

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of
CONSUMERS POWER COMPANY
(Midland Plant, Units 1 and 2)

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

STAFF POSITION ON THE QUESTION OF NEXUS
FILED PURSUANT TO THE BOARD'S REQUEST

The Commission Memorandum and Order
In the Matter of Louisiana Power and Light Company
(Waterford Steam Electric Generating Station, Unit 3)
AEC Docket No. 50-382A

On September 28, 1973, the Commission issued a Memorandum and Order in the Matter of Louisiana Power and Light Company (Waterford Steam Electric Generating Station, Unit 3), Docket No. 50-382A (Waterford). In its Memorandum and Order the Commission set forth standards or benchmarks with respect to the scope of antitrust review.

The Commission restated in the Memorandum and Order what it determined to be the Congressional intention in amending section 105c of the Atomic Energy Act (the Act). Congress did not want the original public control of the nuclear industry to be allowed to develop into a private monopoly via the AEC licensing process, and that access to nuclear facilities be as widespread as possible. This goal must be accomplished within the framework of section 105c of the Act which sets as a standard "whether the activities under the license would

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create or maintain a situation inconsistent with the antitrust laws." Accordingly, the Congress was concerned that access to nuclear power would not be used to maintain a situation inconsistent with the antitrust laws.

The Commission states that Congress did not intend the Commission to review all anticompetitive practices throughout the electric utility industry as part of its review of the impact of the licensed activity. However, the Commission recognized the difficulty in delineating the scope of the statutory standard without the development of an evidentiary record or other precedent.

However, Waterford does set forth certain benchmarks to be utilized by the Board in implementing section 105c of the Act.

1. Statutory standard does not necessarily include all of the applicant's generation, transmission, and distribution.
2. Similarly, it is not automatically limited to the construction and operation of the facility to be operated.
3. The relationship of the specific nuclear facility to the applicant's total system or power pool should be evaluated in every case.
4. In appropriate cases, that is, where a meaningful tie exists with the nuclear facility, an examination of pooling arrangements could be considered.
5. The proper scope of antitrust review turns upon the circumstances of each case.

In approving the recommendations of the Board the Commission determined that certain issues set by the Board were indeed appropriate for consideration within the standard of section 105c. The issues included:

1. a. Whether applicant alone or together with others has the ability to hinder or prevent:
 - (1) smaller electric entities from achieving access to the benefits of coordinated operation (reserve sharing, emergency power exchanges, deficiency power sales and other coordination of existing facilities) either among themselves or with applicant or other electric utilities;
 - (2) smaller electric entities from achieving access to the benefits of economy of size of large electric generating units by coordinated development (joint planning and investment in new plants to achieve economies of scale) either among themselves or with applicant or other electric utilities.
- b. Whether a situation or situations inconsistent with the antitrust laws or the policies clearly underlying these laws has resulted or will result from the exercise of such ability.
2. Whether applicant's policy not to sell unit power or ownership shares in the nuclear facility being licensed deprives smaller electric utilities that are connected or could be connected

with applicant, of the benefit of power from the licensed facility and thereby results in a situation inconsistent with the antitrust laws or the policies clearly underlying these laws.

In Waterford the Commission has made clear that review under section 105c is not to be a far reaching antitrust review of all the anticompetitive practices that exist in the industry. The review must be limited to the impact of the licensed activity on the situation alleged to be inconsistent with the antitrust laws. The staff will present what it believes the Board should consider in determining the physical and legal relationship between the licensed activity and the applicant's system. The staff will also set forth in this paper what it believes to be the relationship between the licensed activity and the situation alleged to be inconsistent with the antitrust laws as set forth in the issues delineated by this Board.

The Relationship between the
Licensed Activity and the Applicant's System

For the purpose of review under section 105c of the Act, the staff believes that the Board should develop an evidentiary record establishing the extent of the relationship between the licensed activity and the situation alleged to be inconsistent with the antitrust laws. If there is a determination made that there is no substantial connection between the licensed facility and the alleged anticompetitive conduct, then no further hearing would be required.

The staff believes the Board should view in its analysis of what it considers to be activities under the license those planning and operating functions of the applicant which are directed to the economic optimization of the nuclear facility.

The Board should consider in determining the relationship between the situation alleged to be inconsistent with the antitrust laws, and the proposed nuclear facility the fact that the commercial operation of the nuclear plant will have an impact on (1) system generating capacity, (2) system generating reserves, (3) system generating reliability, (4) capacity and energy available for sale to the applicant's customers, (5) capacity and energy available for sale to other electric utilities, (6) capacity and energy for emergency support to other electric utilities, (7) energy available for pumping at the Ludington pumped storage hydro plant.

The Board should also consider the functional changes which will take place with the commercial operation of the nuclear facility. Among these changes are: (1) generation scheduling and dispatch, (2) interconnection flows, (3) frequency response, (4) stability limits, and (5) spinning and operating reserves requirements. In this connection some physical modification of bulk power facilities will take place before these functional changes can occur. These physical modifications should be planned in connection with the commercial operation of the nuclear facility. To illustrate, physical connection must be made between the nuclear plant and the transmission grid. Also the transmission grid must be modified to accommodate increased power flows to: (1) load centers, (2) other

generating units, (3) the Ludington pumped hydro storage plant, and (4) other electric utilities.

The Commission has made it clear that in each case the Board should evaluate, "...[T]he relationship of the specific nuclear facility to the applicant's system or power pool...." Therefore, we believe, the record in this case should reflect evidence with respect to the matters mentioned herein so that the Board will be in a position to make a valid determination as to the relationship between the Midland facility and the situation alleged to be inconsistent with the antitrust laws.

The changes that result from the addition of the nuclear facility to the applicant's system also modify the relationship between the applicant and other electric utilities in the area. The extent to which this modification takes place may have an affect on the competitive situation.

There are several cases which have a bearing on the "nexus" question. In this regard Municipal Electric Association of Massachusetts v. S.E.C., 413 F. 2d 1052 (D.C. Cir. 1969) (hereinafter referred to as Yankee) involved orders of the S.E.C. approving the acquisition by certain New England electric utility companies of the stock of two nuclear-power electric generating companies. The municipals had asserted that there was an increase in concentration of control over low cost electric power through nuclear generating plants. They further alleged that this increase was the result of an intentional course of conduct designed to increase control of sponsors of nuclear power over the industry in the area and to foreclose

opportunities to municipals. The court was very concerned with the allegation that the sponsors of nuclear facilities "...are obtaining a monopoly in New England over electric generation through systematic exclusion of municipals and other small electric distributors from 'participating in or purchase of power from' nuclear generators in New England...." ^{1/}

In assessing the allegations to determine which were sufficiently related to the nuclear units to provide the required nexus prerequisites to antitrust review, the court considered: (1) the fact that the plant will be interconnected with the New England Power Grid, (2) the fact that the municipals were being denied access to low cost power on reasonable terms, (3) the ability of the sponsors to absorb power generated from the units and the regional problems of power distribution, and (4) the alleged increase in concentration in Massachusetts and, indeed, New England by control over low cost electric power through nuclear generation plants.

The issues set forth by the Commission as within the Board's discretion include whether the applicants ability to hinder or prevent smaller electric entities from achieving access to the benefits of coordinated operation and access to the benefits of economy of size of large electric generating units results in a situation inconsistent with the antitrust laws. If the Board finds that there exists a situation inconsistent with the antitrust laws, it must determine the relationship that exists between said situation and the activities under the license.

^{1/} 413 F. 2d at page 1059.

The Federal Power Commission has also had the opportunity to review allegations of anticompetitive practices made by the Massachusetts Municipals. In Municipal Electric Association of Mass. v. Federal Power Commission, 414 F. 2d 1206 (D.C. Cir. 1969), the court affirmed action taken by the FPC in connection with antitrust allegation made during a licensing proceeding for a hydroelectric project. The municipals alleged that the licensed facility, if constructed, would result in severe anticompetitive consequences. The FPC considered, relevant to the licensing process, allegations as to whether the municipals would be discriminated against in the sale of power generated during the period before the licensees can absorb the full output of the project, whether the facility was a link in a general boycott, conducted by private power interests in New England, denying municipal power companies access to sources of bulk power and transmission facilities, and whether the municipals had been wrongfully excluded from the New England Electric Coordinating Council.

The Situation that will be Maintained
by the Addition of the Midland Nuclear Unit

Within the Consumers Power Company's service area the applicant provides over 22 million kilowatt hours to its customers and accounts for over 90% of all the electric revenues in its area. ^{2/} Its electric bulk power supply, planning and operations are horizontally integrated in that its conventional steam, nuclear steam, gas turbine, hydroelectric and internal

^{2/} Moody's Public Utility Manual (1973).

combustion generating stations are all interconnected through free flowing lines which include 321 circuit miles operating at 345 kv and 3,174 miles at 138 kv. It operates 4,031 miles of transmission or subtransmission at 46 kv. Its total system capability, excluding receipts from interconnected systems, as of December 1970, was 3,731,600 kw. Its system peak that year was 3,448,345 kw. The applicant is also vertically integrated, operating in 1970, 42,193 pole miles of distribution facilities.^{3/}

The applicant is also interconnected with the Detroit Edison Company through four ehv (extra high voltage) transmission lines operating at 345 kv and through four high voltage lines operating at 120 kv and 138 kv. Applicant's coordination, planning and operations with Detroit Edison are carried out to a high degree and include reserve sharing and coordinated development. In addition, applicant maintains two ehv interconnections with the American Electric Power system and through Detroit Edison as part of the Michigan Pool is interconnected by high voltage or ehv transmission lines to the Ontario Hydro system in Canada and to major utilities in Ohio.^{4/}

There are approximately 22 other electric systems located in the applicant's service area. The largest of these is the Lansing, Michigan municipal system, which in 1973 had a generating capacity of 468,631 kw.

^{3/} Advice letter from the Department of Justice dated June 28, 1971.

^{4/} Ibid.

Besides being much smaller in size, these systems do not have direct access to high voltage, extra high voltage transmission, coordinated development, effective reserve sharing and, of course, nuclear power. To overcome the disadvantage of their small size several of the systems have formed the Michigan Municipals and Cooperatives Power Pool (MMCPP). However, the combined load of these systems account for less than 300 mw, far below the minimum efficient size for a nuclear unit. 5/

Thus in the electric power market situation that exists in Michigan today the applicant is clearly dominant in the generation and transmission of bulk power supply. It also enjoys a substantial dominance in the distribution of electric power throughout its service area. In addition, through its arrangements with Detroit Edison, the Michigan Power Pool, the AEP system and other ECAR^{6/} members, it is able to obtain the benefits of effective reserve sharing, coordinated planning and operation and can take advantage of economies of scale in generation and bulk power supply. The applicant as a result of its overall dominance of this market is thus effectively able to provide for itself an efficient reliable source of firm electric power, thereby enhancing its competitive position in the market.

The Department of Justice in its advice letter to the Atomic Energy Commission advised of this market situation and of the applicant's clear

5/ Ibid.

6/ East Central Area Reliability Coordination Agreement.

dominance in the generation, transmission and distribution of electric power. The Department advised that such a situation may be inconsistent with the antitrust laws and indicated that the granting of an unconditioned license to construct the Midland units may maintain the situation and advised that an antitrust hearing should be held on this matter.

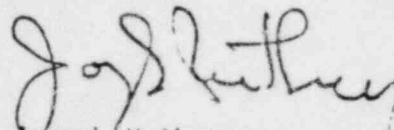
The basis for this recommendation included, inter alia, the applicant's unwillingness to coordinate the planning and operation of its bulk power facilities with small electric utilities in its service area. The Department advised that for a considerable period of time the applicant refused to negotiate with the smaller utilities and that recently during the limited negotiations that have taken place, the applicant has insisted on conditions for various services that are restrictive as well as different from conditions contained in other coordinating agreements that the applicant has with Detroit Edison, AEP, and other large utilities. In sum, the Department advised that the applicant is engaging in coordinated bulk power activities with some utilities and refusing to engage in similar activities with the smaller systems in its service area.

The Department advised that it appears that the applicant, through its sole ownership and control of the high voltage and extra high voltage transmission system covering a major portion of Michigan's lower peninsula, has substantial market power when compared with its smaller competitors and may be exercising that power to deny its smaller competitors those bulk power supply options necessary to maintain their long term competitive viability. As previously indicated by the Department the proposed Midland nuclear facility will have a substantial impact not only on the applicant's entire bulk power supply system, but throughout the applicant's service area as well.

Conclusion

The staff recommends to the Board that the issues as previously stated by the Board are appropriate and well within the framework of section 105c of the Act. What remains for the Board is the development of a record so that it can determine the relationship between the nuclear facility and the situation alleged to be inconsistent with the antitrust laws.

Respectfully submitted,


Joseph Rutberg
Antitrust Counsel for
AEC Regulatory Staff

Dated at Bethesda, Maryland
this 19th day of October 1973.

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CERTIFICATE OF SERVICE

I hereby certify that copies of STAFF POSITION ON THE QUESTION OF NEXUS FILED PURSUANT TO THE BOARD'S REQUEST, dated October 19, 1973, in the captioned matter, have been served upon the following by deposit in the United States mail, first class or airmail, this 19th day of October 1973:

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

Hugh K. Clark, Esq.
P. O. Box 127A
Kennedyville, Maryland 21645

Dr. J. V. Leeds, Jr.
P. O. Box 941
Houston, Texas 77001

William Warfield Ross, Esq.
Keith S. Watson, Esq.
Wald, Harkrader & Ross
1320 19th Street, N. W.
Washington, D. C. 20036

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


George Spiegel, Esq.
Robert A. Jablon, Esq.
James Carl Pollock, Esq.
2600 Virginia Avenue, N. W.
Washington, D. C. 20037

Wallace Brand, Esq.
Antitrust Public Counsel
P. O. Box 7513
Washington, D.C. 20044

Joseph J. Saunders, Esq.
David A. Leckie, Esq.
Department of Justice
Room 8107, Star Building
1101 Pennsylvania Ave., N. W.
Washington, D. C. 20530

Harold P. Graves, Esq.
Vice President and General Counsel
Consumers Power Company
212 West Michigan Avenue
Jackson, Michigan 49201

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


Joseph Rutberg
Antitrust Counsel for
AEC Regulatory Staff

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