they are too small to need coordinating services.

The first premise is erroneous as a matter of law

(supra at II-B-4). The second premise is irrelevant, since the Department has not argued that a refusal to wheel is per se illegal, but rather that a refusal to wheel is exclusionary conduct which is illegal when engaged in by a company possessing monopoly power. Whereas, a refusal to wheel by a company not possessing a monopoly may or may not violate the antitrust laws, such conduct by a monopolist is illegal. (Supra at II-B-3).

The third premise is both factually and legally erroneous. (Supra at II-C-2). The Hearing Board is in effect saying that the utilities "capable of coordination" (MC Pool, Lansing and Holland) do not absolutely need wheeling to coordinate and all other systems need only wholesale power which they can purchase from Applicant.

The Hearing Board goes on to declare that Applicant has a right to choose not to "enter the business of wheeling" (ID at 166) and concludes that if the small utilities have the right to such wheeling "this is the wrong forum for the enforcement thereof." (ID at 166).'*/

Apart from its legal error in assuming that Applicant's facilities must be absolutely indispensible to constitute a

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*/ If the Hearing Board is correct (and we submit it is not), the sole forum available to the small systems to enforce their rights for wheeling over Applicant's system is a District Court (where issues identical to those litigated in this proceeding would be relitigated), since the Federal Power Commission has purposefully been denied such power by Congress. (See, e.g. S. Rep. No. 621, 74th Cong., 1st Sess.)

"bottleneck"; the Board's analysis is factually unsound. There are small systems in Applicant's area which are totally dependent upon the use of Applicant's system to obtain coordinating power. For example, Alpena Power, which presently has a small amount of hydroelectric generation, is interested in and is studying the possibility of constructing a joint venture generating facility. (Fletcher, TR at 4274-76) This proposal requires wheeling over Applicant's transmission network -- the wheeling of coordinating power, a business long engaged in by Applicant. */ The Hearing Board's approach effectively denies Alpena Power and the other small isolated utilities the opportunity to begin generating to meet their full electric power requirements. The "make or buy from Applicant" option (ID, at 165) left open by the Hearing Board to the small utility systems, which are too remote from the MC Pool or the regional power exchange to obtain alternate sources of power without wheeling by Applicant, is illusory. without access to coordination, small-scale electric power generation is simply not viable. (Rogers, TR at 5997-98)

More importantly, the Hearing Board's analysis avoids the real issue. As we demonstrated above, Applicant's transmission network is the sole means through which all the small electric

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*/ For example, Applicant allows use of its facilities to transfer energy between Detroit Edison Co. and Toledo Edison Co. (Int. #1005, at 64-66, DJ #72, 77). Also, Applicant wheels electric power to Commonwealth Edison and Indiana & Michigan Power Co. from the Ludddington-pumpted storage generating facility. (DJ #227, #230; Mayben, TR at 2683-87).

utility systems in Michigan's lower peninsula can obtain alternative sources of electric energy -- and most importantly, obtain access to coordinating energy from the regional power exchange and firm power from utilities outside the Lower Peninsula. Applicant has utilized and continues to utilize its strategic dominance of high-voltage transmission for the specific purpose of preserving its market position in the retail and wholesale markets. Applicant's Chief Executive, Aymond, testified on direct examination that Applicant would refuse to provide wheeling services where it would "result in a significant loss to Consumers Power, directly or indirectly, of existing load or service area . . . . " (Aymond, TR at 6050; see also TR at 6099-6102) In his deposition, Mr. Aymond was equally clear regarding the competitive genesis of Applicant's refusals to wheel:

> Q. Assume that Ohio power or Bukeye power or Ontario Hydro or some other entity were willing to sell power to a municipality within your service territory, would you sell transmission services to get the power there?
>
> A. The matter has never come up and I think I would want to know more of the details of the transaction.
>
> * * *
>
> I would want to know, for one thing, whether or not our lawyers felt we were obligated to do so. For another, I would want to know for what purpose the power was being sold and at what rate . . . what the receiving utility intended to do with it, what impact it would have in the long run on the ability of Consumers Power Company to maintain its present markets.
>
> Q. Is it fair to say that your judgment would be based at least in part on your judgment of the

extent to which the purchase of this power by the municipality or cooperative within your service territory enabled it to reduce its rates in competition with Consumers Power?

A. I think that would be a factor.

Q. A large factor?

A. I think so.

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

* * *

A. . . . . I think whether the receiving utility actual was going to use it to invade our present market area would be a factor.

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

A. Well, start taking away our customers which we have invested a great deal of money in order to serve them. (Int. # 1004, at 183-184).

Nor would Applicant agree to wheel if doing so would result in competition from the small systems in its purchases of coordinating power from, for example, the Hydro Electric Power Commission of Ontario. (Aymond, TR at 6095).

It is clear, therefore, that Applicant employs its monopoly of transmission facilities to maintain its wholesale monopoly, to deny the small Michigan utilities access to the regional power exchange, and will refuse to wheel either wholesale-for-resale electric power or coordinating power if such action would reduce its dominance of the relevant market. As pointed out above, utilization of the leverage afforded by a monopoly in one market to monopolize or attempt to monopolize a second market is

a well-established violation of the antitrust laws. (Supra at II-B-3). It was this very conduct that formed the basis for finding that Otter Tail Power Company violated the Sherman Act. (Supra at II-3-4).

We submit, therefore, Applicant's policy of refusing to wheel either wholesale for resale electric power or coordinating power and energy is a violation of the antitrust laws and fully cognizable under Section 105c.

3. Refusal to grant direct access to the Midland Nuclear Units

The Hearing Board found that refusals by Applicant to grant access to the Midland Nuclear Units were not unreasonable (ID at 147), and this fairly implies a finding that Applicant did, in fact, refuse to grant such access. In order that the Appeal Board have a clear understanding of this important fact, we will briefly outline the record evidence.

By letter dated July 20, 1971, Northern Michigan Electric Cooperative informed Applicant of the Cooperative's interest in exploring participation in the ownership and output of the nuclear-fueled electric power generating plant being constructed at Midland. (DJ #122). Similar written requests were forwarded to Applicant by the City of Grand Haven (July 29, 1971; DJ #27) and the City of Traverse City. (May 24, 1971; DJ #24). Applicant never responded to these requests. Additionally, Mr. Steven Fletcher, President of Alpena Power Company, requested access to

the Midland nuclear unit (Fletcher, TR 4350), as did Mr. E. Harold Munn, Jr., President of the Board of Public Utilities of Coldwater, Michigan. (Munn, TR at 4141-4142) Both gentlemen were informed that access, either by ownership participation or unit power purchase, was not available.

The Hearing Board concludes that Applicant's refusal to offer the small Michigan utility systems direct access to the Midland facility is legitimate and does not constitute a situation inconsistent with the antitrust laws. (ID at 97-99, 144-148, 172-175-177). This conclusion is initially founded on a total misconception of the nature of the Nuclear Regulatory Commission's licensing authority:

> As has been discussed in connection with the matter of next the use of activities under a grant authorized by Congress is immune from the reach of the antitrust [laws]. * * * The argument that activities under and within the scope of a license granted pursuant to federal statute can, in and of themselves, create or maintain a situation inconsistent with the antitrust [laws] is to imply that, in passing the Congress stultified itself. Such an argument stretches credulity to the breaking point. (ID at 98.)

The rationale quoted above would be logical only if (1) the NRC had specifically been authorized by Congress to immunize nuclear licensees from antitrust scrutiny and (2) one of the activities which the NRC was authorized to immunize is refusals by a licensee applicant of requests for direct access to the facility. Silver v. New York Stock Exchange, 373 U.S. 341 (1962); Sea-Land Line v. Federal Maritime Commission, 460 F.2d 932 (D.C. Cir.) 1972), aff'd. 411 U.S. 726 (1973); cf. Pan American World Airways v. United States, 371 U.S.

296 (1963). The Atomic Energy Act contains no such provision nor does it provide for "pervasive" regulation by the NRC of the competitive conduct of a nuclear licensee as a substitute for antitrust enforcement. Compare Keogh v. Chicago & Northwest R. R., 260 U.S. 157 (1922) and Georgia v. Pennsylvania R. R. Co., 324 U.S. 439 (1944). Thus, the argument that granting a license to construct and operate a nuclear facility immunizes from antitrust scrutiny the activities under the license, one of which is unilateral denial of access to the facility, is unfounded.

On the contrary, the legislative history of Section 105c indicates a clear desire by Congress that access to nuclear facilities be as wide-spread as possible. The Atomic Safety and Licensing Board in the proceeding involving Alabama Power Company's Farley Nuclear Plant aptly summarized, in an Order addressed to the question of nexus, Congress' intent in enacting Section 105c:

> Our reading of the legislative history of the antitrust provisions of the Act convinces us that the primary impetus for the injection of antitrust considerations into the nuclear licensing process was the deeply held concern of Congress that the huge public investment in the research and development of nuclear reactor technology should not be utilized by a few leading private firms to entrench themselves in an anticompetitive market position. Competition in the electric power industry, even more than the atomic power industry, was so clearly a basic concern of Congress, and was referred to so often during the legislative history of the 1970 Amendments, that no citations are needed. */

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*/ Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), AEC Docket Nos. 50-384A and 50-364A, Memorandum and Order, February 9, 1973 (hereinafter, "Farley Memorandum and Order") at 14-16.

The Commission emphasized this same theme in its Waterford Memorandum when it stated:

> The Commission's antitrust responsibilities represent inter alia a Congressional recognition that the nuclear industry originated as a Government monopoly and is in great measure the product of public funds. It was the intent of Congress that the original public control should not be permitted to develop into a private monopoly via the AEC licensing process, and that access to nuclear facilities be as widespread as possible. */

Moreover, the fact that the Midland unit is a sole owner nuclear facility rather than a joint venture in no way mitigates the Congressional concern regarding private monopoly over nuclear power. Whether a facility is jointly owned or solely owned is an economic-engineering question dependent on on whether an electric system is large enough to absorb the entire output of a nuclear facility without assistance from its neighboring electric systems. It is implausible to argue, as Applicant has done, that Congress enacted antitrust legislation aimed only at small and medium-sized electric systems, who must enter joint ventures to take advantage of nuclear technology, and left larger firms immune from antitrust liability.

In addition to this "immunity" rationale, the Hearing Board suggests three other bases for its finding that Applicant's refusal to grant the intervenor systems direct access to the Midland facility is reasonable and not a situation inconsistent with the antitrust

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*/ Louisiana Power & Light Company (Waterford Steam Electric Generating Station, Unit No. 3), AEC Docket No. 50-382A; Memorandum and Order of the Commission, September 28, 1973 (hereinafter "Waterford Memorandum").

laws: (1) the requests for direct participation in the Midland facility were not timely (ID, at 144-48); (2) the intervenors do not need direct access to Midland Power (ID at 172-174); and (3) wholesale power provides adequate access to nuclear power. (ID at 175-177).

The Hearing Board's dismissal of the access requests as "untimely ignores the realities of coordination among utilities and rewards Applicant for its persistent course of monopolistic conduct. Until the passage of the amendments to the Atomic Energy Act in December, 1970, the small utilities had no reasonable expectation that Applicant would even consider their requests for direct participation in the Midland Units. It should be remembered that in 1967, the year that construction of the Midland Unit was announced, Applicant was, for example, still refusing to enter into any kind of a reserve-sharing arrangement with the MC Pool. As long as Applicant denied even the most basic forms of coordination to the small systems, it is hardly surprising that requests for the more advanced and sophisticated kinds of coordination (unit power or joint development) were not forthcoming.

Mr. Wolfe of Traverse City explained that simple measures of operating coordination (such as reserve sharing) usually precede in time the more sophisticated pooling transactions involving various kinds of coordinated development:

A. * * *

> I think in the past it has been very common for utilities to, first of all, to become interconnected with the relatively simple agreement used in just

an emergency or an agreement that provides for emergency power transfers and then at some point in time to recognize the advantages of fuller coordination and enter into perhaps a limited pool type of arrangement.

* * *

Q. With respect to coordinating operations, or coordinating planning, sir, would you be more likely to find one rather than the other in the earlier type of agreement?

A. I would say that initially it would tend to be coordinated operations and then progress to coordinated planning. (TR at 1609-10).

* * *

A. So, with that past experience it was natural for us to frame our own proposals or to visualize our own needs and what we might be able to obtain from Consumers Power Company would have to take into account, I would say in my opinion, their negative posture . . . the posture that Consumers had shown up to that time as with those [unfavorable] interconnection arrangements with small systems.

Q. . . . Would it be realistic to expect a small system to frame a proposal for a sophisticated coordinated development?

A. It would not be feasible at all, because as we testified earlier, coordination generally develops from a more simple arrangement to the more coordinated arrangement and generally coordinated operation comes before coordinated planning.

Q. Would you consider arrangements for participation in a generating unit in the baseload generated unit with the more sophisticated type of arrangement, as compared with an emergency power arrangement?

A. Yes. (Wolfe, TR at 1613-1614).

Since the smaller systems had been rejected in their requests for the basic operating coordination, it is not surprising that this chilled specific requests for coordinated development of future supply. However, such requests, including particularly

requests for access to participation in Applicant's proposed nuclear units, quickly appeared when it became known that antitrust review provisions of the Atomic Energy Act of 1954, as amended in 1970, would open opportunities for these arrangements. Thus Mr. Wolfe testified:

> Q. What prompted that [the request for coordination in DJ #58], Mr. Wolfe?
>
> A. . . . 1971 is the period of time in which a decision was made by a number of parties in Michigan to intervene in the Midland antitrust hearing, and it was felt that these particular requests should be documented and made clear for the record that we were, in fact, asking for consideration of these items.
>
> * * *
>
> Q. How did you first learn of any rights you might have had, legal rights to do the things that apparently you may have wanted to do?
>
> A. As regards the Midland Nuclear Plant?
>
> Q. Yes.
>
> A. Well I became aware of the change in the Federal law which required that applicants for construction of nuclear plants would require a review by the Justice Department to consider any antitrust implications about the time that the law was changed.
>
> But it was not clear at the time what the rights of the parties like Traverse City or small systems might be, except there was some speculation in the industry. I think, at the time. But it was not until later that -- I think that change in the law was in 1970, and it was not until in 1971 when the Justice Department made an investigation of this application that we began to become increasingly aware of some of the possible rights that we might have under the law.
>
> And it was at that time that we had considerable discussion among ourselves and with legal counsel regarding some of these provisions and rights and started to attempt to obtain them. (Wolfe, TR at 1624-26).

DJ #22, #24, #26, and #27 all reflect the desires of small systems in Michigan to obtain access to the full range of opportunities in the regional power exchange. Except for acknowledgements of their inquiries, e.g., DJ # 23, Applicant's first response to these inquiries, which date from 1971, was the statement of Alphonse Aymond on the witness stand on February 12, 1974.

We submit that any rationale which allows Applicant to assert the "untimeliness" of the small utilities' requests for participation in the Midland Units as a justification for denial of such participation is inconsistent with the Congressional intent behind Section 105c and is tantamount to permitting Applicant to shield itself with its prior refusals to engage in operational coordination.

The Hearing Board's second (and subsidiary) rationale for its finding that denial of access to Midland does not contravene Section 105c is that:

> There is no substantial evidence in the record of this proceeding that the smaller utilities are precluded from building their own nuclear power facilities because of size limitations. (ID at 174).

This suggested alternative to the small systems is founded on the erroneous proposition that Applicant's 75 mw Big Rock experimental nuclear facility demonstrates that nuclear plants of that size are currently economically feasible. (ID, at 174, 120-122). Nearly every witness who testified in this proceeding was of the opinion that construction of a nuclear power plant by a

small electric system was out of the question. (Mayben, TR at 2771-72, 2808, 2831; Kline, TR at 4431; Chayavadhanangkur, TR at 5137, Paul, TR at 7988; Rogers, TR at 5542-43; Fletcher, TR at 4331, 4311; Aymond, TR at 6645) One of the principal reasons for this inability of small utilities to install nuclear power is the economies of scale associated with nuclear facilities.

The Department's expert, Mr. Mayben, testified that due to these economies of scale, a 500 mw nuclear generator is the smallest size which is economically feasible. (Mayben, TR at 2558; see also Wolfe, TR at 1678A; Brush, TR 2292). Nevertheless, the Hearing Board quotes selectively from Mr. Mayben's testimony, */ states that such testimony "is based on hearsay testimony of gossip in the industry" (ID at 174-175) and concludes a 75 mw nuclear facility is economically feasible. Even assuming the relevance of data regarding the Big Rock plant (it was constructed in 1962 as an experimental facility), the record provides no indication as to the current economic viability of such a

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*/ Mr. Mayben's testimony in full indicates a sound basis for his opinion testimony:

> A. Yes, certainly. I don't want to imply to The Board or to the record that I'm a nuclear power expert, by any means. But in conducting power supply studies for my clients, we do have access to a great deal of information with regard to the cost, the operation, the operational aspects.
>
> With the Nebraska Public Power District, who was an Applicant before this Commission, and is contemplating an operating license very shortly for its plant, I was involved in the very beginning of planning of their 800,000 kilowatt unit, and have

(Footnote continued)

facility. For example, construction costs have inflated substantially since 1962, and it is doubtful that a similar facility could now be constructed. (See Aymond, TR at 6353). This Appeal Board may take official notice of the size of generating units for which applicants are now seeking licenses. If a nuclear unit of anything close to 75 mw were commercially possible, one would surely expect some systems to be seeking licenses to construct them.

The final rationale for denial of nuclear power to the small electric utilities is the Hearing Board's finding that:

> . . . adequate access to nuclear power is provided to both the citizens and the competing utilities by the sale of power by Applicant at its retail and wholesale rates. (ID at 177).

To the extent this finding indicates that the Hearing Board believes firm power and unit power are substitutable, it is in direct conflict with the Safety and Licensing Hearing Board in in the Waterford proceeding, */ which dismissed wholesale power as being inadequate access to a nuclear facility.

(Footnote continued from previous page)

> been involved somewhat embarrassingly in the -- actually, the acquisition of additional funds to complete the cost of construction. It has realized some cost overruns, and so with that role I have kept abreast of what is going on, at least on a broad general basis, in the nuclear power industry. TR at 2559 (Emphasis added).

*/ In the matter of Louisiana Power and Light Company (Waterford Steam Generatin Station Unit No. 3) AEC Docket No. 50-382A, Memorandum of Board with Respect to Appropriate License Conditions Which Should be Attached to a Construction Permit Assuming Arguendo a Situation Inconsistent with the Antitrust Laws, October 24, 1974 (hereinafter "LP&L Board's Memorandum").

To the extent the Hearing Board intends to indicate that the small systems will remain active and viable competitors without direct access to the Midland facility, it is rebutted by substantial evidence to the contrary. The Midland facility will generate approximately 1300 megawatts of nuclear power which will be integrated into Applicant's system for marketing in the area of lower Michigan where Applicant is located. (Stafford, TR at 9166). That 1300 megawatts of nuclear power -- supported by the tying of Applicant's system into the regional power exchange -- is expected to be the cheapest available power to serve new and growing loads at the time the Midland units go on line. (Stafford, TR at 9160, 9166, 9240; Aymond, TR at 6353).

The 1300 megawatts of large unit, base-load, nuclear electric power produced by the Midland units will represent approximately 16% of Applicant's total generation capacity at the time of installation (DJ #183) and will represent an even greater percentage of Applicant's base-load capacity (generating units projected to operate nearly full time). Moreover, when operational, the Midland units will increase the nuclear portion of Applicant's generation capacity to approximately 36%. (DJ #183, at 4). Applicant apparently believes nuclear generation to be the most economical form of new base-load electric power generation for use in Michigan's lower peninsula. (DJ# 21 at 15-17; Aymond, TR at 6353; Stafford, TR at 9240).

This belief is entirely reasonable. (Brush, TR at 2502). In addition to the cost advantage of nuclear generation vis-a-vis

alternative types of generation, there is a serious question as to the avilability of fuel for alternative types of generating units. (Steinbrecher, TR at 1225-27; Mayben, TR at 2807; Brush, TR at 2503-04). Moreover, given the probability of continued increases in the price of fossil fuels, "there does not appear to be any reason to expect that the nuclear advantage will not be maintained or even increased as time goes on." (Federal Power Commission National Power Survey, Part II 1-59 (1970); see also Brush, TR at 2354.)

Applicant's Supplemental Environmental Report (AEC Docket Nos. 50-329A, 50-330A) */ presents an economic comparison of possible generation alternatives for supplying the 1300 megawatts of power generation to be provided by Midland Plant. The following tabulation from the Report shows the total cost of the alternate power sources per kilowatt-hour:

Assumes 1300 mw capacity	Capital	Fuel **/	Overhead & Maintenance	Total
Midland Plant	6.18	1.99	0.50	8.67
Coal Steam Plant	8.76	5.70	0.80	15.26
Oil Steam Plant	20.10	6.86	0.80	27.76
Oil Combined Cycle	10.92	6.86	1.00	18.78
Oil Combustion Turbines	40.77	16.86	1.20	58.83

While the Department does not necessarily concur in Applicant's figures, we certainly concur in the proposition that nuclear power is likely to provide the lowest-cost large-unit, base-load generation for Michigan's lower peninsula.

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*/ DJ #236.

**/ This is based on a nine-year levelized fuel cost.

electric utility system in the lower peninsula and provide a limited form of reserve sharing, it has insisted upon imposing a restriction upon these systems interconnecting with third parties. For example, its 1967 contract with the City of Holland states:

> Connections: It is agreed that the electric energy to be supplied by Consumer's Power to Holland hereunder shall be used solely to meet a part of the requirements of Holland in the operation of its electrical system located in the State of Michigan. It is further agreed that without the written consent of Consumer's Power, Holland shall make no interconnection with any person, firm, corporation, government agency or other entity which might result in either party hereto becoming engaged, directly or indirectly, in a transmission or sale at wholesale of electric energy in interstate commerce. If Holland makes such an interconnection without such written consent, Consumer's Power may, at its option, terminate this agreement forthwith by giving written notice of its intention to do so. (DJ #100).

Similar provisions are contained in Applicant's contracts with Northern Michigan (1967 contract; DJ #64), Edison Sault Electric Company (1966 contract; DJ #800, City of Lansing (1964 contract; DJ #91), Southeastern Michigan Rural Electric Cooperative (1967 contract; DJ #93), the City of Bay City (1967 contract; DJ #94), Alpena Power Company (1966 contract; DJ #95), Village of Chelsea (1964 contract; DJ #98).

It should be noted that Southeastern Michigan, Village of Chelsea, and Bay City have no generation of their own but are solely wholesale customers of Applicant. (DJ #14). Moreover, Northern Michigan (as part of the MC Pool), City of Lansing, Alpena Power, and Bay City, both individually and as a group, are isolated by Applicant's service area and transmission network

from any reasonable possibility of receiving or transmitting power across the Michigan border. (See discussion supra and ID at 126). Thus, the stated rationale for inclusion of these provisions in its contracts with the small systems, namely fear of inadvertently becoming subject to the jurisdiction of the Federal Power Commission (Paul, TR at 7941), was not entirely credible.

Nevertheless, the Hearing Board found that Applicant's inclusion of these provisions was reasonable, and that they did not give Applicant the power to grant or deny access to coordination among the small utility systems. Moreover, it held that even if these contractual restrictions did give Applicant such power, it never exercised the power in an anticompetitive fashion. Finally, the Hearing Board found that even assuming that these contract provisions amount to a situation inconsistent with the antitrust laws, Applicant's abandonment of these provisions makes the situation moot.

We have elsewhere discussed the error of the Board's attempt to scrutinize each of the Applicant's activities in isolation from the evidence as to the purpose and effect of other related activities, and its consequent failure to recognize the aggregate of such conduct as a plan of monopolization. However, a brief comment is necessary here. The existing situation in Michigan's lower peninsula is the result, to one degree or another, of conduct which dates as far back as the foundation of Michigan's electric utility industry in the last century. Artificial barriers imposed by Applicant to coordination between or among the

small utilities have an impact on the competitive situation in Michigan long after the barriers themselves cease. If Applicant, by past monopolistic conduct created a situation inconsistent with the antitrust laws, the critical question is whether that situation now continues, not whether the particular monopolistic conduct continued.

A necessary consequence of Applicant's restriction on the small utilities' ability to interconnect with third parties was to limit these systems' opportunities to broaden their reserve-sharing pool and thereby reduce their reserve requirements. */ Mr. Brush, manager of the Lansing system, testified that Applicant's insistence upon such a clause in a contract between Applicant and Lansing, effective through February, 1973, was very objectionable to him since it precluded Lansing's interconnection with MC Pool. (Brush, TR at 2090; DJ #91). The record shows that in 1968 the consultant for the Northern Michigan and Wolverine cooperatives discussed with Mr. Brush the benefits that might flow to Lansing if it interconnected with the MC Pool. Subsequent to the meeting, Mr. Brush was invited to attend a planning or operating committee meeting of the MC Pool in Grand Rapids to discuss the

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*/ The value of broad scale interconnections and reserve-sharing arrangements is illustrated by DT #65, p. 2, which shows that Applicant's reserve requirements (as viewed in 1962) could be reduced from 24% of load to 19% by interconnection with Detroit Edison, to 15% by interconnecting further with Ontario Hydro and to 12.5% if the MIIO systems to the south were included in the pool.

possibility of Lansing's either joining the pool or interconnecting with it. But the existing contract between Applicant and Lansing precluded such interconnection. (Brush, TR at 2235).

Even if Applicant's primary motive for insisting that these provisions be included in its contracts were a bona fide concern to avoid FPC jurisdiction, the effect of these restrictions was, at a minimum, to deny Lansing to the MC Pool as a coordinating partner. */ Moreover, Applicant's interest in imposing this clause continued well after the time when it decided it was required to file its rate schedules with the FPC. Mr. Jefferson testified that Applicant began filing its rates with the FPC in 1966 (Jefferson, TR at 8300). Yet, Mr. Brush could not recall having been advised in the bargaining sessions with Applicant regarding the 1970 Lansing-Applicant contract that Applicant no longer needed the clause prohibiting "connections with others." He noted that Applicant made no suggestion to amend the existing contract (which lasted through February, 1973) to delete the prohibition. (Brush, TR at 2131). Also, DJ #94 shows that a February, 1967, contract between Applicant and Bay City (which is located near the head of Saginaw Bay far from any state boundary) contained the third-party restriction; DJ #96, a 1971 amendment to

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*/ It is difficult to understand the Hearing Board's finding that Mr. Brush's "interpretation" of the contract provision was "completely unrealistic" (ID at 126) or its relevance. The facts of record are that Lansing refused to pursue a possible interconnection with the MC Pool because of its contract with Applicant. Reasonable or not (of course Lansing could have breached the provision, thereby giving Applicant the option to terminate the entire contract), Lansing's conduct was a direct result of the restriction imposed on it by Applicant.

Applicant's contract with Alpena Power failed to remove the prohibition from their 1966 contract; and DJ #100-#103 show that an identical prohibition on connections with others was in effect in the Holland contract through November, 1971.

Finally, the Hearing Board's finding (based on the testimony of R. L. Paul) that no "contracting party requested or was denied permission to interconnect with a third party" (ID at 126) is refuted by Mr. Paul's testimony on cross-examination. On direct Mr. Paul claimed that no one had ever requested permission to connect with another system and therefore no such request had been denied (Paul, TR at 7942); he claimed, in response to questions from Chairman Garfinkel, that his knowledge was widespread on those contracts. But, when faced with a document which he had written (DJ #272, marked for identification), showing such a request and denial, he concluded that his previous answer was incorrect. (Paul, TR at 8076).

5. Reverter Provision in Deeds by Which Applicant Has Disposed of Hydroelectric Projects

Applicant, by deed restrictions, has consistently insured that its abandoned hydroelectric stations will not be utilized as bulk power supply sources by smaller electric utilities in Michigan. Mr. Aymond discussed this policy on cross-examination:

> Sir, is it correct that you have had a policy in disposing -- well, is it correct that from time to time you have abandoned or disposed of hydroelectric project formerly owned and operated by Consumer's Power Company?
>
> Yes, sir.

Applicant's 1972 Annual Report echoes the importance of nuclear power:

> In the next 27 years, between now and the year 2000, our major energy problem will be to develop increased domestic sources of oil, gas and coal, and to make greater use of available uranium to generate electricity. There will be greater reliance on coal and much greater need to utilize nuclear fuel.
>
> In Michigan, it is clear that nuclear generation of power must increase dramatically, and quickly, if foreseeable requirements for electric energy are to be met. Indeed, if the state is to continue to compete for jobs with all the other industrial states, Michigan's people -- and most especially organized labor -- must realize that nuclear power is their hope.
>
> * * *
>
> Nuclear power, then, continues to hold out the greatest and best promise for meeting the energy needs of the future. (DJ #21 at 16-17).

The advantage of integrating low-cost nuclear generation into a multiple-plant, multiple-fuel, electric utility operation is obvious. Average cost is reduced. (DJ #232; Aymond, TR at 6361-63). To the extent that Applicant is able to reduce its average cost while preventing its competitors from doing so, it improves its competitive position. (Wein, PT. at 65; Rogers, TR at 5544).

In conclusion, we submit that none of the suggested justifications for Applicant's refusal to grant access to the Midland units is valid and that such refusals must be regarded as further monopolistic conduct.

4. Contract Provisions Limiting Small Electric Utilities with Which Applicant was Interconnected from Interconnecting with Third Parties

Even when Applicant has been willing to contract with a small electric utility system in the lower peninsula and provide a limi-

> Now is it correct in the deeds disposing of these projects that you have restricted, as a restrictive covenant in the transaction, the use of the water power for the generation of electric power forevermore after the disposal?
>
> I think so.
>
> You will recall, Mr. Brand, that I pointed out to you that usually we were disposing of these on the grounds that they were no longer economical for us to operate, and we were disposing of them for a very nominal consideration, perhaps one dollar in most instances.
>
> And apparently our lawyers felt that it would be unfair for those to wind up in the hands of a competitor for that nominal a consideration. (Aymond, TR at 6433-6434).

The value to a small utility of owning and operating even a small-scale hydroelectric facility is manifest. Hydro plants have relatively low operation and maintenance costs and their ability to go on line in a very short time period make them ideally suited for serving peak loads and serving as spinning reserve capacity:

> Hydroelectric power plants have distinct advantages over thermal plants. Operation and maintenance costs are relatively low, and in many instances, the plants can be designed for automatic or supervisory control from a remote location. The cost of fuel, a major expense in thermal installations, is not an item in the operational costs of hydroelectric plants. * * * Hydroelectric installations have long life and low rates of depreciation. Unscheduled outages are less frequent and down-time for overhaul is of short duration because hydroelectric machinery operates at relatively low speeds and temperatures and is relatively simple. * * * The ability to start quickly and make rapid changes in power output makes hydroelectric plants particularly well adapted for serving peak loads, and for frequency control and spinning reserve duty. If operating at less than full load, they are, in most cases, able to respond very rapidly to sudden demands for increased power. Their ability to supply

starting power to steam-electric plants following a major power failure has been demonstrated on several occasions in recent years" Federal Power Commission, National Power Survey, Part I 1-7-1 (1970).

Alpena Power, which has a system load of approximately 57 mw, most of which is supplied by Applicant under a wholesale rate, finds it desirable to maintain and operate four hydroelectric plants with a total capacity of only 7 mw (Fletcher, TR at 4256); this allows Alpena Power to maintain only a 50 mw capacity reservation with Applicant despite serving a peak load of 57mw. */ Also, Mr. Kline of Edison Sault Electric Co. (which purchases part of its requirements from Applicant under a wholesale contract) testified regarding the value of hydroelectric generation to this system:

> . . . historically we have had . . . the cheapest rates in the State of Michigan.
>
> So we do evaluate all possibilities of getting the cheapest power we can. And hydro is a highly contributing factor . . . . (Kline, TR at 4418.)

Unfortunately, there are few remaining undeveloped sites in Michigan capable of being employed for hydroelectric generation. (Brush, TR at 2501). Moreover, the majority of hydroelectric resources in the relevant market of Michigan, which have not yet been developed, are owned or controlled by Applicant. Federal Power Commission, (Hydroelectric Power Resources of the United States: Developed and Undeveloped, 65-66 (1972).

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*/ The cost of wholesale firm power reflects both a capacity charge and an energy charge. (Jefferson, TR at 8307). Without its hydroelectric generation, Alpena would be forced to increase, and pay for, its capacity reservation of the full 57 mw although it would seldom hit a peak. In other words, Alpena Power, by operating its hydroelectric generation, is able to lower its overall power costs.

Finally, even if the value to a small utility of the hydroelectric facilities disposed of by Applicant may be somewhat speculative, Applicant declined to take any chance. That Applicant perceives a potential value to a competitor from these facilities is demonstrated by the fact that it took action to prevent future use of these sites for generation of electric power so that they would not "wind up in the hands of a competitor. . . . " (Aymond, TR at 6434).

6. Territorial Agreements Between or Among Applicant And Other Large Investor-owned Utilities

The Hearing Board found that "there is no substance to the testimony concerning 'gentlemen's agreements'." (ID at 160). We sumbit that this finding cannot stand in the face of the abundant testimonial and documentary evidence in this record as to understandings, or "gentlemen's agreements" among the major utilities not to sell electric power to or within a territory generally recognized as belonging to another major investor-owned utility. */

Initially, it should be made clear that the attempt by the Hearing Board to imply that the Department of Justice conceded the immateriality of these territorial agreements is totally erroneous. The Initial Decision states:

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*/ The Hearing Board found that this evidence was beyond the relevant matters in controversy. Somehow, it interpreted this evidence as designed to show "conspiracies to limit retail competition." (ID at 158) The evidence shows conspiracies to limit the availability of power alternatives to small systems. We believe these agreements have a direct bearing on the central allegation that Applicant has monopolized by refusing to deal in coordinating services. The existence of territorial allocation agreements, foreclosing bulk power supply alternatives to small systems, facilitates Applicant's adherence to its refusal-to-deal policy. If the small systems had alternatives for wholesale supply from other major systems, Applicant might well decide to sell them coordinating services, rather than lose them as customers entirely.

"Counsel for Justice accurately and wittily summed up the whole topic of gentlemen's agreement thus:

> MR. BRAND: I just wanted to say that on the news report last night Mr. Sam Goldwyn, who just died, was quoted as saying: "An oral contract isn't worth the paper it's written on." And I think this controversy has about the same weight. [TR at 5382]" (ID at 160).

In fact, the topic of gentlemen's agreements was not being discussed at all. Rather, counsel for the Government was stating his view as to a controversy over whether the statement:

> Experts in the energy field are saying that the utilities have seen the last generation of fossil generating units. (Chayavadhanangkur, PT at 3).

was hearsay or opinion testimony and whether an offer of proof was appropriate since the statement had been stricken. (TR at 5373-5382). With this clarification we now turn to the evidence of record.

In 1960, the Village of Constantine indicated an interest in having Applicant, rather than Michigan Gas & Electric Company, sell it power or, in the alternative, purchase its system. Applicant's G. W. Howard, in a letter to B. G. Campbell, Applicant's Vice President of Marketing, evidenced his recognition of a "gentlemen's agreement" between Applicant and Michigan Gas whereby each would respect the other's territorial integrity:

> We realize, of course, that we do not want to offend the Michigan Gas & Electric Company by serving customers in their area. However, since the Village of Constantine has always been unhappy with Michigan Gas & Electric, maybe there could be a mutual agreement worked out whereby we could serve Constantine. (DJ #157).

Nor, apparently, was Mr. Howard the only employee of Applicant to adhere to such "gentlemen's agreements." Warren Sunstrand,

attorney for the Village of Paw Paw and formerly an electrical engineer working for Applicant, testified that he was advised by Applicant's R. L. Paul that a "gentlemen's agreement" between Applicant and the former Michigan Gas & Electric Company was the reason for Applicant's failure to make an offer in 1962 or early 1963 to sell wholesale power to the village. (Sunstrand, TR at 3903). Later, in 1966, following a tender offer by American Electric Power to the shareholders of Michigan Gas & Electric, Applicant did make an offer to the Village of Paw Paw (TR at 3911), but promptly withdrew it when it appeared that competition had developed between it and AEP. (DJ #136; Paul, TR at 8095-8096). */

While both Alphonse Aymond, chief executive of Applicant, (Aymond, TR at 6045) and Mr. Robert Paul, Applicant's employee in charge of dealing with competing municipal systems (Paul, TR 7959), denied the existence of such territorial agreements and, in fact, Mr. Aymond testified that if anyone in Consumer's Power Company were party to such an understanding, he would discharge him immediately (TR at 6841), it is significant that in an internal

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*/ The initial decision finds that "if there was such a gentlemen's agreement, Applicant broke it," (ID at 159). But the 1966 offer to the Village of Paw Paw was made by Applicant only after American Electric Power had made a tender offer for the Michigan Gas & Electric Company; Applicant may well have regarded AEP's aggressive conduct in advancing the tender offer as releasing it from the obligations of the gentlemen's agreement.

memorandum of December 3, 1963 (DJ #235), Mr. Paul acknowledged the existence of such an agreement with regard to Paw Paw. The document states in part, "they [Paw Paw officials] are expected to point out that the gentlemen's agreement not to infringe on other power companies' territory even when no franchise or contract exists is an act of undue restraint of trade." Mr. Paul is still an active employee of Applicant.

Finally, there is the well-documented attempt of Southeastern Michigan Rural Electric Cooperative, Inc. to obtain a more favorable power supply for its retail markets extending across the Ohio-Michigan border. Prior to 1966, Southeastern obtained power for its Michigan loads from Applicant; its Ohio loads were originally served by the Toledo Edison Company directly, and then later by Toledo's wheeling power from Buckeye (a generation and transmission Cooperative of which Southeastern is a member). Both the earlier Toledo Edison contract and the Buckeye arrangement prohibited Southeastern from taking power in Ohio and carrying it across the border into Michigan. (DJ #128, No. 4 and No. 26). Similarly, Southeastern's contract with Applicant prohibited Southeastern's use in Ohio of the power purchased from Applicant. (DJ #93). It is significant that Applicant was clearly aware that Southeastern was prohibited from using the power obtained from either Toledo Edison or Buckeye to serve loads in the State of Michigan. A November 21, 1966 internal Applicant memorandum from H. F. Small to A. F. Brewer states:

> The Buckeye Power group of which SEMREC is a member cannot at this time deliver power into Michigan. (Int. #1055).

This situation is concisely described in a June 2, 1967 memorandum from W. C. Morris, REA Planning Engineer, to John S. Scoltock, Chief Engineering Branch:

> The Southeastern Michigan Rural Electric Cooperative, Inc., is a distribution cooperative which serves an area in southeastern Michigan and northwestern Ohio. To serve its system, the cooperative has for some years and currently purchases power from the Consumers Power Company for the Michigan portion of its system. The Cooperative's system is separated at the state line as contractual limitations with both power suppliers prevent the movement of power and energy across the line. (DJ #128, No. 2, at 1).

In August, 1966, Applicant notified Southeastern of the termination of its contract, together with a threatened rate increase. (DJ #128). */ An internal memorandum of Southeastern's consulting engineer explained the problem of seeking out an alternative bulk power supply for the Michigan portion of the cooperative:

> The Cooperative presently purchases about one-quarter of its power from Toledo Edison for eight mills and, within two years, should be purchasing this portion of its power under the Buckeye arrangement for not more than 6.5 mills. Previous studies (prior to Buckeye) have indicated good economic feasibility by building transmission lines from the Toledo Edison area into the Michigan portion of the system. However, the present contract with Toledo Edison prohibits this in quite emphatic language and it is also now being worked out by Buckeye, under which many of the Ohio Power Companies will be wheeling for the Cooperatives. The Cooperative is isolated from the Michigan G & T groups, as far as economic transmission is concerned, so that we can look for no help in this regard. (DJ #128, No. 19 at 5).

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*/ February 14-16 memorandum from Darling to Goodwin. (DJ #128, No. 9 at 1).

In its efforts to develop some alterative bulk power supply, Southeastern approached Toledo Edison about the possibility of supplying its Michigan requirements. According to two separate reports of field agents for REA, Toledo's refusal to supply Southeastern was the result of its agreement with Applicant on a territorial allocation. One report, dated February 14-17, 1966, to John Scoltock from Robert Badner, lists reasons given by Toledo for its decision. These included (1) FPC jurisdiction, (2) conflict with Buckeye Power (presumably referring to the "Buckeye pact"), and (3) territorial agreement with Consumers Power Company. The memorandum goes on to indicate:

> Suprisingly the company did not appear to be too concerned over items 1 and 2 [FPC jurisdiction and Conflict with Buckeye Power] outlined above. Conversely they seemed disturbed and concerned over the thought of invading the territory of the Consumers Power Company. In the past it was believed that the company avoided service in Michigan primarily becau e of FPC jurisdiction. Today this is not the case. In fact it is almost certain the company will interconnect with the Consumers Power Company sometime in 1969 or 1970. The company officials were advised that they would not be expected to serve in Michigan but rather, the cooperative would provide the necessary substation and transmission facilities. They still stated that they were not interested. Again they indicated that they did not want to invade the Consumer Power Company territory. (DJ #128, No. 8 at 1) (Emphasis added).

In another memorandum dated February 14-16, 1966, to James W. Goodwin, Mr. Thomas Darling confirms Mr. Badner's advice:

> 1. Desire to avoid Federal Power Commission jurisdiction. The Company's letter of November 23, 1965, stated that as an Ohio Company, with operations confined strictly to the State of Ohio, it was in no position to serve the cooperative nor would its contract so permit. The probability of early enforced

Federal Power Commission jurisdiction or the fact that Michigan 5 [Southeastern's Michigan distribution coops] will be willing to take service at the state border did not change the Company's attitude.

2. Reluctance to violate an understanding with Consumers that neither utility would cross the state line into the other Company's territory.

3. Concern that Toledo Edison might be accused of violating the "Buckeye Pact" by reason of transmitting power into Michigan.
Although Toledo Edison appears adamant at the present time in refusing to serve Michigan 5 this source would be the most favorable from both a rate and engineering standpoint. (DJ #128, No. 9 at 1) (Emphasis added).

In a later memorandum to Goodwin, following a meeting with Toledo Edison, Mr. Darling states:

Of the three reasons mentioned in my field report of February 14-16 why Toledo Edison refused to serve across the state boundary line, Mr. Schwalbert stated that the first reason (desire to avoid Federal Power Commission jurisdiction) was not now as vital as it had previously been, in view of the fact that enforcement of Federal Commission jurisdiction is anticipated in the near future. As for the concern that T.E. might be accused of violating the Buckeye Pact by transmitting power into Michigan, he conceded that there might be a possibility of arranging for bulk delivery of power by T.E. to Michigan 5 at the state line, thus avoiding "Buckeye" implications. There still remains, however, T.E.'s reluctance to violate an understanding with Consumers that neither utility will cross the state boundary into the other Company's territory. In any event, although the T.E. source is the most favorable from a rate and engineering standpoint, the Company remains adamant in refusing to serve Michigan 5, and appeared unconcerned that partial requirements might be obtained from D.E. (DJ #128, No. 23 at 1) (Emphasis added).

Southeastern also received rejections from Indiana & Michigan Electric Co. of the AEP system in a letter of December 2, 1965 from R. M. Kopper. (DJ #128, No. 13 at 2). On the same date Mr. Kopper advised Applicant of its action by letter stating that Indiana & Michigan would not be providing service to Southeast. (DJ #112). */

Southeastern finally received an offer from Detroit Edison, which required Southeastern to build its own transmission from its load centers to Detroit's area. Moreover, Detroit Edison refused to recognize a reduction in the demand charges to allow for the cost of transmission, **/ notwithstanding that its service to another REA cooperative (Thumb Electric) did provide for delivery points when needed. ***/ The cost of transmission to Southeastern, made the plan prohibitively expensive when applied to all Southeast's load. (DJ #128, No. 10).

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*/ Nor was Indiana & Michigan reluctance to deliver electric power to utilities in Michigan limited to Southeastern Michigan REC. Mr. Steinbrecher, Manager of Northern Michigan, testified that the MC Pool requested power from Indiana & Michigan, received a negative response "and in pressing for a reason, it is my understanding that the reason for the refusal was the fact that Indiana & Michigan did not want to supply power that would be distributed in the area where power is supplied by Applicant." (Steinbrecher, TR at 1220).

**/ DJ #128, No. 5.

***/ DJ #128, No. 23.

Finally, a plan transferring the part of Southeastern's load nearest Detroit Edison's facilities was found to be marginally feasible, was recommended by REA personnel, and was ultimately adopted. On January 27, 1966, R. W. Heidman, Supervisor of Municipal Sales for Detroit Edison, wrote Mr. J. J. Lower, Manager of Southeastern, and made a firm offer for service. (DJ #128, No. 11, at 2). Four days later, on January 31, 1966, Edwin O. George, Senior Vice President of Detroit Edison, wrote B. G. Campbell of Applicant, to advise him of Detroit Edison's offer to Southeastern. He enclosed a copy of Detroit's proposed contract with Southeastern and asked Mr. Campbell to contact Mr. George if he had "any questions regarding this contract or this situation . . . ." (DJ #121).

It should be noted that the understanding between Applicant and the Toledo Edison Company, demonstrated by Exhibit DJ #128, is not, as the initial decision states, hearsay evidence. (ID at 159) The documents included in DJ #128 are memoranda and letters kept in the official course of business by the Rural Electrification Administration of the Department of Interior and, therefore, are exceptions to the hearsay rule under both the Business Records Exception (Fed. Evid. 803(6)) and the Public Records and Reports Exception to the hearsay rule (Fed. Evid. 803(8)).

In the face of this strong and direct evidence--comprised of contemporaneous documents as well as testimony--the Hearing Board's implicit finding that Applicant has not been party to gentlemen's agreements regarding wholesale territorial allocation (ID at 160) must be regarded as clearly erroneous.

7. Pre-emptive Coordination and Other Efforts to Forestall Coordination Between and Among Small Electric Utilities

The record clearly demonstrates, and the Hearing Board should have found, that Applicant has used its abilities to offer attractive coordinating opportunities to small systems as a strategic device for preventing the development of more threatening bulk power supply arrangements among groups of small systems.

When two or more small systems in the area of a large one start evaluating and planning for coordination, the large system often finds a long-term interest in making an alternative offer to one or a limited few of them. The large system has more to offer in a coordination arrangement than either of the small utilities, both in terms of reserves and load growth, if it wishes to do so. Accordingly, when the large system gains knowledge of the possible interconnection between two or more small systems, which could lead to the growth of a small-scale alternative power exchange, it could offer a so-called "sweetheart contract" to one of them. It would offer only enough coordinating benefits to prevent the small system from joining the alternative power exchange and enhancing its size.

Mr. Mayben referred to this conduct as "pre-emptive coordination" since it preempts coordinating opportunities of the other entity or entities, which do not have access to adequate power excharge services. In the long run, the system not having the power exchange access may fail to survive; and the previously favored system may then find it difficult to renew its arrangements for power exchange. (Mayben, TR at 2635-2640).

The fact of Applicant's engaging in pre-emptive coordination and its intent in doing so is revealed with particular clarity in the internal documents of Applicant which explain why it was willing to enter into a limited coordination agreement with the City of Holland. An August 30, 1966 memorandum from R. A. Condon to his superior in the Marketing Department, Mr. B. G. Campbell, records a meeting attended by R. L. Paul, W. Jack Mosely, R. A. Condon, and A. H. Aymond, Chief Executive Officer of Applicant, to discuss a new interconnection contract with the City of Holland. Mr. Aymond was briefed:

> [O]n our present negotiations in trying to sell Holland's supplemental power [firm wholesale power] in lieu of installing additional generation. It was pointed out that we have been unsuccessful and the city is committed to a 28,000 kw addition to be put in operation in late 1967 or early 1968.

The memorandum goes on to state:

> We then recommended to Mr. Aymond that a new interconnection agreement be negotiated with the City of Holland. Our prime reason being that if Consumers' did not maintain its interconnection, undoubtedly the city and Wolverine Electric Coop would enter into such an arrangement.
>
> Mr. Aymond agreed that it was to the Company's benefit to maintain the interconnection and authorized us to negotiate with the City of Holland . . . . (DJ #50) (Emphasis added).

Similar in purpose and effect to preemptive coordination is a situation where a utility system with generation requests coordinating services, particularly a reserve-sharing arrangement, but instead is offered and is forced to accept a wholesale for resale contract. This conduct is equally effective as preemptive coordination in forestalling the formation and evolution of an independent power exchange.

Applicant's dealings with Northern Michigan and Wolverine cooperatives demonstrate both anticompetitive refusals to deal, as well as attempts to forestall self-generation alternatives by inducing purchases from Applicant under a wholesale contract. Under present-day REA regulations, cooperative generation is only financed when either of the following conditions is present: (1) no firm bulk power supply from another source is available or (2) the firm bulk power supply available from another source is higher in cost than that of self-generation. (REA Bulletin 20-6, DJ #7). For a period of the 1960's, REA employed a third criteria, which permitted loans for generation and transmission cooperatives where bulk power suppliers imposed anticompetitive restrictions such as dual rates or restrictions on resales to industrial and commercial loads. (REA Bulletin 20-6, dated May 31, 1961, providing for this third criterian, was revoked by revised Bulletin 20-6, May 6, 1969, (DJ #7)).

When Northern Michigan and Wolverine, after a cost evaluation in the 1960's, decided to go forward with expansion of their own generation, Applicant's efforts to sell wholesale firm power to these entities escalated. Applicant carried its case to the distribution cooperative members of the G&T's (DJ #143), the public newspapers (DJ #145), radio and television (Steinbrecher, TR at 1237), the Rural Electrification Administration, and Congress. As Mr. Paul put it:

> With the decision made to proceed with additional generation, Consumers' Power withdrew our special rate proposals and informed the two G and T cooperatives that we were cancelling their existing contracts. It was indicated, however, that if the cooperatives wish to continue the connections with Consumers' Power Company, new contracts would be negotiated on our then-new standard wholesale power rates.
>
> Consumers Power Company is still officially on record as opposing the new loans for generation here in Michigan. In September of 1965, we called on Mr. Norman Clapp, REA Administrator, in Washington to protest these loans. (DJ #188 at 6).

In early 1966, the City of Allegan requested Applicant to provide the city with a proposal for either emergency standby or supplemental power. (DJ #178). Prior to responding to this request, Applicant carefully evaluated the cost to Allegan of going through with a proposed interconnection with Wolverine Cooperative (DJ #180); noted that if it could lower its costs by selling a substation to the City it "might be able to offer the city a proposition that will eliminate the danger of the city making a connection with Wolverine . . . ." (DJ #178); and finally responded to the city by offering: (1) a wholesale firm power contract or (2) purchase of the city system. (DJ #179). As pointed out above, Allegan chose the latter.

As recently as November 9, 1971, Applicant urged the City of Portland, Michigan to abandon its "costly" diesel generation and purchase substantially all of its power requirements from Applicant under a standard wholesale rate. (Int. #2032).

Again, DJ #188, a speech by R. L. Paul to employees of Consumers Power Company, clearly reveals that acquisition of a system outright through a purchase or lease arrangement and acquisition of its load requirements by supplying wholesale for-resale firm represented alternative strategies for maintaining Applicant's bulk power supply dominance:

> Since 1950, Consumers Power has purchased six municipal electric systems. An offer to purchase the Charlevoix system was turned down, but we are now supplying most of Charlevoix's requirements . . . .
>
> * * *
>
> In addition to these acquisition problems, we have also been working to increase our wholesale power sales to other customers. Engineering cost studies were made for Petoskey and Holland in hopes of increasing sales to these customers and forestalling the installation of additional generating facilities. These efforts were successful in Petoskey, but Holland plans to go ahead with a 30,000 kw unit. */

Applicant recognized that by selling wholesale power to competing distribution systems, it may well in some instances be supplying power at below the cost that the purchasing systems could obtain by self-generation from small units. It is clear from the documentary evidence that this was viewed by Applicant as the lesser of two evils; that is, the small systems migh otherwise achieve an independent and competitive bulk power supply.

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*/ See also DJ #15.

> Although these [wholesale sales] represent a small portion of our total electric business, the associated problems and the relationships to the future welfare of our company are extremely important to all of us. In this phase of our business, we are in the position of perpetuating the existence of the municipal plants and the REA's which could be the nucleus of a greater public power system yet to come. Yet, if we don't do business with them, we may be forcing their more rapid consolidation and expansion. (DJ #188 at 1).

Applicant's Mr. Paul confirmed this proposition on the witness stand:

> Q. Did you believe that by doing business with them, you could reduce their rapid consolidation and expansion or lessen such expansion and consolidation? ***
>
> A. Yes. I would answer yes. (Paul, TR at 8034).

Although, in his direct testimony, Mr. Paul denied that the fact of retail competition influenced Applicant's wholesale policies in any way (Paul, TR at 7895), this is contradicted by his remarks to his fellow employees quoted above and by a March 20, 1970 internal memorandum from Mr. Paul to a superior. The memorandum discusses alternative courses of action by Applicant, one of which might effect a lower cost of wholesale power for the distribution cooperatives:

> Although we could supply the distributing cooperative directly with wholesale electric energy at a cost significantly below that now paid to Northern Michigan and Wolverine for this power, contractual arrangements and other problems make it extremely difficult, if not impossible, to disassociate the distribution cooperatives from their G and T suppliers. (DJ #187)

Mr. Paul supported his recommendation that the possibility of Applicant's acquiring both Northern Michigan and Wolverine be pursued on the grounds that: "Although it would improve the

position of the distributing cooperatives, it would hopefully eliminate future increased penetration or influence of public power groups in our service area." (DJ #187).

8. Applicant's Specific Intent to Acquire All the Small Systems in its Area

The Hearing Board analyzes Applicant's conduct and correctly concludes that Applicant has the specific intent to:

> . . . monopolize the retail and wholesale power markets by destroying competition from a group of healthy, growing, effective and aggressive competitors. Each acquisition or attempted acquisition whether or not innocent, in and of itself, is a material element and a substantial factor in such a scheme. Applicant's goal to acquire all the smaller utilities in the relevant market is an anticompetitive scheme to monopolize. Such schemes are forbidden by Section 2 of the Sherman Act. Mr. Aymond's disavowal of the scheme is an assertion that it never existed. The testimony shows no intent to abandon an existing scheme. [Tr at 6063] We find that as a matter of fact that the scheme still exists and that the matter is not moot. (ID at 155)

Although the Hearing Board is correct in this finding, it fails to recognize that Applicant's specific intent to acquire all of the small Michigan utilities is but another manifestation of Applicant's primary goal of monopolizing the generation of electric power in the relevant geographic market. Acquisition of a small utility is surely the most effective method of eliminating independent electric generation, but it is not the only method. Guided by the unmistakeable evidence of Applicant's intent, the Hearing Board should have recognized that other elements of Applicant's conduct were directed toward the same basic end.

For example, Applicant's 1965 offer to lease the electric system of Traverse City (DJ #30) was made at approximately the same time that the city was attempting to issue revenue bonds to finance the construction of a 20 mw generating station. (Wolfe, TR at 1587). This lease offer received widespread publication (copies of DJ #30 were sent to the Mayor, the City Commissioners and the local newspaper) and due to its timing had a "disruptive influence" on the bond issue. (Wolfe, TR at 1588-89; ID at 153). Any contention that the timing of Applicant's offer to Traverse City was merely a coincidence and not made for the purpose of forestalling additional generation is laid to rest by DJ #188:

> In 1965, when it became apparent that Traverse City was about to expand its generating plant, we attempted to head this off with a lease proposal. . . . (DJ #188 at 3).

Also in 1965, Applicant went to even greater lengths to prevent a loan by the Rural Electrification Administration to finance the construction of a 22 mw coal-fired gen-rator by Northern Michigan Co-op. It sent letters to the distribution cooperative members and public newspapers, made announcements on radio and television and presented its opposition to the REA (Paul, TR 8067-68) and Congress. */ (Supra; see also ID at 153-54).

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*/ It should be noted that Applicant's public argument against the REA loan, namely, that the cost of power to the distribution cooperatives would have been lower under Applicant's wholesale rate than their purchases from Northern Michigan and Wolverine, may well have been specious. The rate comparison prepared by

(Footnote continued next page)

Again in 1970, R. L. Paul advocated that Applicant acquire the generating and transmission facilities of Northern Michigan and Wolverine, despite a possible benefit to the distribution co-ops (which he did not advocate acquiring) since "it would hopefully eliminate future increased penetration or influence of public power groups in our service area." (DJ #187). **/

Finally, DJ #188, the speech given by R. L. Paul during which he announced the goal of Applicant, namely, to acquire all of the small utilities, sums up the concerns of Applicant and motivation for its determined efforts to forestall generation on the part of the small utilities:

> It is this growing system that presents the real problem to Consumers Power Company because the system is not only duplicating our system but it is also

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*/ (Footnote continued)

Applicant to support its opposition to the REA loan omits the cost of transmission necessary to distribute its wholesale power to the co-op members. (Steinbrecher, TR at 1244-45). REA, which was prohibited from approving a loan to finance self-generation if bulk power supply was available at lower cost from another source (REA Bulletin 20-6, DJ #7), approved the loan to Northern Michigan in the face of Applicant's well-publicized rate comparison. (Steinbrecher, TR at 1277). Since there is no evidence that REA disregarded the mandate of Bulletin 20-6 (id), we must conclude REA found Applicant's figures to be erroneous. Furthermore, the rate comparison circulated by Applicant disregarded an earlier study, which reached a somewhat contrary conclusion (Paul, Tr. at 8065-66) and, being based solely on historic data, Paul's study ignored the impact of the proposed generation on the co-op's costs. (Paul, TR at 8068-69).

**/ Similar efforts were undertaken by Applicant with respect to the City of Holland (DJ #50), the City of St. Louis (DJ #15) and the City of Petoskey. (DJ #188).

attempting to achieve a completely independent power source. (DJ #188, at 5) (Emphasis added).

With this slight refocusing of the Hearing Board's finding of monopolistic purpose and intent on the part of Applicant, the history of its dealings with the small utilities takes on a different cast. This purpose provides the mortar which holds each particular course of conduct together and allows a pattern to emerge. It explains why Applicant, which was under no duty to sell wholesale power (Aymond, TR at 6496), held itself out to the small utilities as willing to provide their power requirements so that they could retire their "costly" isoldated generation; why Applicant was willing to "coordinate" with the City of Holland, namely, to prevent it from interconnecting with, and thereby broadening the size of the MC Pool; why Applicant refused to enter reserve-sharing and coordinating arrangements with the MC Pool and other small systems; why Applicant refused to provide transmission services; why Applicant inserted reverter provisions in the deeds by which it disposed of hydroelectric facilities; and why it continues to refuse to grant access to the Midland Units. Simply, anything Applicant could do or refuse to do which would increase the cost of generation to the small systems would reduce the threat of emergence of a completely independent power source and would thereby increase the possibility of Applicant's accomplishing its announced goal of acquiring all of the small utilities. As our previous discussion of anti-trust law makes clear (supra, at II-B) this pattern of conduct, constitutes monopolization under Section 2 of the Sherman Act.

E. A Situation Inconsistent with the Antitrust Laws Exists in the Relevant Market Area

A situation inconsistent with the antitrust laws exists in the relevant market area since it has been demonstrated that: (1) Applicant possesses monopoly power by virtue of its large share of sales in the relevant market area and its control over a strategically-dominant transmission network; (2) Applicant has deliberately raised unnatural barriers to entering the relevant markets by denying its small competitors the access to coordinating services which is essential to their continuing competitive viability; (3) Applicant is monopolizing in violation of Section 2 since the effect of its anticompetitive course of conduct has been to maintain its monopoly position; (4) A situation inconsistent with the antitrust laws exists in the relevant market area since it has been shown that Applicant is monopolizing the relevant markets.

III.

THE NEXUS: THE ACTIVITIES UNDER THE MIDLAND LICENSES MAINTAIN THE SITUATION INCONSISTENT WITH THE ANTITRUST LAWS

A. The Hearing Board's Nexus Standard is Erroneous

Although purporting to adopt a nexus standard in the "middle ground" between "the very tight, almost unbreakable, causal bond of Cicero and his compatriots" (ID at 50) and the standard proposed by the Department, the Hearing Board's application of its standard appears to preclude any "situation inconsistent with the antitrust laws" from having the requisite nexus. On its face the Hearing Board's suggested standard, although phrased awkwardly, does not seem very different from the one suggested by the Department. But then the Hearing Board's recital at the conclusion of its analysis of each of the eight "situations"*/ -- that even assuming arguendo that the "situation" is inconsistent with the antitrust laws, no nexus exist between said situation and the activities under the license -- destroys any hope of understanding the nexus standard it has set out.**/ For

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*/ (ID at 127, 134, 137, 142-43, 148, 157, 162-63 and 167).

**/ The Hearing Board stated its conclusions as follows:

(a) Nexus exists between otherwise lawful activities under a proposed license and a situation inconsistent with the antitrust laws, if, and only if, the said activities are misused so as to be a material element and a substantial factor in a scheme or conspiracy the purpose or effect of which is to cause the creation or maintenance of said situation. (Footnote continued)

example, the Board assumes that Applicant's denial of access to the Midland facility is a situation inconsistent with the antitrust laws, yet can find no nexus between this situation and the Midland facility. On the basis of these applications of the Hearing Board's nexus test, it is just about impossible to predicate any situation which would meet its test.

Perhaps the key to the Hearing Board's erroneous concept of nexus lies in its belief that (1) activities under a nuclear license cannot per se create or maintain a situation inconsistent with the antitrust laws, and (2) therefore, the activities must be "misused." Initially, the nexus standard is founded on a totally fallacious analogy to Congress' grant of antitrust immunity to labor unions (ID at 56-60) and of monopoly rights to the holder of a valid patent (ID at 51-56). Nowhere in the Atomic Energy Act or its legislative history is there any indication that Congress intended to authorize a nuclear monopoly or immunize the holder of a nuclear license from antitrust scrutiny. To the contrary, the Atomic Energy Act,

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**/ Footnote continued

(b) Activities under a license issued by the Commission pursuant to statute per se cannot create or maintain a situation inconsistent with the antitrust laws.

(c) Activities under a license issued by the Commission pursuant to statute can create or maintain a situation inconsistent with the antitrust laws if, and only if, such activities constitute a material element and a substantial factor in a scheme or conspiracy the purpose or effect of which is to cause the creation or maintenance of a situation inconsistent with the antitrust laws. (ID at 60-61 (Emphasis added)

its legislative history and prior decisions by the NRC point out the unapplicability of the labor law and patent monopoly analcgies. The Commission emphasized this in its Waterford Memorandum when it stated:

> The Commission's antitrust responsibilities represent inter alia a Congressional recognition that the nuclear industry originated as a Government monopoly and is in great measure the product of public funds. It was the intent of Congress that the original public control should not be permitted to develop into a private monopoly via the AEC licensing process, and that access to nuclear facilities be as widespread as possible. Louisiana Power and Light Company (Waterford Steam Electric Generating Station, Unit No. 3), Dkt. No. 50-382A, Memorandum and Order of the AEC, RAI 73-9, 619 (September 28, 1973)

B. The Nexus Required by Section 105c is Simply That The Licensed Activities Will Maintain The Situation

The Commission has emphasized that there must be a meaningful nexus between the activities under the nuclear license and the situation alleged to be inconsistent with the antitrust laws in order for those activities to be found to create or maintain that situation. Waterford Memorandum, supra. The Department agrees entirely. A relationship or nexus between two things must be shown: (1) "a situation inconsistent with the antitrust laws"; and (2) "activities under the license." The requisite nexus is simply that the activities must "create or maintain" the situation.

The evidence adduced in this proceeding has made the existence of this nexus quite clear.

We have shown first a situation inconsistent with the antitrust laws wherein Applicant has monopolized the firm bulk power market over a large area of Michigan's lower peninsula through, inter alia, its refusal to grant other electric systems coordinating access to its system and to the regional power exchange.

Second, it is undisputed that the activities under the licenses include the construction of the Midland units and, eventually, the operation and marketing of the 1300 megawatts of power they will produce. This power will not and cannot be marketed in isolation -- the Midland units will be integrated into Applicant's system and coordinated with generation of other systems through the regional power exchange.

Finally, we have demonstrated that Midland power, (DJ #236, #21 at 16-17) will be integrated into Applicant's system, coordinated with generation of other systems throughout the regional power exchange and marketed by Applicant in the wholesale and retail markets in Michigan. (Stafford, TR at 9166). Midland Power will be more economical than

any other form of new base load generating capacity; */ its addition will strengthen and expand Applicant's system and the regional power exchange of which it is a part. This strengthening and expansion will increase Applicant's future ability to install and obtain low-cost power from large units. (Aymond, TR at 6441). Yet, concurrent with Applicant's actions of installing and planning to operate the Midland units to strengthen and expand its system and the regional power exchange, Applicant continues to refuse reasonable access to the regional power exchange to its competitors. It thus forecloses them from applying for licenses to install their own large, low-cost base-load nuclear generation -- and from obtaining the benefits of the nuclear technology developed by the Federal Government. As a further

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*/ Even if it were established that nuclear power does not hold out the promise of being the lowest cost new base load generation (which is not the case in this proceeding), the small utilities, which are unable to construct a nuclear facility on their own, must be afforded an opportunity to participate in nuclear generation. The very enactment of Section 105c shows that Congress believed that nuclear power is unique and should not be monopolized by a few large utilities.

> Our reading of the legislative history of the antitrust provisions of the Act convinces us that the primary impetus for the injection of antitrust considerations into the nuclear licensing process was the deeply held concern of Congress that the huge public investment in the research and development of nuclear reactor technology should not be utilized by a few leading private firms to entrench themselves in an anticompetitive market position. Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), AEC Dkt. Nos. 50-348A and 50-364A, Memorandum and Order 14-16, (February 9, 1973)
> (Footnote continued on next page)

consequence, it denies them the low-cost power they will need to compete with Applicant for new and growing loads and to support their future competitive installation of large generating units.

This nexus is neither a "truism" (see Reply Brief for Applicant at 23-25) nor a "very loose incidental and inconsequential bond" (ID at 50). The Department has clearly demonstrated how Applicant's denial of meaningful access to the Midland nuclear facility will maintain and exacerbate its monopoly position in the relevant wholesale and retail power markets in Michigan. To the extent Applicant is able to deny its competitors access to low-cost nuclear power, it increases the competitive gap in the cost of bulk power supply between it and its smaller competitors.*/

In short, construction and operation of the Midland units and marketing of the power from those units through integration into Applicants's system and the regional power exchange demonstrably furthers Applicant's monopolization of the firm bulk power market and thereby maintains and indeed exacerbates a situation inconsistent with the antitrust laws.

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*/ Footnote continued
In short, a nuclear generating facility is not "just another" generating unit. Applicant's denial of access to the Midland units, the sole source of nuclear power to the small utilities, amounts to monopolization of nuclear power in Michigan's lower peninsula, which is clearly inconsistent with the antitrust laws and clearly maintained by the licensed activities.

*/ For a full discussion of the economic impact of nuclear generation, see supra, at

This is the nexus required by the plain language of Section 105c(5).*/ It is not necessary that the license activities themselves be inconsistent with the antitrust laws or their policies.**/ It is not necessary that the license activities create a situation inconsistent with the antitrust laws where none was present before. It is not necessary that the effect of the license activities on the existing situation be an effect peculiar to nuclear power, or an effect which only the advent of nuclear power could bring about. It is not necessary that the license activities be the sole cause of maintaining a situation inconsistent with the antitrust laws. The only thing necessary is that the license activities be found to contribute in a significant manner to the maintenance of a situation inconsistent with the antitrust laws or their underlying policies.

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*/ This is confirmed by the legislative history of the 1970 Amendment to the Atomic Energy Act, which the Department previously reviewed in some detail in this proceeding. Reply on Issues Other Than Disqualification, June 9, 1972, and which is incorporated herein by reference.

**/ Kansas Gas and Electric Company and Kansas City Power and Light Company (Wolf Creek Generating Station, Unit No. 1) No. 50-482-A, Decision of Atomic Safety and Licensing Appeal Board, 19-20 (June 30, 1975).

IV

RELIEF

A. The Obligation to Impose Appropriate License Conditions and the Scope Thereof

The Hearing Board, by concluding that there was no situation inconsistent with the antitrust laws and no nexus between any assumed situation and the activities under the Midland license, never reached the issue of appropriate relief. We have demonstrated above that the Hearing Board's findings as to both the nonexistence of a situation inconsistent with the antitrust laws and the lack of nexus are erroneous factually and legally. It follows, therefore, that the Hearing Board's failure to consider and impose license conditions appropriate to remedy the situation, as required by Section 105c(6), is equally erroneous.

Section 105c(6) of the Atomic Energy Act comes into play after a finding under Section 105c that license activities would create or maintain a situation inconsistent with the antitrust laws. It provides:

> In the event the Commission's finding under paragraph (5) is in the affirmative, the Commission shall also consider, in determining whether the license should be issued or continued, such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest. On the basis of its findings, the Commission shall have the authority to issue or continue a license as applied for, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate. (Emphasis added)

The Report by the Joint Committee on Atomic Energy on

the 1970 amendments to the Atomic Energy Act sets out authoritatively the role Congress intended for Section 105c(6):

> Paragraph (6) provides that if the Commission finds "the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a that the Commission "shall also consider, in determining whether the license should be issued or continued, such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest." On the basis of all its findings -- the finding under paragraph (5) and its findings under paragraph (6) -- the Commission would have the authority "to issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate." While the Commission has the flexibility to consider and weigh the various interests and objectives which may be involved, the committee does not expect that an affirmative finding under paragraph (5) would normally need to be overridden by Commission findings and actions under paragraph (6). The Committee believes that, except in an extraordinary situation, Commission-imposed conditions should be able to eliminate the concerns entailed in any affirmative finding under paragraph (5) while, at the same time, accommodating the other public interest concerns found pursuant to paragraph (6). Normally the committee expects the Commission's actions under paragraph (5) and (6) will harmonize both antitrust and such other public interest considerations as may be involved. In connection with the range of Commission discretion, the committee notes that pursuant to subsection 105a the Commission may also take such licensing action as it deems necessary in the event a licensee is found actually to have violated any of the antitrust laws. Of course, in the event the Commission's finding under paragraph (5) is in the negative, the Commission need not take any further action regarding antitrust under subsection 105c. S. Rep. No. 91-1247, 91st Cong. 2d Sess. (1970), H.R. Rep. No. 91-1470, (1970) (Emphasis added).

It was the intent of Congress that the Commission impose conditions to eliminate the concerns entailed in findings of

antitrust inconsistency -- i.e., conditions sufficient to eliminate the situation inconsistent with the antitrust laws. The sole exception to this mandate is an "extraordinary situation." In the context of this proceeding, however, there is no contention that such extraordinary situation exists and, thus, conditions must be imposed to insure that activities under the Midland licenses do not maintain a situation inconsistent with the antitrust laws.

It is important to note that the question of relief udner Section 105c(6) differs from the nexus question discussed above under Section 105c(5). Once the finding of nexus has been made -- i.e., that the license activities would create or maintain a situation inconsistent with the antitrust laws -- the focus shifts to the relief "appropriate" to eliminate that situation. The only question to be considered at this stage is one of appropriateness -- i.e., whether the proposed license conditions are appropriate to eliminate the situation inconsistent with the antitrust laws. That the term "appropriate" is not a limit on the scope of relief was made crystal clear by the Appeal Board decision in Wolf Creek:

> Section 105c(6) simply directs the Commission to place "appropriate" conditions on licenses where necessary to rectify anticompetitive situations. This is an invocation of the Commission's discretion not a limitation on its powers. Had Congress wished to do the latter, it would have said so in unmistakable terms. Kansas Gas and Electric Co. and Kansas City Power and Light Co. (Wolf Creek Generating Station, Unit 1) No. 50-482-A, Decision of Atomic Safety and Licensing Appeal Board, 26-56 June 30, 1975),

Moreover, it is equally clear that "appropriate" license conditions may reach every aspect of a utility's electrical operations.

> Competition in the electric power industry, even more than the atomic power industry, was so clearly a basic concern of Congress, and was referred to so often during the legislative history of the 1970 Amendments, that no citations are needed. [Footnote omitted] It can further be presumed that Congress was familiar with the laws of physics and the benefits flowing from interconnection, pooling, reserve sharing, and other practices of electric utilities which would necessarily involve the output of the proposed nuclear generating facilities in question, and would thus be subject to any provisions or conditions made a part of the license by the Commission. Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 & 2) AEC Dkt. Nos. 50-348A and 50-364A, Memorandum and Order 14.16 (February 9, 1973).

This is underscored by the memorandum of the Hearing Board in the Louisiana Power and Light Co., Waterford Unit No. 3 proceeding */, which makes clear that once a situation inconsistent with the antitrust laws has been found to exist, the NRC has broad authority to impose conditions to eliminate such situation.

In that proceeding the Department, the NRC Staff and Louisiana Power and Light Co. (LP&L) agreed on appropriate license conditions. **/ Intervenor municipal systems were

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*/ Louisiana Power and Light Company (Waterford Steam Generating Station Unit No. 3) AEC Docket No. 50-382A, Memorandum of Board with Respect to Appropriate License Conditions Which Should be Attached to a Construction Permit Assuming Arguendo a Situation Inconsistent with the Antitrust Laws, (October 24, 1974) (LP&L Hearing Board's Memorandum).

**/ Essentially the agreed-upon conditions obligated the Applicant to: (1) interconnect and share reserves with
Footnote continued

dissatisfied with this agreed-upon relief, */ and the LP&L Hearing Board ordered them to show cause why said relief was not adequate, assuming arguendo that the activities under the Waterford Licenses would create or maintain a situation inconsistent with the antitrust laws. After the show-cause hearing, the LP&L Hearing Board issued a Memorandum in which it found the agreed-upon relief inadequate and in which it set forth its views with respect to an adequate set of license conditions.

The LP&L Hearing Board formulated license conditions which expanded and clarified the relief already agreed to by LP&L. **/ Since the LP&L Hearing Board went beyond the license conditions already agreed to by LP&L, it necessarily viewed all the relief provided for by its expanded conditions as necessary to provide appropriate relief in the proceeding. Moreover, by expanding the reserve sharing and wheeling relief in the conditions beyond that originally consented to by LP&L, the LP&L Hearing Board necessarily rejected any argument that the granting of some form of access to the

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*/ Footnote continued
small systems on an equal-percentage basis; (2) engage in unit power transactions; (3) grant access to future nuclear facilities; (4) wheel power and plan and construct transmission facilities for such wheeling; and (5) sell power and energy at wholesale.

*/ The cities alleged nine deficiencies in the proposed conditions. LP&L Hearing "Board's Memorandum" at 12.

**/ Except in one regard, which led subsequently to the Department's filing of an exception to the Board's Initial Decision (Dkt. No. 50-382A), November 14, 1974.

nuclear unit applied for represents the limit of the NRC's jurisdiction to impose license conditions under Section 105c. (See Brief for Applicant at 213-214).

The LP&L Hearing Board's Memorandum represents the first precedent under Section 105c on the appropriateness of license conditions.

B. The Department's Proposed Relief

The Department urges that the Appeal Board condition Applicant's license to construct and operate the Midland nuclear facility in such a manner as to prevent Applicant's continued monopolization of the relevant wholesale and retail power markets in Michigan. Specifically, we recommend as a condition to Applicant's utilization of power from the Midland Units, that it be required to: (1) grant direct access to the Midland nuclear facility, (2) grant access to its high voltage transmission network and provide wheeling services for both wholesale power and coordinating power, (3) interconnect and share reserves on an equal percentage on Gainesville principles, */ (4) sell bulk power at wholesale to any utility engaging or proposing to engage in the sale electric power at retail, and (5) notify each neighboring utility that it will not directly or indirectly enter into or adhere to any agreement or understanding to allocate, restrict, or divide the markets or territories for the sale or exchange of electric power at wholesale.

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*/ Gainesville Utilities Dept. v. Florida Power Corp., 40 FPC 1227 (1968), 41 FPC 4 (1969) aff'd 402 U S 515 (1971).

In the aggregate, this relief will permit greater competition between Applicant and the smaller electric systems in Michigan (both existing and potential). By providing the small utility systems with more economical, alternative sources of bulk power supply, heretofore foreclosed by Applicant, the Department's proposed relief will alleviate the situation in Michigan, which is clearly inconsistent with the antitrust laws and which will be maintained by the Midland licenses. In short, the making available of options other than buying at wholesale from Applicant or engaging in small-scale, inefficient generation, will eliminate, in substantial part, the current anticompetitive situation in Michigan.

1. Access to Nuclear Units

The Department proposes that Applicant be required to offer the small Michigan utilities direct access by, at their option, ownership participation and/or unit power purchases, to the Midland facility and all future nuclear generating plants for which an application is filed by Applicant during the term of the instant license and any extensions thereof. It is clear that for the small utilities to remain competitive in the generation of electric power, access to the benefits of low-cost nuclear power is vital. (Mayben, TR at 2649; Brush, TR at 2354). Due to the relatively small size of the cooperatives, municipals and other investor-owned utilities

in the relevant area, it is not economically feasible for them to construct a nuclear unit either individually or as a group. (Brush, TR at 2292; Fletcher, TR at 4333). Thus, without access, the small Michigan utilities will be unable to utilize nuclear power, which is the lowest cost form of new base load generation (in the relevant market area) available for the foreseeable future. (Aymond, TR at 6353; Wolfe, TR at 1721).

2. Wheeling Services

We have demonstrated above that Applicant's transmission network is a "bottleneck" facility. Without access to wheeling services the small Michigan utilities can neither effectively coordinate among themselves nor obtain alternative supplies of bulk power. The Department, therefore, recommends that Applicant be required to transmit bulk power (either wholesale firm or coordinating power) to, from, between or among any utility(ies) with which Applicant is or may be interconnected directly or indirectly, via the transmission network of an intervening utility.

3. Interconnect and Engage in Coordinating Transactions

Absent interconnection and coordination arrangements, even the largest electric utility would find it difficult to justify the installation of large base load generating units, whether fossil or nuclear-fueled. (Rogers, TR at 5545). Applicant has recognized this fact by concluding, in 1964, that that nuclear generation would be feasible only if it entered into large third party interconnections. (Int. #1005; Wall Deposition at 36-37). Similarly, the small electric systems in Michigan's Lower Peninsula must have access to the full range of coordinating service to even consider installation of large-scale generation, such as nuclear. (Mayben, TR at 2842). Moreover, unless the coordination arrangements afforded the small utilities are both far reaching and on an equitable basis, access to the Midland facility may be meaningless.

> Indeed, Consumers Power Company has the ability to nullify and advantages that Intervenors may obtain from an Atomic Energy Commission order allowing participation by denying access to transmission and coordination or by granting it on unfavorable terms and conditions. (Chayavadhanangkur PT at 19).

Coordination through reserve sharing is essential if an electric system is to operate efficiently. (Muller, PT at 19, 20; Wein, PT at 62; Helfman, PT at 34: Chayavadhanangkur, PT at 10, 13; Brush, TR at 2217). The ability to share reserves allows a system to decrease capital investment in generating facilities without sacrificing system reliability, as well as increase the size of generating facilities which

can justifiably be installed on the interconnected system. The advantages of emergency energy interchanges for all participants thereto are well established. (Mayben, TR at 2569; Chayavadhanangkur, PT at 10, 18; Wein, PT at 62; Muller, PT at 21; Aymond, TR 6637, 6257).

One of the principal methods by which a large electric system is able to negate benefits of interconnection to a small system is to impose an inequitable reserve responsibility upon the smaller system. For example, under the terms of the interconnection agreement between Applicant and the City of Holland, the City is required to maintain 45-48% reserves while Applicant, as an equal member of the Michigan Pool, maintains 15-20% reserves. (Chayavadhanangkur - PT at 21). If Holland were interconnected with Applicant on an equal percentage or Gainesville basis it could sell 21 mw additional firm power, whereas under the "Holland formula" it can market only 1.5 mw of firm power more than it could on an isolated basis. (Slemmer, TR at 8983-8948). This is in sharp contrast to the trend towards equal percentage reserves in coordination agreements, (Rogers, TR at 5520), particularly where the utilities involved are of equal bargaining strength. (Mayben, TR at 3743-45).

The Hearing Board notes that "sharing reserves on an 'equal percentage' basis does not always result in each party receiving a benefit," (ID at 77), a conclusion with which we agree but which has no relevance to the instant proceeding.

The interconnection of the MC Pool, Coldwater and Holland with Applicant on an equal percentage reserve basis would cause no degradation of Applicant's system reliability and in fact would result in a slight benefit to it. (Lundberg, PT at 21).

Maintenance energy arrangements allow a utility system to effectively maintain its generating units by providing it with the ability to engage in scheduled maintenance without the fear that simultaneous outages of other generating units will cause a loss of capacity on its system. As such, it is similar to emergency power and results in many of the same benefits. (Muller PT at 21; Wein, PT at 62; Aymond, TR at 6257, 6637).

Economy energy exchanges are important since they insure that the most efficient generation available will be utilized. Moreover, each party in economy energy exchange benefits from the transaction through a splitting of the savings. (Wein, PT at 62; Muller, PT at 21; Aymond, TR at 6257; Wolfe, TR at 1590).

4. Wholesale Sales

In light of Applicant's commitment on the record to provide wholesale-for-resale firm power to all entities engaging in or proposing to engage in the sale of electric power at retail (Reply Brief for Applicant at 77-78), no further discussion of this issue is required.

5. Territorial Agreements

Simply, the Department's proposed relief would require Applicant to notify all of its neighboring utility systems that it will not adhere to any "gentleman's agreement." Since Applicant's Chief Executive Officer has denied the existence of such agreements, (Aymond, TR at 6045), this relief represents merely a publication of company policy stated under oath in this proceeding.

V.

CONCLUSION

Since, as demonstrated above, the activities under the Midland licenses will maintain a situation inconsistent with the antitrust laws, we urge this Appeal Board to condition the Midland License so that antitrust inconsistent situation is remedied in accordance with the principles set out in Section V of this Brief.

Respectfully submitted,

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MARK M. LEVIN

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UNITED STATES OF AMERICA

BEFORE THE

NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the foregoing document upon the following persons by depositing a copy thereof in the United States mail, with first class or air mail postage affixed, this 13th day of November, 1975:

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